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You Guys Are Getting Paid? Time for Interns to Cash in on the FLSA

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ABSTRACT

Under the Fair Labor Standards Act ("FLSA"), individuals who qualify as employees are entitled to the federal minimum wage. Because the statute itself gives little guidance about who meets the FLSA definition of an employee, courts generally determine employee status by applying the economic reality test, which assesses the economic circumstances of the relationship and tends toward broad inclusivity. The Supreme Court, however, created a caveat in 1947 in *Walling v. Portland Terminal*, holding that trainees might be uniquely excluded from FLSA employee status and its attending benefits.

The trainee exception, as it has since become known, has expanded in the last 76 years. In that time, the exception has been extrapolated to a growing cohort that scarcely existed at the time of *Walling*: interns. As the intern population has grown, so have the number of tests attempting to determine the employee status of interns under the FLSA. A few have gained traction, and one has risen to the top: the primary beneficiary test.

This Comment reviews the trajectory of internships as engines of opportunity in the last several decades and the circuit split over the proper test for determining interns' employee status. Ultimately, this Comment recommends that the Supreme Court take up the issue again and reject the primary beneficiary test. Instead, the Court should adopt a test backed by the tenets of *Walling*, the aspirations of the FLSA, and the realities of the modern-day intern economy: an objective, employer-focused cost-benefit approach.

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INTRODUCTION

The internship, as a trope, is familiar and well-established: an awkward, singular post, occupied by a constantly frazzled or chronically apathetic college student. However, this composite character scarcely reflects the scope of the intern economy.[1] Internships now come in every shape and size and have become the main entryway to many fields.[2] Students might complete not just one, but a series of internships on their way to a regular, full-time position.[3] The proliferation of internships has resulted in a rising tide of litigation centered primarily on two major questions.[4] First, might interns

1. *See infra* Section I.A.1.
2. *See infra* Section I.A.1.
3. *See infra* Section I.A.1.
4. *See infra* Section I.B.

qualify as employees under the FLSA, such that they are entitled to the minimum wage and other benefits? And second, how should courts determine whether an intern is, in fact, an employee?[5]

I. BACKGROUND

A. The Rise of Internships and the FLSA

1. The Internship Boom

In the last three-quarters of a century, career gateways in the United States have undergone significant change.[6] One major development is that internships have cropped up in an increasingly wide array of different fields,[7] some of which now regard the completion of an internship as a prerequisite to full-fledged employment.[8] In the United States, an estimated two million internships take place each year—the data, however, is a decade old and does not account for internships undertaken by college graduates, community college students, high school students, or graduate students.[9] In light of these gaps and the continuing growth of internship programs in the United States,[10] the number of internships completed each year may be considerably higher.[11]

The phenomenon of widespread internship participation among college students in the United States is recent, but not altogether new. Between 1980 and 2016, the number of students at 4-year colleges and universities that participated in an internship during their undergraduate years jumped from a mere 3 percent[12] to 65.4 percent.[13] However, the concept of an internship can be traced back to the Middle Ages, when securing an apprenticeship with a

5. *See infra* Section I.B.

6. *See* Sean Rogers et al., *All Internships are not Created Equal: Job Design, Satisfaction, and Vocational Development in Paid and Unpaid Internships*, 31 HUM. RES. MGMT. REV. 100723, 3–4 (2021).

7. *Id.* at 4; ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 26–36 (2011).

8. Rogers et al., *supra* note 6, at 2.

9. PERLIN, *supra* note 7, at 27.

10. NAT'L ASS'N OF COLLS. & EMPS., 2019 INTERNSHIP & CO-OP SURVEY REPORT EXECUTIVE SUMMARY 4 (2019) (anticipating a 2.6-percent increase in internship hiring in 2019). Granted, a .5-percent decrease in internship hiring was anticipated for 2021 due to the pandemic. NAT'L ASS'N OF COLLS. & EMPS., 2021 INTERNSHIP & CO-OP SURVEY REPORT EXECUTIVE SUMMARY 3 (2021).

11. PERLIN, *supra* note 7, at 27. Reliable data on internship participation rates is lacking, as the Bureau of Labor Statistics does not collect information on internships. *Id.* at 29.

12. Rogers et al., *supra* note 6, at 4.

13. ANDREW CRAIN, NAT'L ASS'N OF COLLS. & EMPS. FOUND., UNDERSTANDING THE IMPACT OF UNPAID INTERNSHIPS ON COLLEGE STUDENT CAREER DEVELOPMENT AND EMPLOYMENT OUTCOMES 11 (2016).

craftsman was critical to social mobility.[14] The practice of learning a trade through an apprenticeship was imported to the United States and featured prominently in the colonial American economy.[15] Eventually, this practice petered off as the industrial revolution created a demand for more technical skills.[16]

Internships, in their present form, offer numerous and well-documented benefits. Interns stand to gain "realistic job preview[s],"[17] career development, work experience, and networking opportunities.[18] Meanwhile, employers use internships as a recruiting mechanism that enables them to screen potential hires.[19] Yet there is a less brochure-ready side to the modern internship—an estimated 50 percent of internships are unpaid.[20]

Research demonstrates that paid and unpaid internships are not distributed proportionately across demographic groups.[21] Women are much more likely than men to undertake unpaid internships, accounting for 77 percent of unpaid interns[22] and only 35 percent of paid interns.[23] The gender disparity narrows but persists even within fields that offer a high proportion of paid internships.[24] For instance, among interns in the fields of engineering, computer science, physical science, mathematics, and business, an average of 73 percent of women are paid, compared to 86 percent of men.[25] First-generation students are also more likely to complete unpaid internships than non-first-generation students.[26] These findings

14. *See* CHARLES H. SIDES & ANN MRVICA, INTERNSHIPS: THEORY AND PRACTICE 3 (2007) ("Crafts, trades, and apprenticeships were ways in which serfs and other indentured people bought their freedom.").

15. *Id.* at 7. Incidentally, Benjamin Franklin was a printer's apprentice—even one of our founding fathers started as an intern. *Id.*

16. *Id.*

17. Rogers et al., *supra* note 6, at 4.

18. *Id.* at 2.

19. *Id.*

20. PERLIN, *supra* note 7, at 28.

21. Mimi Collins, *Open the Door: Disparities in Paid Internships*, NAT'L ASS'N OF COLLS. & EMPS. (Nov. 1, 2020), https://bit.ly/3J8KThP [https://perma.cc/L94B-J5V6]. *See* Elaine Swan, *The internship class: subjectivity and inequalities—gender, race, and class, in* HANDBOOK OF GENDERED CAREERS IN MANAGEMENT: GETTING IN, GETTING ON, GETTING OUT, 30, 36–38 (Adelina M. Broadridge & Sandra L. Fielden eds., 2015) ("The entry into internships—the starting point for a potential career trajectory—is unevenly distributed by gender and race, as well as class.").

22. PERLIN, *supra* note 7, at 27.

23. John Zilvinskis et al., *Unpaid Versus Paid Internships: Group Membership Makes the Difference*, 61 J. COLL. & STUDENT DEV. 510, 513 (2020).

24. *Id.*

25. *Id.*

26. *Id.* at 510.

raise the concern that internships, intended to generate opportunity, instead initiate wage gaps among college graduates.[27]

On top of disparate participation, paid and unpaid internships generate disparate outcomes.[28] Unpaid internships result in a job offer only 37 percent of the time.[29] By comparison, paid internships result in a job offer roughly 60 percent of the time.[30] All told, in 2019, students who completed paid internships received 50 percent more job offers than students who completed unpaid internships.[31] In fact, at least in the short term, completion of unpaid internships corresponds to negative employment outcomes.[32] Students who complete unpaid internships experience longer job searches, lower salaries, and lower job satisfaction in their first position after graduation compared to students who complete paid internships.[33] And, despite the laudable abstract benefits of unpaid internships,[34] students who complete unpaid internships have "no greater probability" of securing a full-time job offer than students who complete no internships whatsoever.[35]

As unpaid internships rise in a given industry, they displace growth in paid internships in that industry, such that unpaid internships increasingly outnumber paid internships.[36] In radio, for in-

27. *Id.* at 515.

28. CRAIN, *supra* note 13, at 18 (identifying an "empirical distinction" in outcomes between paid and unpaid internships). One partial explanation for the difference in outcomes between paid and unpaid internships may be that unpaid internships suffer from poor job design. *See* Rogers et al., *supra* note 6, at 7–12. A lack of clear work and learning objectives results in lower satisfaction among unpaid interns. *See id.* Another reason for the difference in outcomes may be that paid interns spend more time performing professional tasks, as opposed to clerical work, than their unpaid counterparts. Susan Adams, *Odds Are Your Internship Will Get You a Job*, FORBES (Jul. 25, 2012, 6:20 PM), https://bit.ly/3mrQR4H [https://perma.cc/UQ3P-JLJJ]. Paid interns spend an estimated 42 percent of their time on professional tasks, while unpaid interns spend only 30 percent. *Id.* The difference in outcomes is not accounted for by students' GPAs or fields of study. Jordan Weissman, *Do Unpaid Internships Lead to Jobs? Not for College Students*, ATLANTIC (June 19, 2013), https://bit.ly/3sGZ87T [https://perma.cc/8C8Z-J9TN].

29. Adams, *supra* note 28.

30. *Id.*

31. Zilvinskis et al., *supra* note 23, at 510.

32. *Id.*; CRAIN, *supra* note 13, at 18.

33. CRAIN, *supra* note 13, at 18.

34. *Id.* Quantitative employment outcomes aside, research shows that unpaid internships have "positive outcomes in the areas of confirming or rejecting career interests, setting and attaining career goals, quality of supervision, and networking" and have been rated more often as beneficial to academic coursework than paid internships. *Id.*

35. *Id.* at 12 (quoting *Unpaid internships: A clarification of NACE research*, NAT'L ASS'N COLLS. & EMPS. (Oct. 16, 2013), https://bit.ly/3g5QwRj [https://perma.cc/7CF7-3UBH]).

36. PERLIN, *supra* note 7, at 28.

stance, 81 percent of interns were paid in 1976.[37] By 1991, only 21 percent of interns in radio were paid.[38] Meanwhile, organizations save an estimated two billion dollars per year by "hiring" unpaid interns.[39] The growing asymmetry of what was, in its ideal form, a reciprocal relationship, is not lost on the half of all interns who go unpaid, and who are now trying their luck in the courts, arguing for employee status under the FLSA.[40]

2. Employment Status

Under the federal Fair Labor Standards Act ("FLSA" or the "Act"),[41] an employee is defined as "any individual employed by an employer."[42] In turn, to employ "includes to suffer or permit to work."[43] These definitions, though famously oblique, have high stakes for workers. Used throughout the FLSA[44] and other federal employment and labor statutes,[45] an individual's employment status carries with it a suite of benefits and protections, to include protection against discrimination and harassment in the workplace,[46] overtime,[47] and the federal minimum wage.[48]

Two primary tests have been developed in an attempt to interpret the "employee" definition for the different purposes of the statutes in which it appears. First, the common law "control" test

37. *Id.*

38. *Id.*

39. *Id.* at 124 (calculating the total cost savings based on a conservative 500,000 interns working for a 12-week summer at the federal minimum wage).

40. *See* Rogers et al., *supra* note 6, at 2.

41. Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

42. 29 U.S.C. § 203(e)(1).

43. 29 U.S.C. § 203(g).

44. Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

45. *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 675–91 (2013). The term "employee" plays a key role in determining individuals' rights under the Employee Retirement Security Act (ERISA), the National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), statutory protections afforded by the Occupational Safety and Health Administration (OSHA), the Fair Labor Standards Act (FLSA), and the Family and Medical Leave Act (FMLA), which incorporates the definition found in the FLSA. 29 U.S.C. § 1002(6); 29 U.S.C. § 152(3); 42 U.S.C. § 2000e(f); 29 U.S.C. § 630(f); 42 U.S.C. § 12111(4); 29 U.S.C. § 652(6); 29 U.S.C. § 203(e)(1); 29 U.S.C. § 2611(3).

46. O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (determining that an unpaid intern at a hospital did not qualify for protection against workplace harassment and discrimination because she was not an employee for the purpose of Title VII).

47. 29 U.S.C. § 207(a).

48. 29 U.S.C. § 206(a).

governs the term "employee" as it appears in ERISA,[49] the NLRA,[50] OSHA,[51] and the federal employment anti-discrimination statutes.[52] Acknowledging that the FLSA was intended to apply broadly, courts have historically used the more lenient "economic reality" test to evaluate an individual's employment status under the FLSA.[53] Courts have likewise applied the economic reality test to determine employment status under the FMLA,[54] which incorporates the FLSA definition by reference.[55]

Under the economic reality test, employees are "those who as a matter of economic reality are dependent upon the business to which they render service."[56] This test lends itself to a generous interpretation of who is an employee, focusing on the economic circumstances of the activity[57] to determine whether the relationship in question is among those that Congress intended to include under the FLSA.[58] As a result, employment status under the FLSA is broad and extends the federal minimum wage and overtime protections[59] to a wider group than those who may qualify as employees for the sake of other benefits.[60]

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49. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (adopting the common law control test for ERISA).

50. N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968) (approving the National Labor Relations Board's use of the common law control test to determine employment status under the NLRA as an appropriate use of discretion).

51. Occupational Health and Safety Admin., Office of Gen. Industry Enf't, Opinion Letter on Voluntary/Reserve/Apprentice Firefighters Who Are Not Paid (Apr. 2, 1996), No. 1975.3, https://bit.ly/31fSVVD [https://perma.cc/PM3E-QXGR] (referring to the control test as the governing standard with respect to OSHA's regulations). *But see*, Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n, 20 F.3d 938, 942 (9th Cir. 1994) (applying the economic reality test to interpret OSHA regulations but finding that the result would be the same under the control test).

52. *Darden*, 503 U.S. at 322–23 (1992) (explaining that when, as in the anti-discrimination statutes, "Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."). *See, e.g.*, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448 (2003) (applying the principle articulated in *Darden* to the ADA).

53. Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987).

54. Nichols v. All Points Transp. Corp. of Michigan, 364 F. Supp. 2d 621, 630 (E.D. Mich. 2005) (explaining the relationship between the FLSA and FLMA definitions and affirming use of the economic reality test for FLMA purposes).

55. 29 U.S.C. § 2611(3); *Nichols*, 364 F. Supp. 2d at 630.

56. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

57. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

58. Bodie, *supra* note 45, at 684–85.

59. 29 U.S.C. §§ 206–207.

60. Bodie, *supra* note 45, at 685.

3. Walling v. Portland Terminal and the Trainee Exception

The Supreme Court has, however, identified a caveat to the broad tendency toward inclusion under the FLSA[61]: the trainee exception.[62] The Court first carved out this exception in *Walling v. Portland Terminal*.[63] In *Walling*, a railroad company provided select applicants with a training course that lasted seven or eight days and provided them with the skills that would be necessary to work as brakemen.[64] If they passed the course, they would either be put to work immediately or added to the company's roster to be called on when an opportunity arose.[65] During the training period, the trainees observed the existing employees at work and were eventually allowed to complete some of the tasks themselves under close supervision.[66]

Ultimately, the *Walling* Court determined that while trainees or apprentices *could* qualify for protection under the FLSA,[67] the brakemen did not qualify because they were not "employees" within the meaning of the statute.[68] The Court cited three primary reasons for this decision, which became the basis for subsequent iterations of the test for determining whether a trainee (despite apparently being employed) is an employee.[69] First, the trainees did not displace any of the company's regular employees or otherwise expedite the employer's business.[70] Second, the trainees did not expect to be compensated for their time.[71] Third, the training course was similar to one that might be offered to students at a vocational school.[72] Finally, the Court held that, because the railroad gained no "immediate advantage" from the trainees' work, the trainees were not employees under the FLSA.[73]

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61. Sec'y of Lab. v. Lauritzen, 835 F.2d 1529, 1534 (7th Cir. 1987).

62. *See* Beatriz Carrillo, *Employment Law: Mirror, Mirror on the Wall, are They Trainees and Not Employees at All? The Legality and "Economic Reality" of Unpaid Internships*, 13 SEVENTH CIR. REV. 282, 290 (2017) (noting that, in light of *Walling*, employers must grapple with whether trainees fall under trainee exception).

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

64. *Id.* at 149.

65. *Id.* at 150.

66. *Id.* at 149.

67. *Id.* at 151 ("Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation.").

68. *Id.* at 153.

69. Carrillo, *supra* note 62, at 284.

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

71. *Id.* at 150.

72. *Id.* at 152–53.

73. *Id.* at 153.

In sum, the *Walling* Court inaugurated a distinction: The broad definition of an employee under the FLSA does not include "a person whose work serves only his own interest," whose would-be employer "gives him aid and instruction."[74]

B. The Circuit Split

The *Walling* Court neglected to specify a test that would determine whether an individual falls under the trainee exception.[75] Finding the default test for employment status under the FLSA (the economic reality test[76]) poorly tailored to the educational or training context,[77] many of the circuit courts have adopted separate tests to determine the employment status of interns.[78] Three distinct tests for determining whether an intern qualifies as an employee under the FLSA are currently in use.[79] First, the primary beneficiary test, which has two variations;[80] second, the totality of the circumstances test;[81] and third, the default FLSA economic reality test, which one circuit applies to interns.[82]

1. Primary Beneficiary Test

The primary beneficiary test is currently the dominant test for determining the employment status of interns under the FLSA. Six of the nine circuits that have confronted the issue have adopted the primary beneficiary test in one form or another.[83] The central pre-

74. *Id.* at 152.

75. *See id.* at 150–53 (providing a rationale for the trainee exception, but without explicitly identifying a test to govern the exception).

76. *Supra* Section I.A.2.

77. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 522–23 (6th Cir. 2011) ("To state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA's definitions themselves. There must be some ultimate question to answer, factors to balance, or some combination of the two.").

78. Irene Hickey Sullivan, *Learning on the Job: Glatt v. Fox Searchlight Pictures, Inc.'s Primary Beneficiary Test and Its Implications for Harassment and Discrimination Protections for Unpaid Interns under Title IX*, U. CHI. LEGAL F. 797, 805 (2017).

79. *See id.* at 805–06 (identifying the primary beneficiary test, the totality of the circumstances test, and the economic reality test).

80. *Infra* Section I.B.1.

81. *Infra* Section I.B.2.

82. *Infra* Section I.B.2.

83. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535–36 (2d Cir. 2016); McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 272 (5th Cir. 1982); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 532 (6th Cir. 2011); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015).

mise of the primary beneficiary test is that interns should not be considered employees under the FLSA "when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation."[84] In other words, the primary beneficiary test asks which of the parties gains more from the employment relationship, considering both tangible and intangible benefits at least for the intern.[85] From this premise, the primary beneficiary test splits into two main variations.[86]

a. *Glatt* Variation

The Second Circuit articulated the traditional variation of the primary beneficiary test most clearly in *Glatt v. Fox Searchlight Pictures, Inc.*[87] In *Glatt*, three intern-plaintiffs worked for Fox unpaid either in the production of the film *Black Swan* or in publicity work out of Fox's corporate office in New York.[88] Though two of the interns were enrolled in graduate programs, none of them received academic credit for their participation.[89] The interns worked as many as ten hours a day, five days a week,[90] completing a variety of often menial tasks and errands.[91] They made photocopies, organized filing cabinets, took lunch orders, made deliveries, and updated takeout menus.[92] Occasionally they were tasked with the director's personal errands.[93]

In determining the appropriate test for analyzing the interns' employment status, the *Glatt* court rejected the Department of Labor's (DOL) Fact Sheet #71,[94] an opinion letter in which the DOL proposed a test for proper classification as an unpaid intern that featured six elements.[95] The *Glatt* court also rejected the plaintiffs'

84. *Glatt*, 811 F.3d at 535.

85. *See id.*

86. *See* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1025 (6th Cir. 2020) (Batchelder, J., concurring in part) (noting that the majority departs from the traditional primary beneficiary test by taking a segmental approach), *cert. denied*, 141 S. Ct. 2747 (2021).

87. *Glatt*, 811 F.3d at 536–37.

88. *Id.* at 531–32.

89. *Id.* at 532–33.

90. *See id.* at 532.

91. *See id.* at 532–33.

92. *Id.* at 532–33.

93. *See id.* (noting that one plaintiff was once tasked with buying the director a hypo-allergenic pillow, and another brought the director tea and delivered DVD footage to his apartment).

94. *Id.* at 536.

95. U.S. DEP'T LAB. WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), https://bit.ly/2XZJ1WB [https://perma.cc/HPF5-HESZ] [hereinafter DOL Fact Sheet #71

proposed test, which relied on the proposition that the lack of an "immediate advantage" to the employer was dispositive in *Walling*.[96]

Instead, the *Glatt* court adopted a "nuanced" primary beneficiary test,[97] which featured a non-exhaustive list of factors for courts to consider in determining who the primary beneficiary is—the intern or the employer.[98] The *Glatt* court supplied seven factors:

> (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
> (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
> (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
> (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
> (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
> (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
> (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[99]

The *Glatt* court identified three reasons for its adoption of the primary beneficiary test, as expressed by the seven factors listed.[100] First, the test focuses on what interns receive in exchange for their work; second, it provides courts with flexibility in assessing the economic reality of the relationship; and third, it acknowledges that the

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(2010)]. The Department of Labor has since updated its proposed test to include seven elements. WAGE & HOUR DIV., U.S. DEPT. LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2018), http://bit.ly/3mQPv69 [https://perma.cc/9WED-QL6U] [hereinafter DOL Fact Sheet #71 (2018)].

96. *Glatt*, 811 F.3d at 535.
97. *Id.*
98. *Id.* at 535–36.
99. *Id.* at 536–37.
100. *Id.* at 536.

intern-employer relationship differs from an ordinary employment relationship because interns expect educational benefits.[101] In applying the *Glatt* test, courts must weigh and balance these factors, none of which are determinative, and are free to consider additional evidence.[102] Courts also might opt to apply the test to an internship program as a whole rather than to the experience of one specific intern.[103] However, implicit in the holding is that the subject of the inquiry is the entire relationship, viewed on the whole, between the employer and the intern.[104]

The Ninth and Eleventh Circuits have squarely adopted the *Glatt* variation on the primary beneficiary test.[105] The Fourth and Fifth Circuits have pre-existing versions of the primary beneficiary test, and although they have not adopted the seven *Glatt* factors, they are nonetheless consistent with the *Glatt* variation insofar as none dictates an exclusive list of considerations and all examine the relationship between intern and employer in its entirety.[106]

b. *Eberline* Variation

In 2020, the Sixth Circuit, which adopted the primary beneficiary test in *Solis v. Laurelbrook Sanitarium & School, Inc.,*[107] added

101. *Id.*

102. *Id.* at 537.

103. *Id.*

104. Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1025 (6th Cir. 2020) (Batchelder, J., concurring in part) ("The Glatt factors evaluate the entirety of the working relationship—not mere segments of it . . . ."), *cert. denied*, 141 S. Ct. 2747 (2021). *See Glatt*, 811 F.3 at 536 ("[T]he proper question is whether the intern or the employer is the primary beneficiary of *the relationship*.") (emphasis added).

105. Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017) ("The [*Glatt* variation] best captures the Supreme Court's economic realities test in the student/employee context and . . . is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA."); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015) ("We agree with the Second Circuit's reasoning . . . . The factors that the Second Circuit has identified effectively tweak the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships.").

106. *See* McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 (4th Cir. 1989) ("[T]he general test used to determine if an employee is entitled to the protections of the [FLSA] is whether the employee or the employer is the primary beneficiary of the trainees' labor."); Harbourt v. PPE Casino Resorts Maryland, LLC, 820 F.3d 655, 660 (4th Cir. 2016) (noting the importance of whether a trainee's skills will be transferable in applying the primary beneficiary test); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 271–72 (5th Cir. 1982) (adopting a balancing test that compares the benefits flowing to the trainee with those flowing to the employer); *supra* note 104 and accompanying text.

107. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011).

a new twist to the traditional variation. In *Eberline v. Douglas J. Holdings, Inc.*,[108] the intern-plaintiffs were students at a cosmetology school.[109] The students provided hair, skin, and nail services to customers at a clinic salon, under the supervision of the school's instructors.[110] The students had to complete 965 hours performing these cosmetology tasks in order to reach a state-mandated practical experience requirement and become licensed cosmetologists.[111] In addition to performing cosmetology services, the students also performed janitorial tasks at the salon.[112] The students sought compensation only for the subset of time spent completing these janitorial tasks.[113]

In reviewing the claim, the court held that, within an educational context, the primary beneficiary test should be applied to the portion of the work for which the student-intern seeks compensation and "not to the broader relationship as a whole."[114] This segmented approach has not been adopted by other courts that use the primary beneficiary test, which assesses the "entirety of the working relationship—not mere segments of it."[115] The court reiterated a non-exhaustive list of eight factors developed in *Laurelbrook*, which differ only slightly from the *Glatt* factors.[116]

2. Totality of the Circumstances Test and Economic Reality Test

In addition to the primary beneficiary test in its twin variations, there are two other tests still in use to evaluate interns under the FLSA. The totality of the circumstances test remains in use only in the Tenth Circuit.[117] The Tenth Circuit relies on the six criteria recommended by the DOL in 2010,[118] one of which calls for a consid-

108. Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1009 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

109. *Id.* at 1009.

110. *Id.* at 1010.

111. *Id.* at 1009–10.

112. *Id.* at 1010.

113. *Id.* at 1008–09.

114. *Id.* at 1014.

115. *Id.* at 1025 (Batchelder, J., concurring in part).

116. *Eberline*, 982 F.3d at 1018. Even considering their slight differences, the *Eberline* factors are not inconsistent with the *Glatt* factors because both sets of factors are non-exhaustive. *See id.*; Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016).

117. Nesbitt v. FCNH, Inc., 908 F.3d 643, 646–47 (10th Cir. 2018).

118. *See id.* at 646, 649 (listing and affirming the factors to be weighed in considering the totality of the circumstances); DOL Fact Sheet #71 (2010), *supra* note 95 (providing the same six factors). The Tenth Circuit continues to rely on the 2010 factors, although the Department of Labor modified the factors in 2018. DOL Fact Sheet #71 (2018), *supra* note 95.

eration of whether the internship is for the intern's benefit.[119] In the Tenth Circuit, the courts must consider all six criteria as factors and decide whether a trainee is an employee based on the totality of the circumstances.[120] The Seventh Circuit evaluates interns under the economic reality test[121] and has been leery of the primary beneficiary test.[122] Finally, the Eighth Circuit has flirted with the economic reality test, the primary beneficiary test, and the factors underlying the totality of the circumstances test, but has affirmatively selected none of these.[123] Instead, the Eighth Circuit relies heavily on the "immediate advantage" language of *Walling*.[124]

II. ANALYSIS

More than three-quarters of a century has passed since the brakemen of *Walling* went to court,[125] and suffice it to say that times have changed.[126] In evaluating the status of a group of railroad trainees over a week-long course,[127] the Court could seldom have contemplated the lengthy and serial placements that newcomers to the workforce might undergo in nearly any profession today.[128] The Court acknowledged as much, leaving open the

119. DOL Fact Sheet #71 (2010), *supra* note 95.

120. *Nesbitt*, 908 F.3d at 647.

121. *Supra* Section I.A.2.

122. Hollins v. Regency Corp., 867 F.3d 830, 835 (7th Cir. 2017) (noting that the lower court was "rightly skeptical about the utility of this plethora of 'factors'").

123. *See* Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005) (reasoning that the chores performed by a student attending a pair of Baptist boarding schools were primarily for the student's benefit, and that the economic reality of the relationship does not support an employment relationship); Petroski v. H & R Block Enters., LLC, 750 F.3d 976, 982 (8th Cir. 2014) (noting that the holding is incidentally supported by the DOL's six criteria).

124. *See Petroski*, 750 F.3d at 980 (reasoning that H & R Block, like the railroad in *Walling*, received no "immediate advantage" from tax professionals' completion of a rehire training that rendered them eligible to work the following tax season); Donovan v. Trans World Airlines, Inc., 726 F.2d 415, 416–17 (8th Cir. 1984) (affirming the district court's decision on the grounds that Trans World Airlines derived no "immediate benefit" from the plaintiffs' completion of flight attendant training).

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

126. *See* Rogers et al., *supra* note 6, at 3–4.

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

128. *See It Takes Two (or More)*, CHEGG (Oct. 26, 2019), https://bit.ly/3Gbu1VI [https://perma.cc/2YA4-TSRT] ("Among those who do an internship, just over half do more than one. Of those go-getters, 27 percent do two internships and 13 percent do three. And, an astoundingly ambitious (possibly non-sleeping) two percent of interns complete six or more internships!"); *Employer Resources: Internship Duration and Seasons*, CHEGG (Dec. 4, 2018), https://bit.ly/3ASmnOZ [https://perma.cc/2MKH-XT72] (explaining that interns typically work for 10 to 14

possibility that *Walling* would "open up a way for evasion of the law."[129] In light of the role internships have come to play as gatekeepers to the professions[130] and the disparities that they promote,[131] the Court ought to take up the issue once again.

A. The Employer-Focused Cost-Benefit Approach

The primary beneficiary test has gained the endorsement of nearly half of the circuit courts[132] and has won the approval of numerous commentators as well.[133] As the Sixth Circuit noted in *Laurelbrook*, the "economic realities" do little to illuminate the relationship between an employer and a student or trainee,[134] which is central to any analysis of employment status under the FLSA.[135] Instead, "[t]here must be some ultimate question to answer, factors to balance, or some combination of the two."[136] For its part, the primary beneficiary test supplies a question—who benefits more from the relationship, the trainee or the employer?[137]—and plenty of factors.[138] In recent years, the factors themselves have been the

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weeks, though the University of Washington recommends up to 16 weeks at 20 to 35 hours per week).

129. *Walling*, 330 U.S. at 153.

130. *See* Adams, *supra* note 28; Rogers et al., *supra* note 6, at 2.

131. *See* PERLIN, *supra* note 7, at 27; Zilvinskis, *supra* note 23, at 510–15; Collins, *supra* note 21.

132. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535–36 (2d Cir. 2016); McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 272 (5th Cir. 1982); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 532 (6th Cir. 2011); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015).

133. *See, e.g.*, Elizabeth Heffernan, *"It Will Be Good for You," They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims*, 102 IOWA L. REV. 1757, 1781 (2017); Morgan Knott, *Intern or Employee in Disguise? The Rise of the Unpaid Internship and the Primary Beneficiary Test*, 84 MISSOURI L. REV. 177, 193 (2019); Vincent P. Honrubia, *From Mailroom to Courtroom: The Legality of Unpaid Internships in Entertainment after Glatt v. Fox Searchlight Inc.*, 7 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 107, 110–11 (2017); Jay Rahman, *The Second Circuit's New Approach in Determining when Unpaid Interns are Employees Under the Fair Labor Standards Act*, 2017 U. ILL. L. REV. 2077, 2079 (2017).

134. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 522–23 (6th Cir. 2011).

135. *Supra* Section I.A.2.

136. *Laurelbrook*, 642 F.3d at 523.

137. *Supra* Section I.B.1.

138. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535–37 (2d Cir. 2016).

subject of much debate.[139] But does the primary beneficiary test ask the right question?

Despite having some support in precedent,[140] the primary beneficiary test is not the only option that *Walling* and the FLSA would abide. Both the language of *Walling* and the well-documented legislative intent of the FLSA would permit a different balancing test. This Comment proposes an objective cost-benefit approach that compares the costs an employer incurs in educating, training, and supervising an intern with the benefits that the employer derives from the intern's labor.

1. Support from Walling

The Supreme Court's holding in *Walling* lends direct support to an objective, employer-focused cost-benefit analysis: "Accepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the [FLSA]'s meaning."[141] Circuits that have adopted the primary beneficiary test have been dismissive of the "immediate advantage" language, relying instead on the *Walling* Court's factual reasoning.[142] When the *Glatt* plaintiffs argued for a test that centers on whether an employer received an immediate advantage, the Second Circuit rejected this argument on the grounds that such a test would fail to properly reflect the benefits an intern receives.[143] The Ninth Circuit agreed and characterized the *Glatt* plaintiffs' argument for reliance on the "immediate advantage" language as a suggestion that "if the employers received any economic benefit, the plaintiffs were employees."[144]

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139. *See, e.g.*, Heffernan, *supra* note 133, at 1783–84; Michael Pardoe, Glatt v. Fox Searchlight Pictures, Inc.: *Moving Towards a More Flexible Approach to the Classification of Unpaid Interns Under The Fair Labor Standards Act*, 75 MARYLAND L. REV. 1159, 1160 (2016); Michael A. Hacker, *Permitted to Suffer for Experience: Second Circuit Uses "Primary Beneficiary" Test to Determine Whether Unpaid Interns are Employees Under The FLSA in* Glatt v. Fox Searchlight Pictures, Inc., 57 B.C. L. REV. E-SUPPLEMENT 67, 81–82 (2016).

140. *See Glatt*, 811 F.3d at 536 (noting that the primary beneficiary test reflects the *Walling* Court's focus on the benefits that trainees receive and abides by the longstanding use of case-by-case factual analysis in evaluating employment status).

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

142. *See Glatt*, 811 F.3d at 535–36.

143. *See id.* at 539 (explaining that the employer's receipt of an immediate advantage will not account for "whether the internship program could be tied to an education program [or] whether and what type of training the internship program provided").

144. Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1145 (9th Cir. 2017).

The Ninth Circuit's interpretation, however, is not the only sound reading of the "immediate advantage" language in *Walling*.[145] And in a strict sense, it does not follow from the Court's reasoning.[146] The Second and Ninth Circuits have read "immediate advantage" to connote *any benefit* to the employer.[147] This language, however, in the context of *Walling*, could more easily be read to connote a *net benefit* to the employer. The trial court in *Walling* found that the railroad did receive *some* benefit—over the course of their training, the aspiring brakemen were permitted to do "actual work."[148] Nevertheless, the employer still received no immediate advantage in the eyes of the Court.[149] How can an employer be said not to benefit from work? The implicit answer, and the key to the Court's holding, is that because of the level of supervision required, the work cost the railroad more than it was worth.[150] Based on this reading of *Walling*, an employer enjoys an immediate advantage from the work of an intern only when the benefits that the intern provides (in the form of work) exceed the costs that the employer incurs in educating and supervising the intern.

Consideration of *Walling*'s context supports the interpretation that "immediate advantage" connotes a net benefit.[151] The railroad received no immediate advantage, though the trainees completed some actual work during the training period under close supervision.[152] If we take appropriate notice that the Court affixed the "immediate advantage" language to its holding,[153] we can reasonably conclude that *Walling* supports, if it does not compel, an employer-focused cost-benefit approach.

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145. *Infra* Section II.A.1; *infra* note 192 and accompanying text.

146. *Infra* Section II.A.1; *infra* note 192 and accompanying text.

147. *Benjamin*, 877 F.3d at 1145. *See Glatt*, 811 F.3d at 535–36.

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

149. *Id.* at 153.

150. *Id.* at 149, 153.

151. *Id.* at 149, 153. The trainees were "gradually permitted to do actual work," but only "under close scrutiny." *Id.* at 149. Under these circumstances, the railroad enjoyed "no immediate advantage." *Id.* at 153.

152. *Id.* at 149, 153.

153. *Id.* at 153 ("*Accepting . . . that the railroads receive no 'immediate advantage' from any work done by the trainees*, we hold that they are not employees within the Act's meaning.") (emphasis added). The Eighth Circuit, without articulating a balancing test, has generally treated the "immediate benefit" language as dispositive. *See* Petroski v. H & R Block Enters., LLC, 750 F.3d 976, 980–81 (8th Cir. 2014); Donovan v. Trans World Airlines, Inc., 726 F.2d 415, 416–17 (8th Cir. 1984).

2. Support from Congress

The legislative intent of the FLSA likewise supports the cost-benefit approach, insofar as it would be more protective of interns than the primary beneficiary test.[154] The primary purpose of the FLSA was "to aid the unprotected, unorganized and lowest paid of the nation's working population."[155] The Act targeted "employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."[156] With this group in mind, the Act set maximum hours and a minimum wage in order to reduce the flow of goods into the economy produced by workers suffering from poor working conditions.[157] In enacting the FLSA, Congress set its sights on a pair of twin "evils": "the displacement of regular employees and exploitation of labor."[158] Internships—especially unpaid ones—are susceptible to both of these maladies.[159] For these reasons, in determining whether interns qualify for the benefit of employee status under the FLSA, courts should apply a test that better reflects the Act's protective posture toward workers.[160] As a test with quantitative reference points that adhere directly to the concrete economic circumstances of the internship,[161] the employer-focused cost-benefit approach takes this stance.

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154. *See infra* Section II.B (explaining that the cost-benefit approach would shift risk from interns to their employers). The district court's decision in *Glatt* has been regarded as the first time that a court found employee status for an intern. Jamey Collidge, *"I Mean, You're Not Staff": The Employee Classification Circuit Split and Why the Southern District of New York's Totality of the Circumstances Test from Glatt v. Fox Searchlight Pictures Inc. Deserves A Lead Role*, 60 VILL. L. REV. TOLLE LEGE 53, 69 (2015). As of 2017, no appellate court had upheld a decision finding employee status for an intern. Sullivan, *supra* note 78, at 805.

155. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (citing 81 CONG. REC. 7652, 7672, 7885 (1937); 82 CONG. REC. 1386, 1395, 1491, 1505, 1507 (1937); 83 CONG. REC. 7283, 7298, 9260, 9265 (1938)).

156. *Id.*

157. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947).

158. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 527 (6th Cir. 2011).

159. *See supra* Section I.A.1 (discussing the tendency of unpaid internships to drive out paid opportunities and the growing trend toward widespread, serial participation in unpaid work, particularly among women, first generation students, and people of color).

160. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (citing 81 CONG. REC. 7652, 7672, 7885 (1937); 82 CONG. REC. 1386, 1395, 1491, 1505, 1507 (1937); 83 CONG. REC. 7283, 7298, 9260, 9265 (1938)).

161. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (holding that the determination of employment status under the FLSA "does not depend on . . . isolated factors but rather upon the circumstances of the whole activity").

B. The Shortcomings of the Primary Beneficiary Test and the Strengths of the Cost-Benefit Approach

1. Maintaining Legitimate Experiential Education While Targeting Exploitative Practices

From a practical perspective, the cost-benefit approach would maintain the status quo with regard to the legitimate practice of experiential learning, while discouraging the growth of more dubious unpaid internships.[162] Take, for example, a nursing student in Delaware who needs to complete 400 hours of hands-on learning under constant, close supervision.[163] Under the primary beneficiary test, that student is not likely to succeed in proving employee status. The benefits they receive are substantial. They gain a major component of their education and meet a licensing requirement.[164] By comparison, the benefits to the employer are relatively minimal because the student is still learning. Under the cost-benefit approach,[165] we would see the same result: the student is not an employee because the cost of providing one-on-one supervision is greater than the benefit that the employer receives from the work that the student performs in the process. Now recall the *Glatt* plaintiffs.[166] Under the primary beneficiary test, the Second Circuit vacated the trial court's finding of employee status and remanded for factfinding regarding the educational benefits the plaintiffs received.[167] While the *Glatt* case was resolved in a settlement,[168] subsequent case law suggests that the *Glatt* plaintiffs would not have fared well under the primary beneficiary test.[169] Under a cost-benefit approach, we would likely see the opposite result. Because the

162. *See supra* Section I.A.1 (discussing the disparate outcomes of paid and unpaid internships).

163. *Registered Nursing Requirements by State*, NURSEJOURNAL (Brandy Gleason ed., Jan. 31, 2023), https://bit.ly/3Gz2MEU [https://perma.cc/LE9V-H368].

164. *See* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1009, 1016–17 (6th Cir. 2020) (explaining that, for cosmetology students who must complete a set number of hours of practical experience in order to be licensed, being able to work is itself a benefit), *cert. denied*, 141 S. Ct. 2747 (2021).

165. *See supra* Section II.A (explaining the cost-benefit approach).

166. *Supra* Section I.B.1.a.

167. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 538 (2d Cir. 2016).

168. Dominic Pattern, *Fox Settles 'Black Swan' Interns Lawsuit After Five Years*, DEADLINE (July 12, 2016, 3:37 PM), https://bit.ly/3om5zuQ [https://perma.cc/R38Y-TZMQ].

169. *See, e.g.*, Wang v. Hearst Corp., 877 F.3d 69, 72, 76 (2d Cir. 2017) (holding that a group of unpaid interns working for fashion magazines, where they completed "menial and repetitive tasks" and received little supervision, guidance, or formal training, were not employees).

cost of supervising the interns appears to have been minimal,[170] and the benefit to the employer considerable,[171] the interns would have a solid claim to employee status.

2. *The Zero-Sum Game of Compensation and Allocation of Risk*

The *Eberline* plaintiffs confronted the Sixth Circuit with the prospect of an uncomfortable result under the traditional primary beneficiary approach.[172] The intern-plaintiffs would undoubtedly be considered the primary beneficiaries of the relationship on the whole—they received all the training necessary to become licensed cosmetologists under the tutelage of the school's instructors.[173] The benefit they received was not only analogous to an education,[174] it *was* an education, taking place right there in the salon.[175] And yet, the court wondered, should an intern's receipt of a bona fide benefit remove the entirety of their labor from the shelter of the FLSA?[176] To reach the non-educational work performed by plaintiffs who, on the whole, were primary beneficiaries, the *Eberline* court adopted its segmented approach to the primary beneficiary test.[177]

The different variations on the primary beneficiary test deliver different results once an intern or trainee has crossed the threshold into primary beneficiary status. Under *Glatt*, if an intern is the primary beneficiary of the relationship on the whole, the entirety of the intern's work is absorbed by the trainee exception.[178] Under the *Eberline* test, only the portion of the work for which the intern is the primary beneficiary would be absorbed by the exception.[179]

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170. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 522–23 (S.D.N.Y. 2013), *vacated and remanded*, 791 F.3d 376 (2d Cir. 2015).

171. *See id.* at 533 ("Glatt and Footman performed routine tasks that would otherwise have been performed by regular employees.").

172. *See supra* Section I.B.1.b (discussing the facts of *Eberline*).

173. Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1009–10 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

174. *Cf. Walling*, 330 U.S. 148, 152–53 (1947) ("Had these trainees taken courses in railroading in a public or private vocational school . . . it could not reasonably be suggested that they were employees of the school within the meaning of the Act.").

175. *Eberline*, 982 F.3d at 1009–10.

176. *Id.* at 1016–17.

177. *See id.* at 1015 (explaining that, when assessing an intern's employment status, the Sixth Circuit considers "whether the students were the primary beneficiaries of the activities for which their status as employees was in dispute" and noting that "courts have routinely segmented working relationships for the analysis of FLSA claims").

178. *See supra* note 104 and accompanying text.

179. *See Eberline*, 982 F.3d at 1015 (allowing interns' work to be considered in segments instead of as one).

Initially, the segmented approach under *Eberline* seems like an attractive solution to the zero-sum game of interns' compensation. The segmented approach provides primary-beneficiary-interns with an avenue to seek compensation for menial tasks they perform,[180] and the nuisance value of these "targeted" claims could conceivably deter employers from shifting compensable work to unpaid interns. Additionally, the court raises the sensible point that a person might have two separate FLSA relationships with one employer.[181] However, the court's ultimate resolution to allow for the segmentation of a singular relationship has a pair of major defects. First, it calls for a painstaking dissection of an intern's function and would require courts to consider the myriad segments of work that an intern performs, limited only by a plaintiff's imagination.[182] Ultimately, these tasks may prove de minimis or too difficult to record.[183] Second, it renders an intern's employment status even more unpredictable to employers than under the traditional primary beneficiary approach by requiring consideration of every aspect of the intern's work.[184]

Granted, the cost-benefit approach also has zero-sum stakes, because either all of an intern's work is compensable, or none of it is.[185] But the test's focus on the employer's real or constructive balance sheet regarding the internship ensures that the intern will not come up empty-handed. Either the training, supervision, and other tangible resources that the employer pours into the internship are of greater value than the work the intern provides—and the intern reaps the quantifiable benefits—or they are not, and the intern gets paid.[186]

One can imagine difficult results where the costs to the employer exceed the benefits, but not by much.[187] One hard-working modifier could ease the resolution of such cases and shelter interns from risk in borderline cases: *substantially*. With the addition of a

180. *See id.* at 1017 (explaining that the segmented approach "allows for the possibility of compensation for labor that—although related to the educational relationship in an attenuated way—does not actually provide a benefit to students that exceeds the benefit of free labor received by the school").

181. *See id.* at 1015 (citing Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999)) (determining that city firefighters were not employees of the city when working on volunteer rescue squads).

182. *See id.* at 1015 (permitting segmented claims).

183. *Id.* at 1018–19.

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

185. *See supra* Section II.A (explaining the cost-benefit approach).

186. *See supra* Section II.A (explaining the cost-benefit approach).

187. According to the *Eberline* court, these predicaments "raise the potential of zones of exploitation." *Eberline*, 982 F.3d at 1016.

practical, policy-driven[188] modifier, under the cost-benefit approach, an intern would forfeit FLSA employment status only where the costs substantially outweigh the benefits. In effect, this test allocates the risk of loss to the employer, rather than to the intern—an outcome aligned with the labor-protective policy of the FLSA.[189] One might argue that this could have a chilling effect on the "hiring" of unpaid interns. However, such an effect would seem to be in the public interest, considering the dubious benefits these opportunities provide.[190] Further, if businesses that save on labor by shifting "real" work to interns can no longer do so,[191] one might imagine that a decrease in hiring unpaid interns would generate an increase in hiring entry-level employees.

3. Subjectivity and Judicial Discretion

The primary beneficiary test, in both its variations, weighs the benefits the employer receives against an intern's subjective experience.[192] However, as the district court pointed out in *Glatt*, "whether someone learned anything does not answer the question of whether training or useful knowledge was offered."[193] In other words, whether an intern actually and personally benefits from an internship may have little to do with the employer's own behavior.[194] In theory, under the primary beneficiary test, an employer could put tremendous resources into an internship, only for the intern to gain nothing from the experience.[195] Alternatively, an employer may provide no training, supervision, or enrichment, though the intern learns a great deal.[196] Even if, on the Second Circuit's suggestion, a court reviews evidence of the benefits received by in-

188. *See supra* notes 149–56 and accompanying text (explaining the protective posture the FLSA takes toward workers who lack bargaining power).

189. *See supra* Section II.A.2.

190. *See supra* Section I.A.1.

191. *See supra* Section I.A.1.

192. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535–37 (2d Cir. 2016) (explaining that an intern is not an employee under the FLSA "when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation," and noting that the primary beneficiary test "focuses on what the intern receives in exchange for his work"); *Eberline*, 982 F.3d at 1018 (noting that courts should consider the "educational value, both tangible and intangible" of an intern's work).

193. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 533 (S.D.N.Y. 2013), *vacated and remanded*, 791 F.3d 376 (2d Cir. 2015).

194. *Id.*

195. *Contra id.*

196. *Id.*

terns in a program on the whole,[197] that evidence is still grounded in a subjective reality, albeit a shared one.[198]

In conducting a primary beneficiary analysis, courts currently place the intern's subjective experience on one side of the scale, and the employer's objective benefit on the other.[199] However, the intern's subjective benefit is best viewed as a proxy for the employer's contributions—in other words, the cost that the employer incurs.[200] All parties would be better served by an apples-to-apples comparison, which weighs the employer's objective costs against the employer's objective benefits. Such a comparison would be more predictable: Employers would better understand which interns they need to pay, while interns would better understand their rights under the FLSA. Additionally, an apples-to-apples approach with quantitative reference points would promote judicial economy and administrability by sparing courts the labor of weighing seven or eight different factors and comparing objective against subjective benefits.[201]

Finally, an objective comparison would reduce the role, inherent in an unweighted, multi-factor test, of judicial discretion in determining interns' rights under the FLSA.[202] While there is a long tradition of determining employee status under the FLSA on a case-by-case basis,[203] this tradition does not warrant the overwhelming discretion[204] that courts have been assigned in adminis-

197. *See Glatt*, 811 F.3d at 537 ("[A] court may elect in certain cases, including cases that can proceed as collective actions, to consider evidence about an internship program as a whole rather than the experience of a specific intern.").

198. *See Glatt*, 293 F.R.D. at 533.

199. *Glatt*, 811 F.3d at 536–37.

200. In administering its primary beneficiary test, the Second Circuit "focuses on what the intern receives." *Glatt*, 811 F.3d at 536. But in *Walling*, the Supreme Court implicitly weighed the cost of the training to the railroad against the benefit of the work the railroad received. *Supra* Section II.A.1. What the trainees received relates to this analysis only insofar as the intern's benefits may reflect the employer's costs. But as the district court in *Glatt* pointed out, the intern's benefits may not correspond to the employer's costs. *Glatt*, 293 F.R.D. at 533 ("[W]hether someone learned anything does not answer the question of whether training or useful knowledge was offered."). As a result, the benefits to an intern are only a proxy for the relevant metric, the employer's cost. *Supra* Section II.A.1.

201. *See Glatt*, 811 F.3d at 536–37; Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1018 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

202. *See Glatt*, 811 F.3d at 536 (explaining that the primary beneficiary test "accords courts the flexibility to examine the economic reality as it exists between the intern and the employer").

203. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

204. *See Glatt*, 811 F.3d at 537. The Second Circuit instructs:

> Applying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not

tering the primary beneficiary test. Because courts are at liberty to select any factors they deem appropriate and assign those factors the weight they see fit,[205] how an intern's status is determined hinges in no small part on their jurisdiction. The resulting arbitrariness of an intern's employment status runs counter to the goals of the FLSA,[206] and the protective, inclusive posture of the Act.[207]

4. Policy Considerations

The Second Circuit notes that the primary beneficiary test "reflects the role of internships in today's economy" better than a test that relies strictly on *Walling*.[208] And this much is true. However, the law can do more than reflect the status quo, in which a conservative estimate of 1,000,000 interns work for free each year,[209] 77 percent of them women[210] and a disproportionately high number of them first-generation students and people of color.[211] With the law regarding interns' employment status both unpredictable[212] and underenforced,[213] businesses are at liberty to decide whether they are going to pay interns.[214] As long as they can come up with enough "tangible and intangible" benefits for their interns,[215] employers

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an employee entitled to the minimum wage. In addition, the factors we specify are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases.

Id.

205. *Id.*

206. *Supra* Section II.A.2.

207. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (citing 81 CONG. REC. 7652, 7672, 7885 (1937); 82 CONG. REC. 1386, 1395, 1491, 1505, 1507 (1937); 83 CONG. REC. 7283, 7298, 9260, 9265 (1938)); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (noting the "striking breadth" of the word "employ" under the FLSA, which in turn "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").

208. *See Glatt*, 811 F.3d at 537–38.

209. *See* NAT'L ASS'N OF COLLS. & EMPS., 2019 INTERNSHIP & CO-OP SURVEY REPORT EXECUTIVE SUMMARY 4 (2019); PERLIN, *supra* note 7, at 28.

210. PERLIN, *supra* note 7, at 27.

211. Collins, *supra* note 21.

212. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013), *vacated and remanded*, 791 F.3d 376 (2d Cir. 2015).

213. There are an estimated one million unpaid internships each year. *See* NAT'L ASS'N OF COLLS. & EMPS., 2019 INTERNSHIP & CO-OP SURVEY REPORT EXECUTIVE SUMMARY 4 (2019); PERLIN, *supra* note 7, at 28. The courts do not have the capacity to review the potential multitude of FLSA violations on a case-by-case basis. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

214. David C. Yamada, *"Mass Exploitation Hidden in Plain Sight": Unpaid Internships and the Culture of Uncompensated Work*, 52 IDAHO L. REV. 937, 945 (2016).

215. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535–36 (2d Cir. 2016).

can rest assured that even their most litigious interns are unlikely to succeed in raising a challenge based on the primary beneficiary test. As a result, employers save an estimated two billion dollars each year.[216] This figure indicates that interns provide valuable labor.[217] Unless their employers provide them with resources of an even greater value, fairness dictates that they deserve compensation.

CONCLUSION

Despite the increasing influence of the primary beneficiary test,[218] we need not accept, as a foregone conclusion, that *Glatt* got it right. The spread of internships is pervasive, and their quantity and diversity necessitate a clearer standard for employers to follow, as opposed to a more flexible standard. Grounding this standard in a cost-benefit analysis has support in both precedent and legislative history.[219] It may be tempting to set *Walling* aside for its antiquity, but for now, courts are not free to do so. As the Supreme Court once forecasted, creating an exception to the FLSA "may open up a way for evasion of the law."[220] In the 76 years since *Walling*, this premonition has been fulfilled, and the hole in the FLSA has grown wider and wider with each multi-factor test that the courts have promulgated to respond to the growth of the intern economy. In response, the Supreme Court should reject the chief among these, the primary beneficiary test, as lacking a sound basis in precedent and policy.[221] The Court should instead adopt the cost-benefit test, which is grounded in precedent and protective toward interns, in accordance with the legislative intent of the FLSA.[222] In 76 years, we've seen enough. It is time to deliver on the promise of the FLSA, and it is time for interns to cash in and employers to pay up.

216. *See* PERLIN, *supra* note 7, at 124.
217. *See id.*
218. *Supra* Section I.A.1.
219. *Supra* Section II.A.1–2.
220. Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947).
221. *Supra* Section II.A.1–2.
222. *Supra* Section II.A.1–2.

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