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When Must Interns Be Paid? Resolving the Circuit Split: Advantages of a Uniform Principle-Based Test

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I. Introduction & Purpose

The importance of formulating a fair and practical test to determine whether an intern's completed work warrants payment is evident in light of the both the magnitude of cascading socio-economic consequences such a test would create and the high volume of attention this issue has garnered in media and modern culture.[1] Stephen Colbert aptly captures this notion by reminding viewers that "this country was built by unpaid interns."[2] This controversy is a familiar one, fraught with concerns of capitalism, exploitation, and economic externalities. Payment has been framed both as a right for the aspiring, broke college graduate as well as a burden for businesses, both large and small, trying to meet their bottom line in a competitive market environment. Against this backdrop, this Comment proposes a uniform principle-based test in place of the predominant judicial-crafted multi-factor approach used to determine when an intern deserves payment from an employer.

Underyling the complex task of creating a judicial standard governing the payment of interns is an important deadlock. Although interns have become essential cogs in the fast paced, evolving business world, businesses are keen on withholding compensation from them. On one hand, interns demand payment not only to cover the value of services provided but also to pay for transportation costs, office clothing, and an assortment of other living expenses.[3] Employers, on

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[1] Kristen Pizzo, *Unpaid Internships Suck. Here's What You Can Do About Them*, MEDIUM (Aug. 15, 2018), https://medium.com/the-daily-rant/unpaid-internships-suck-heres-what-you-can-do-about-them-6fab8549c140

[2] Andrew M. 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. 293, 293 (2011).

[3] Andrew M. Bennett, *Letter to the Editor, Internships for Pay, Credit, or None of the Above*, CHRON. HIGHER EDUC. (D.C.), Apr. 11, 2008, at 39.

the other hand, are reluctant to divest business investment dollars into the hands of novice hires. Moreover, the demand for unpaid interns is ever-rising in light of the gig economy and the gradual shift to short term employment positions. This tension highlights the importance of a clear uniform test to answer the question of payment.[4] Yet, neither statutory schemes (namely, the Fair Labor Standards Act) enacted at the federal level, nor guidance offered by the Department of Labor, has provided a clear and workable legal framework. Moreover, the only Supreme Court case on point has espoused broad principles rather than any binding rule, thereby leaving the door open for the circuit courts to construct different tests. As such, courts interpreting the issue have enjoyed a significant degree of flexibility.

To address this fractured landscape, this Comment proposes that courts adopt a uniform standard grounded in three principles rather than any set of factors in order to accurately and flexibly determine whether an intern should be paid. In support of this proposition, this Comment will first examine various tests as currently adopted in the Second, Fourth, Sixth, Seventh, and Eighth Circuits in order to identify and retrieve the analytical building blocks for the aforementioned principles. Throughout this building process, this Comment will endorse the goal behind the Second Circuit's framework in *Glatt v. Fox Searchlight Pictures, Inc* in terms of identifying the primary benificary, while rejecting the multi-factor test that the court employed for that purpose in the context of an intern-employer relationship. In delineating the deficiencies of the Second Circuit's multi-factor framework, this Comment will examine other circuit court's tests as insightful yet ultimately unsuccessful attempts to refine the Second Circuit's test with respect to fairness and flexibility.[5]

[4] Fair Labor Standards Act, 29 U.S.C. § 206.

[5] These principles represent the individual strengths (while omitting the weaknesses) presented by the varying multi-factor tests used by the Second, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits.

Second, after the aforementioned canvassing, this Comment zeroes in on the principles grounding this Comment's proposed test. Critically, these principles present flexible and broad considerations rather than a list of factors, in determining the weighing of benefits for purposes of answering the intern-payment question. Those principle are threefold: 1) rather than enumerating specific factors for determining who is the primary beneficiary, courts should examine only logical and pertinent factors appropriate to the specific internship and parties; 2) in examining which party is the primary beneficiary, the court should examine both intangible and concrete benefits that relate to the weighing of benefits, but refrain from analyzing party expectations; and 3) courts should go beyond the scope of the party's interactions and examine the broader structure in which those interactions sit; including, but not limited to whether the internship is a statutorily mandated requirement for graduation.

Finally, this Comment is limited to constructing a fair and practical framework for determining when an intern deserves payment with respect to FLSA purposes. This Comment does not address state law considerations, or whether interns are employees for other regulatory purposes, including but not limited to, discrimination and whistleblower protection.

II. UNDERSTANDING THE CIRCUIT SPLIT: LIMITED ADMINISTRATIVE AND STATUTORY GUIDANCE

The starting point in the legal debate over the definition of an intern in determining the question of payment, inheres in the FLSA standard. The FLSA is an umbrella statute that sets a spectrum of standards for overtime pay, child labor, and minimum wage.[6] Accounting for specific limited exceptions, every employer is required to pay its employees the federally required minimum wage.[7] Thus, the issue turns on whether someone may properly be classified as an

[6] 29 U.S.C. § 206.
[7] *Id*.

employee. Under the definition provided by the Fair Labor Standards Act, an employee is someone whom the employer "suffer[s] or permit[s] to work."[8] Unsurprisingly, this generic, ambiguous statutory definition is circular, thereby leaving the task up to the judiciary and the Department of Labor.[9]

The Supreme Court has not resolved the issue. In fact, the Court has only once glossed the issue in its 1947 decision in *Walling v. Portland Terminal Co.* Here, the Court provided a "primary beneficiary" principle but ultimately neglected to put forth a test comprising specific factors of analysis. In applying this principle, the *Portland Terminal* Court examined the "economic realities" between the parties, thereby affirming a railroad employer's decision to not pay trainees participating in seven-to-eight-day program to become certified yardmen where the trainees had no expectation of compensation, did not "expedite the company business," and did not displace existing workers.[10] Important to this decision was the fact that the railroad "received no 'immediate advantage' from any work done by the trainees."[11] Thus, the primary beneficiary was the trainees and as such they were unable to receive payment.

In lieu of the absence of a directive by the Supreme Court to examine any specific factors, circuit courts operate under considerable discretion in fashioning their own tests. These tests comply with *Portland Terminal* as long as they are tethered to a mode of analysis examining the "economic realities" of the employer-intern relationship as directed by the Supreme Court. This framework suggests examination of factors such as the employee's opportunity for profit or loss, the degree of control exercised by the employer, the relative investments made by both parties, the permanency of the relationship, the required level of skill, and whether the service rendered is an

[8] *Id.*
[9] 29 U.S.C. § 203(g) (2006).
[10] Walling v. Portland Terminal Co., 330 U.S. 148 (1947).
[11] *Id.* at 153.

integral part of the employer's business.[12] However, the list if non-exhaustive, as economic realities is but a situational framework of analaysis for each employer-intern relationship, which in turn, represents the method of implementing the Surepem Court's primary beneficiary analysis. As such, each circuit court test regarding payment of itnerns—as will be subsequentely examined, presents a different rendition or interpretation of *Portland Terminal's* legal framework. As such, there is no uniform test.[13] Notably, to date, the Supreme Court has yet to recanvass the issue and place its stamp of approval on any posited test, despite the fractured applications among the circuit courts.[14]

The FLSA has also provided guidance, though not binding and thus left unaddressed by some of the circuit court tests. In 2010, under the Obama Administration, the DOL announced an interpretation of the FLSA that presumed employment status unless six factors are all met. This interpretation inhered in a "fact sheet,"[15] which stipulated that an employment relationship is assumed, but will only not be found if the following necessary requirements are met:[16] 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 loose supervision of existing staff; 4) the employer that provides the training derives no immediate

[12] ELLEN C. KEARNS ET AL., THE FAIR LABOR STANDARD ACT 15 (1999).
[13] The Fifth Circuit conducts a "balancing analysis" that considers the "relative benefits" of the putative employee's work. *See* Donovan v. American Airlines, Inc., 686 F.2d 267, 272 (5th Cir. 1982). The Sixth Circuit asks whether the employee in a "learning or training situation" is the "primary beneficiary of the work performed." Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011).
[14] Veronica Nannis, *Big Business and Hollywood Rack up Major Win in Unpaid Intern Case: The Second Circuit Applies a "Primary Beneficiary Test" for Interns, Reversing the Lower Court and Rejecting the Department of Labor's Published Guidance as Outdated*, JOSEPH GREENWALD & LAAKE BLOG (Aug. 31, 2015), https://www.jgllaw.com/blog/big-business-hollywood-rack-major-win-unpaid-intern-case.
[15] WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010) [hereinafter 2010 FACT SHEET]; Wage and Hour Div., U.S. Dep't of Labor, Field Operations Handbook, § 10b11 (1993) [hereinafter *Handbook*].
[16] 2010 Fact Sheet, *supra* note 15.

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.

Subsequently, on January 5, 2018, the DOL under the Trump Administration, released a new fact sheet promoting seven-factor test (the most widely implemented standard used today among the circuit courts). This test revoked the presumption in favor of employment from the previous 2010 fact sheet, opting instead to address the intern status question through a balancing approach involving a totality of factors:[17] 1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation (with any promise of compensation, expressed or implied, suggesting 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; and 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.

[17] WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2018) [hereinafter CURRENT FACT SHEET].

In sum, the current legal framework for examining the employment status of interns draws from multiple sources: the circumlocutory FLSA standard, the Supreme Court's primary benificary framework as presented in *Portland Terminal* alongside circuit court tests seeking to implement that framework, and guidance from the DOL fact sheets.[18] Against this fractured backdrop, this Comment focuses on the judicial line of interpretation regarding the standards for determining payment of interns.

Nevertheless, as a precursor, in canvassing this fractured legal landscape, the first decision to examine is the widely cited Second Circuit case of *Glatt v. Fox Searchlight Pictures, Inc*. Here, the Second Circuit adopted factors resembling the "primary beneficiary test"[19] provided by the 2018 DOL fact sheet. Specifically, the court's approach allegedly drew from the "immediate advantage" framework set forth in *Portland Terminal* and has garnered support by the DOL as reflected in its 2018 fact sheet.[20] In fact, the *Glatt* test has become so influential that the Fourth and Sixth Circuits have used its factors as a rough model for their respective tests.[21]

The present Circuit split may be summarized by the following: while the Second Circuit's primary beneficiary test is most popular, other circuits—notably the Fourth and Sixth Circuits expressly reject the DOL's former six-factor test and have adopted their own modified primary beneficiary test (to be subsequentely discussed in detail).[22] Meanwhile, the Fifth Circuit defers to the six-factor test originally promulgated by the DOL in 2010 and grants "substantial deference"

[18] Bennett, *supra* note 2, at 301.
[19] Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 383–84 (2d Cir. 2015).
[20] *Portland Terminal*, 330 U.S. at 148.
[21] *See* McLaughlin v. Ensley, 877 F.2d 1207, 1209–10, n.2 (4th Cir. 1989) (holding that the DOL's six-factor test was inapplicable and that "the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor"); *Solis*, 642 F.3d at 518 (employing a primary benefits test and describing the DOL's former six-factor test as "overly rigid and inconsistent with a totality-of-the-circumstances approach.").
[22] *See McLaughlin*, 877 F.2d at 1209-10; *Solis*, 642 F.3d at 518.

to it.[23] The Seventh Circuit is unclear; it has decided a case that adopted the Second Circuit's seven factors, but has not extended that test in other cases.[24] Still further, the Eighth Circuit provides another relatively murky test; it uses the primary beneficiary test like *Glatt*, but unlike *Glatt*, does not identify any specific factors to consider.[25] The Eighth Circuit has also noted that the DOL's original six factors provides "further support" in the determination of an intern's status but has not provided clear affirmative guidance to that effect. [26] Finally, the First, Third, and D.C. Circuits have not yet clearly addressed the issue.

III. LITERATURE REVIEW: INSUFFICIENCY OF EXISTING MULTI-FACTOR TESTS AND EQUITABLE SOLUTIONS

The body of literature governing the payment of interns has sought to rectify the confusion regarding internship status unsatisfactorily and in piecemeal. First, some scholars have proposed solutions involving directly amending the FLSA.[27] One such amendment calls for a clarification of the "learner exception." As context, the FLSA affords the DOL's Wage and Hour Division power to pass regulations governing intern status; one such regulation is the learner exception.[28] The WHD defines "learners" as "worker[s] who [are] being trained for an occupation . . . for which skill . . . when initially employed produces little or nothing of value."[29] This definition alone, is seemingly co-extensive with the reality of interns. Yet the problem is that a learner may only obtain certification for payment of minimum wage when the employer is able to show, among other things, that "an adequate supply of qualified experienced workers is [currently unavailable],"

[23] Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983).
[24] Hollins v. Regency Corp., 867 F.3d 830, 835–37 (7th Cir. 2017).
[25] Petroski v. H&R Block Enters., 750 F.3d 976, 976 (8th Cir. 2014).
[26] *Id.*
[27] Jessica L. Curiale, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2010).
[28] 29 U.S.C. § 214(a) (2006).
[29] 29 C.F.R. § 520.300 (2009).

and that "the experienced workers presently employed in the . . . occupations in which learners are requested are afforded the opportunity, to the fullest extent possible, for full-time employment."[30] Yet as previously discussed, when the modern workplace is neither lacking in labor supply nor prone to offering full-time employment upon completion of an internship, these requirements may never be met. As such, the current learner exception is unworkable and invites meaningful amendments.[31]

Yet reinforcing the learner exception presents unique challenges. For one, given the political swing from the Trump to Biden administration, as well as more prevalent issues dominating the day such as COVID-19 and unemployment, it is unclear whether the DOL will have the political support to craft regulations that properly address interns in the modern workplace.[32] Moreover, even if one strikes the above requirements within the learner exception or affords new extensions as to cover unpaid student interns, other tangential regulations would only permit such interns to receive 95 percent of minimum wage.[33] Ultimately, extending coverage of learners to include unpaid interns through clarifying relevant regulation necessarily requires the DOL to establish a test of some kind. Yet, the fact that administrative regulation is not binding on courts invites the rebuttal that the same test is better formulated under binding legislation or by Supreme Court decision.

Another solution calls for legislation allowing unpaid interns to unionize as a form of internal dispute resolution, (particularly in the context of student interns) in order to negotiate with their employer for minimum wage payments.[34] Here, unpaid interns could seek protection under

[30] § 520.404(d).
[31] *See* Curiale, *supra* note 27, at 1553.
[32] *See The Biden-Harris Administration Immediate Priorities*, THE WHITE HOUSE, https://www.whitehouse.gov/priorities/ (last visited Jan. 15, 2022).
[33] 29 C.F.R. § 520.408.
[34] *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 255–56 (2002).

the National Labor Relations Act (NLRA) if they "choose to engage in concerted activity for mutual aid or protection." Yet it is unclear what, if any, negotiating power student interns may have, given that the internship may be required for graduation, that interns are typically working in their position for the brief time span of one summer, and that there exists considerable information and economic power asymmetry between the intern and the employer. Arguably, unionization is thus fatally impractical.

The most prevalent, albeit ultimately insufficient solution discussed in the literature for properly addressing the intern payment issue is that the Supreme Court propose a uniform standard. One commentator has proposed a test that seeks to narrow the DOL's fact sheet into a single question, asking whether there was mutually induced consideration sufficient to form an employer-employee relationship.[35] Another commentator posits that revising the DOL's original six-factor all-or-nothing test by modernizing specific outdated unworkable factors, presents the best solution.[36] Yet another test seeks to rectify the circuit split on the intern classification question by having the Supreme Court decide a relevant case under, and through endorsing, the Second Circuit-specific multi-factor approach.[37]

This Comment rejects all the above in favor of a broader, more flexible principle-based test. Importantly, this Comment will compare its proposed test to current and suggested alternatives in order to justify why any test organized around specific factors rather than broad principles, ultimately falls short of setting a clear and workable standard regarding the intern payment question. To be clear, numerous commentators have endorsed a principle-driven test

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[35] 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, 186–87 (2013).

[36] Paul Budd, *All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 U. Kan. L. Rev. 451, 477 (2015).

[37] 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, 2101 (2017).

which calls for analytic criteria not contrary to the primary beneficiary framework, but they have not provided actual criteria to propel the analysis under that framework.[38] This paper fills that gap by providing three flexible, principle-based criteria.

IV. FORMULATING THE SUBSTANCE OF A PRINCIPLE-BASED TEST BY EVALUATING STRENGTHS AND WEAKNESSES OF CURRENT CIRCUIT COURT TESTS

This section integrates discussion and analysis for each of the circuit court tests regarding determining an intern's employment status consistent with the Supreme Court's primary beneficiary directive. Particularly, this section aims to break down each circuit's test in order to extraplate both broader legal principles as well a specific factors that will be later incorporated into this Comment's proposed test in Section V. The goal of this section is to justify the components of the Comment's proposed test and to identify their sources in the caselaw.

A. Building Blocks: The Second Circuit's "Primary Beneficiary Test"

The Second Circuit's test inheres in *Glatt. v. Fox Searchlight Pictures, Inc.* Here, the court vacated the district court's grant of partial summary judgement for unpaid interns working at film-production company,[39] instead fashioning a new test for the lower court to implement upon remand. Originally, the district court had deferred to the DOL's original six-factor test but had applied those factors as part of a balancing test, thereby concluding that because four factors weighed in favor of classification as employees, the plaintiff's motion for summary judgement should be granted.[40] Yet on appeal, the Second Circuit promulgated a multi-factor totality of the circumstances approach.[41]

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[38] *See, e.g.*, Diana Shaginian, *Unpaid Internships in the Entertainment Industry: The Need for A Clear and Practical Intern Standard After the Black Swan Lawsuit*, 21 SW. J. INT'L L. 509, 531 (2015); Gregory S. Bergman, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 587–88 (2014).
[39] *Glatt*, 791 F.3d at 380–81.
[40] *Id.* at 382.
[41] *Id.* at 379.

With respect to this new test, the Second Circuit selected factors consistent with the underlying purpose of deciding who—the intern or the employer, occupies the position of primary beneficiary.[42] In establishing this principle, the *Glatt* court moved away from the "immediate advantage" test as explicitly articulated in *Portland Terminal* in favor of more "nuanced primary beneficiary test" assessing the relative benefits conferred.[43] In the former, if an immediate advantage is conferred to the employer, then an employment relationship arises; in the latter, an employment relationship arises only when the benefits to the employer exceed those to the employee.[44] In deciding this question, the court rejected *Portland Terminal*'s "immediate advantage" framework as too simplistic and rigid a method for addressing the multitude of workplace situations and also declined to endorse the DOL's interpretation of the test.[45] Specifically, the court adopted the primary beneficiary test as it 1) focuses on "what the intern receives in exchange of his work; and 2) "accords courts the flexibility to examine the economic reality as it exists" between the employer and intern.[46] In determining the identity of the primary beneficiary, the court examined seven factors (which the DOL subsequently incorporated into its 2018 fact sheet).[47]

In considering a test that fairly and flexibly addresses the modern workplace, scholars tend to agree that *Glatt* is at the very least, a step in the right direction.[48] When compared to the DOL's 2010 fact sheet, several commentators correctly observe that each of the factors promulgated by the Second Circuit's decision attempt to guard against exploitation while gauging the relevant

[42] *Id.* at 383.
[43] *Id.* at 383.
[44] *Id.*
[45] *Glatt*, 791 F.3d at 383.
[46] *Id.* at 384.
[47] CURRENT FACT SHEET, *supra* note 17.
[48] Vincent P. Honrubia, *From Mailroom to Courtroom: The Legality of Unpaid Internships in Entertainment After* Glatt v. Fox Searchlight Inc., 7 NYU J. INTELL. PROP. & ENT. L. 107, 131 (2017).

educational aspect of the employer-employee relationship.[49] Yet viewing *Glatt* with a critical eye, the court's test here is arguably an unjustified, complete departure from the *Portland Terminal* and the "primary beneficiary framework."[50] Though the *Glatt* court framed its "primary beneficiary" test as an extension of *Portland Terminal's* "immediate advantage" test, these two tests appear to be more in opposition than in agreement. Indeed, there appears to be a fundamental distinction between "primary beneficiary" and "immediate advantage" as the former examines employment status in terms of relative advantage for both parties, while the latter presents a self-contained analysis about the advantage to the employer.[51] Even assuming consistency, it is unclear how the *Glatt* court's seven factors present an analysis of relative advantages.[52] Arguably only factor six fits that purpose.[53] For example, factor seven (which examines realized *expectations* of payment on the part of an intern on an ad hoc basis) does not logically constitute any clear measure of benefit.[54]

Alternatively, the *Glatt* decision, as one commentator suggests, may be read as "totality of the circumstance" analysis of the DOL's all-or-nothing six-factor test.[55] Yet even this perspective does not cleanly capture the essence of the primary beneficiary principle that the decision allegedly espouses. Several factors implemented in *Glatt* resemble principles of promissory estoppel rooted in quasi-contract rather than a simple weighing of benefits received by the parties that the primary beneficiary principle demands. As such, the *Glatt* test presents an unjustified departure from the governing principle and diverts attention away from the applicable legal standard. For example,

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[49] *See* Rachel P. Willer, *Waging the War Against Unpaid Labor: A Call to Revoke Fact Sheet #71 in Light of Recent Unpaid Internship Litigation*, 50 U. RICH. L. REV. 1361, 1381 (2016); *see also* Rahman, *supra* note 36, at 2101.

[50] *Employment Law-Fair Labor Standards Act-Second Circuit Crafts "Primary Beneficiary" Test for Unpaid Interns.*- Glatt v. Fox Searchlight Pictures, Inc., *791 F.3d 376 (2d Cir. 2015)*, 129 HARV. L. REV. 1136, 1141 (2016).

[51] *See Glatt*, 791 F.3d at 383–84.

[52] *See id.*

[53] *See* CURRENT FACT SHEET, *supra* note 17.

[54] *See id.*; *Portland Terminal*, 330 U.S. at 148 (emphasis added).

[55] *See* Budd, *supra* note 36, at 476–77.

factor one—that "any promise of compensation, express or implied, suggests that the intern is an employee, and vice versa," arguably seeks to hold the employer accountable to establishing an employment relationship through the reliance of the employee, rather than the manifestation of benefits as between the parties.[56] Factor seven also resembles promissory estoppel as it focuses on the subjective expectations of the employee in receiving permanent employment at the end of the internship.[57] A test that is more faithful to the "primary beneficiary standard" would steer clear of analyzing such conceptually aberrant and thereby confusing factors resting on irrelevant legal principles, whether contractual or otherwise.[58]

On the other hand, factors three, four, and five—receival of academic credit, value of the internship, and accessibility of the internship, do contribute towards measuring the comparative benefit between the parties. Factor six is also faithful to the weighing of benefits framework because it examines displaceability on the part of the employer and value of the learning for the employee. Yet, the problematic component is the mandatory examination of these four factors in every factual circumstances in place of more relevant and commonsense metrics of benefit, particularly those with respect to the employer.[59] For example, is it not important to consider the intern's impact on the company by valuing and grading work completed, or examining the company's profitability in the long term as a result of hiring that individual? By ignoring such metrics, the *Glatt* court's test does not fully encapsulate and weigh the overall benefits as between the parties; ergo, it fails to posit an accurate and comprehensive "primary beneficiary" framework.[60]

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[56] *See* CURRENT FACT SHEET, *supra* note 17.
[57] *See id.*
[58] *See Glatt*, 811 F.3d at 539 (finding that determining an intern's employment status presents a "highly context-specific inquiry").
[59] *See* CURRENT FACT SHEET, *supra* note 17.
[60] *See id.*

Interestingly, the Second Circuit defends its test on the basis of accommodating for modern workplaces through alleging that internships are typically tied to formal education.[61] Nevertheless, not all interns are in school; in fact, "while the majority of people start internships while they're in college, 31% of internships begin after the person has graduated college."[62] Arguably, these interns are advantaged by the test (with respect to factors one, two, and arguably three). Legally informed employers may also be less likely to hire such interns for fear of incurring the legal obligation to pay them.[63]

Relatedly, the Glatt court's reformulation of the immediate advantage test on the rationale that the immediate advantage framework presents inflexible application, does not present a justified legal pivot. [64] For example, factor three in the DOL's original six-factor test (that the intern "works under close supervision of existing staff") is arguably not an outdated metric limited to analyzing railroad yard workplaces. Within such workplaces, interns do directly shadow and work under more skilled and experienced staff, but the same could be said for virtually any modern business environment.[65] In fact, interns today are arguably under more stringent, pervasive surveillance by a variety of mentors and staff, especially considering the increase in business supervision technology.[66] Moreover, the very fact that several factors in the Second Circuit's primary beneficiary framework directly overlap with the DOL's original six-factor test, (factors one and two, partially, as well as five and six) lends further support to the notion that the immediate advantage framework is applicable even at present. [67]

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[61] *Glatt*, 791 F.3d at 385 (finding that focus on "educational aspects of internship" aids the court's test in "better reflect[ing] the role of internships in today's economy").
[62] *Internships By The Numbers*, CHEGG INTERNSHIPS (Sept 8, 2020) https://www.internships.com/career-advice/basics/internships-by-the-numbers.
[63] *See* CURRENT FACT SHEET, *supra* note 17.
[64] *See* 2010 FACT SHEET, *supra* note 15.
[65] *Id.*
[66] *E.g.*, DIANE L COOPER, ET AL., LEARNING THROUGH SUPERVISED PRACTICE IN STUDENT AFFAIRS 70 (2nd ed. 2014).
[67] *See* CURRENT FACT SHEET, *supra* note 17; 2010 FACT SHEET, *supra* note 15.

Importantly, from a business perspective, the Second Circuit's seven factor approach is not only unnecessary but also a detrimental overhaul of the DOL's six necessary requirements. This observation is particularly especially to the technology industry.[68] For example, the technology industry boasts 44 pecent of the highest paying internships.[69] Such robust and prosperous employers would arguably still be able to meet all six requirements from the DOL's original standard through careful structuring of the internship and other strategic expenditures.[70] The current test, on the other hand, makes it easier for employers to meet the standard while inadequately safeguarding against exploitation, as no factor is dispositive.[71] For example, even if the internship fails to meet factor five (insofar that it does not "provide[] the intern with beneficial learning"), a court could still determine an intern's classification based on other factors, notwithstanding both exploitation and an obvious failure of the internship to equip the intern with useful skills.[72] In the same vein, many unpaid interns today perform only remedial office work despite the fact their internships are part of their school's curriculum.[73] As a result, companies have an incentive to take advantage of those factors that merely, in effect, require structuring internships around the school program rather than providing relevant translatable skills.[74]

Another pointed criticism is the inconsistency in the Second Circuit's statement that "this flexible approach is faithful to *Portland Terminal*" because "nothing in the [] decision suggests that any particular fact was essential to its conclusion."[75] This may well be a valid argument for

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[68] *See Glatt*, 791 F.3d at 385.
[69] *98 Internship Statistics: 2020/2021 Data, Trends & Predictions*, COMPARE CAMP (May 26, 2020).https://comparecamp.com/internship-statistics/.
[70] *See* 2010 FACT SHEET, *supra* note 15
[71] *See Glatt*, 791 F.3d at 384 (holding that "every factor need not point in the same direction for the court to conclude that an intern is not an employee entitled to minimum wage").
[72] *Id.*
[73] *Unpaid Internships Often Include Menial Work, Career Services Expert Says*, THE DAILY FREE PRESS (April 12, 2011), https://dailyfreepress.com/2011/04/21/unpaid-internships-often-include-menial-work-career-services-expert-says/.
[74] *See Glatt*, 791 F.3d at 384.
[75] *Id.*

expanding the number of factors to be considered, but not a valid argument for *overhauling* the framework of analysis from "immediate advantage" to accessing "primary beneficiary" from a comparative employer-employee standpoint.[76] Based on the foregoing criticisms, the Second Circuit's decision in *Blatt* not only fails to justify its departure from *Portland Terminal* and the DOL's 2010 guidance, but also raises a number of detrimental business-orientated externalities.[77]

B. *Building Blocks: The Fourth and Sixth Circuit's "Modified" Primary Beneficiary Tests*

The Fourth Circuit's decision in *McLaughlin v. Ensley* presents a totality of circumstances approach in deciding the intern payment question. Here, the court found that trainees hired to distribute snacks and stock vending machines were employees under the FLSA.[78] Importantly, the defendant derived income entirely from commission sales, which trainees partook in by operating route jobs. Trainees were also only hired after five days of exposure to the tasks they were required to perform, such as driving the truck, restocking vending machines, and dealing with retailers.[79] Notably, evidence conflicted as to whether the trainees hindered the vendor-employer's normal business, as two experienced drivers testified that "the extra hands naturally made their work load lighter," and whether the training guaranteed a future job.[80] On these facts, the district court had granted the vendor's motion for directed verdict, on grounds that the trainees failed the six part test promulgated by the DOL's restatement of the *Portland Terminal* case.[81] On appeal, the Fourth Circuit instead applied a modified "primary beneficiary test."[82]

[76] *Id.* (emphasis added).
[77] *Id.*
[78] *McLaughlin*, 877 F.2d at 1208.
[79] *Id.* at 1208–09.
[80] *Id.*
[81] *Id.* at 1210.
[82] *Id.*

In reaching this decision, the Fourth Circuit rejected any predetermined set of factors, finding that the vendor-employer received "more advantage than the workers" as the vendor received: 1) at "[no] cost to himself, employees able to perform at a higher level when they began to receive pay"; 2) a "free opportunity to review job performance"; 3) additional hands on route for distributing snack products and generating income; and 4) at-will employees, as there was "no credible evidence" to suggest that "a person who completed the training was not subsequently hired."[83] On the other hand, the workers received "very little" during their brief training period, as the skills received were "so specific to the job or so general to be of practically no transferable usefulness."[84]

Underlying this analysis was the fact that the Fourth Circuit borrowed four factors from the Second Circuit's test that it found applicable to its own facts—whether there was an expectation of employment following the training period, whether there was promise of a guaranteed job, whether the worker displaced current employees, and whether the intern received beneficial learning."[85] Nonetheless, the Fourth Circuit's framework differed from that of the Second Circuit in two key respects: it 1) did not list required factors that a court must examine; and 2) explicitly examined benefits conferred upon the employer as opposed to those onto the employee.[86]

As compared to the Second Circuit, the Fourth Circuit's open-ended "primary beneficiary test" more accurately weighs relative benefit as between the parties. The latter test presents a more flexible format for addressing a wide spectrum of workplaces, primarily as it does not require

[83] *McLaughlin*, 877 F.2d at 1210.
[84] *Id.*
[85] CURRENT FACT SHEET, *supra* note 17; *Glatt*, 791 F.3d at 383–84.
[86] *Compare Glatt*, 791 F.3d at 383-84 (promulgating a non-exhaustive, seven-factor test under which every factor must be examined but none of which are dispositive), *with McLaughlin*, 877 F.2d at 1210 (using a modified primary beneficiary test that unlike the Second Circuit's test, does not require examination of any particular factor and weighs benefits that are concrete).

examination of the connection between the internship and the intern's educational institution.[87] Notably, the Fourth Circuit's test bears no reference to an intern's academic credit received, whether the internship was part of a school program or clinic, or whether the training was similar to that received at the educational institution.[88] This approach thus more even-handedly treats interns who are attending school, and interns who are out of school,[89] rectifying both the inequity in the potential for corporate exploitation as well as the arbitrary denial of payment for interns arguably presented by the Second Circuit's test.

Moreover, unlike the Second Circuit, the Fourth Circuit examines more concrete benefits, thereby presenting a "primary beneficiary" framework that is easier and more clear in its application.[90] For example, the Fourth Circuit evaluated the fact that the vendor was receiving more competent employees at no cost, and the ability to review the trainee's performance during that time prior to hiring them.[91] On a principle basis, this framework is also more consistent with the notion of "immediate advantage" espoused in *Portland Terminal*; unlike the Second Circuit's total conceptual departure, the Fourth Circuit's modified framework sensibly builds on the principle of immediate advantage by discussing pertinent factors (e.g., increases in employees and performance review capacity) while leaving out unrelated considerations such as expectations of compensation or permanent employment.[92] In application, the Fourth Circuit's analysis also helps weigh the primary beneficiary test in favor of interns—especially in the non-profit and public

[87] CURRENT FACT SHEET, *supra* note 17.
[88] *Compare id., with Glatt*, 791 F.3d at 383–84.
[89] *See McLaughlin*, 877 F.2d at 1210.
[90] *See id.*
[91] *Id.*
[92] *See* CURRENT FACT SHEET, *supra* note 17; *Glatt*, 791 F.3d at 383–84.

sectors which often require shadowing and assisting a more experienced employee, while preserving close to "no educational component whatsoever" for the intern.[93]

Ultimately, the Fourth Circuit's open ended test that implicating no specific set of factors, more fairly and flexibly addresses modern workplaces as compared to the Second Circuit's test.[94] Not all interns attend school and they should not be subject to analysis of the internship's relationship to an educational curriculum.[95] Further, by obviating the need to analyze arguably unclear factors such as whether the intern displaces current paid employees—as the word "displaces" could mean "replace," or simply "hinder," the Fourth Circuit's test does not bind itself to ambiguity and is therefore a more streamlined and efficient analysis.[96]

In a similar vein, the Sixth Circuit has promulgated its own modified primary beneficiary test in *Solis v. Laurelbrook Sanitarium & Sch., Inc*. This case affirmed a district court decision in favor of students assigned to the kitchen and housekeeping department of a sanitarium operated by the defendant-school on grounds that the students were primary beneficiaries of the internship program and thus properly classified as non-employees.[97] Conversely, the defendant's argument that *Portland Terminal* presented a categorical exemption for vocational schools, was rejected by the Court.[98] The fact that the students attended a vocational school and were assigned to various kitchen and sanitarium duties as part of their training at the school, could not bypass analysis of the 'economic realities" of the relationship between the two parties.[99] The court regarded the

[93] ROSS PERLIN, INTERN NATION 24 (2011); *The High Cost of Unpaid Internships*, U.S. NEWS (Apr. 4, 2016), https://www.usnews.com/opinion/knowledge-bank/articles/2016-04-04/education-or-exploitation-should-all-internships-be-paid.
[94] *See McLaughlin*, 877 F.2d at 1210.
[95] Louie Andre, *111 Internship Statistics for 2021: Pay, Benefits & Trends*, B2B NEWS (2021), https://financesonline.com/internship-statistics/.
[96] *See* CURRENT FACT SHEET, *supra* note 17.
[97] *Solis*, 642 F.3d at 520–21.
[98] *Id.* at 523.
[99] *Id.* at 524.

alleged language of *Portland Terminal* pointing to such an exception, as dicta: "had these trainees taken courses in railroading in . . . a vocational school, wholly disassociated from the railroad, it could not possibly be suggested that they were employees of the school."[100] The court further instructed that the alleged exception would be applicable only when the students are "performing regular school work performed primarily for its educational value."[101]

Moreover, the Sixth Circuit rejected the plaintiff's argument that the original DOL six-requirement test should apply, reasoning that the test's rigidity would fail to encompass the totality of circumstances.[102] Eschewing the factors used by the Second and Fourth Circuits, the Sixth Circuit applied yet another multi-factortest. It found that the students received the primary benefit of the internship program because: 1) the training involved useful practical skills and was thus not "deficient" in any respect;[103] and 2) students did not displace employees (in fact, had the "students not "performe[d] at the Sanitarium," the school was still "adequately staffed" such that the staff could "continue to provide the same services.").[104] These benefits outweighed the labor received by the school, which was not of any exceptional value since the sanitarium was not in competition with other like establishments.[105]

The Sixth Circuit's refusal to decide the case using a categorical exemption from employee status for vocational students is arguably a legal misstep, but the holding as a whole, nevertheless presents a more accurate framework for analyzing "primary beneficiary" as compared to that used by the Second Circuit. With respect to the exemption, the Sixth Circuit arguably misconstrues the

[100] *Id.* at 523.
[101] *Id.* at 524.
[102] *Solis*, 642 F.3d at 525.
[103] *Id.* at 530–31.
[104] *Id.*
[105] *Id.*

holding of *Portland Terminal*;[106] the court acknowledges that the language in the latter was "likely intended merely to 'point out the absurdity of regarding as employment a student's regular school work performed primarily for its educational value: with the case at hand, where students are receiving practical skills.'"[107] Yet at a vocational school, such "regular school work" constitutes practical skills.[108] Thus, there is no meaningful distinction to be made between the allowance of an exemption such as "cafeteria duty as an integrated part of a . . . course of study in . . . home economics" and here, sanitarium duty as an integrated part of a course of study in hospital service and health.[109]

Interestingly, the Sixth Circuit's rejection of labels in examining "economic realities" is arguably contradictory because the *Solis* court simultaneously acknowledges—hrough the home economics example, that a student learning practical skills and enrolled in a regular, non-vocational school, would be labelled as a non-employee.[110] Nevertheless, the analytical value in the Sixth Circuit's primary beneficiary test lies in the fact that it presents a more accurate framework to address the concept of "primary beneficiary" as compared to the Second Circuit's approach; like the Fourth Circuit, it examines more specific and apparent benefits received by the employer and is thus more faithful to the applicable legal cannon.[111]

C. *Building Blocks: The Fifth Circuit Test*

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[106] *See Portland Terminal*, 330 U.S. at 152–53 (holding that "had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act").
[107] *Solis*, 642 F.3d at 524.
[108] *See* Mahmut Ozer & Matjaz Perc, *Dreams and Realities of School Tracking and Vocational Education*, NATURE (Feb. 28. 2020), https://www.nature.com/articles/s41599-020-0409-4.pdf.
[109] *Solis*, 642 F.3d at 525.
[110] *See id.*
[111] *Compare Solis*, 642 F.3d 518 at 525 (weighing services received by the employer with skills, if any, received by intern, thereby representing "primary beneficiary" concept in an accurate sense), *with Glatt*, 791 F.3d at 383–84 (positing seven factor-test where several factors, including expectations of compensation and full-time employment, do not reasonably fit into the cannon of weighing benefits).

Put simply, the Fifth Circuit in *Atkins v. Gen. Motors Corp.* has not deviated from the 2010 DOL guidance. Here, the court ruled in the employer's favor where two groups of plaintiffs sued for back-pay based on work requiring the debugging of machines serviced during their time as trainees on a production line.[112] The trainees, aiming to become machine attendants, participated in classroom training "followed by actual hands on training" at a G.M. plant in Louisiana.[113] In determining whether the trainees were employees, the Fifth Circuit applied the DOL's original six-factor test out of "substantial deference" to the agency's judgement.[114] Under this framework, the court rejected appellant-trainees argument that they performed work that "derived to G.M's advantage" because the alleged service of debugging was not an "integral part of the training experience."[115] In addition, the court noted that G.M has "employees on hand" to help perform the necessary functions, and that testimony in the record indicated that the trainees either "damaged or incorrectly repaired equipment."[116]

Moreover, the appellant-trainees additionally alleged that they cleaned up around the plant; nevertheless, the court rejected this argument on the basis that the record demonstrated that in only one "isolated instance" was the cleaning "not directly related to the training" and that generally, the testimony offered by the trainees stated that they were only to clean up "after themselves and that this was all they did."[117] Crucially, the fact that the trainees also participated in uncrating "one piece of machinery" were "de minimis." Thus, the relevant compensable work was "so minimal in time" that no exception to trainee classification would apply.[118]

[112] *Atkins*, 701 F.2d at 1124.
[113] *Id.* at 1127.
[114] *Id.* at 1128.
[115] *Id.*
[116] *Id.* at 1128–29.
[117] *Atkins*, 701 F.2d at 1128–29.
[118] *Id.* at 1129.

The Fifth Circuit's overall "substantial deference" to the DOL indicates that it is also likely to adopt the DOL's current seven-factor test in future cases.[119] Even so, this case provides analytical value insofar as the Fifth Circuit unjustifiably narrowed its consideration of the exchange of benefits, by holding that the trainees provided no immediate advantage to the employer. An important albeit unexamined factor lies in the fact that the trainees presented the employer the benefit of cost-free, training for labor tied specifically to an incentive for the employer to relocate to Louisiana.[120] That this training program was structured as an incentive for the employer to relocate, indicates that the benefits—even if *de minimis* at present, should instead be understood as the intangible future benefit of a steady qualified workforce.[121] At least one sister circuit has stated that the training provided in such internships cannot itself constitute a benefit for the employer because they are present in every case. Yet the distinguishing component in a case where the employer's decision to relocate his business into a state, is at least in part, predicated on state supplying a training pool, is the fact that training has been acknowledged as particularly valuable and as such it should be considered as a benefit.[122] Therefore, where such an incentive structure is present in supporting the exchange of intangible benefits, a court deciding a similar issue should be careful in not following the narrow scope of reasoning applied by the Fifth Circuit here.[123]

[119] *Id.* at 1128.
[120] *Id.* at 1127.
[121] *Id.*
[122] *See McLaughlin*, 877 F.2d at 1213 (Wilkins, J., dissenting) (finding that "the training of prospective employees does not, by itself, constitute an "immediate advantage" to the employer because such a benefit is "present in every training-period case").
[123] *Compare id., with Atkins*, 701 F.2d at 1128–29.

Nor should intangibility or delayed materialization of a benefit be enough to exclude the benefit from consideration.[124] Rather, as the Sixth Circuit, and sister courts have acknowledged, if intangible benefits connected to an educational program designed to instill "strong work ethic, leadership skills, and other practical skills . . . ." can tip the primary benefit in the student's favor, then the intangible benefits of a cost-free training pool for the employer (namely, security in the hiring process backed by the state, as well as avoiding opportunity cost in time or money to invest in other start-up or relocation needs) should also be examined in favor of the employer.[125] As several commentators have noted, there is merit in weighing intangible benefits insofar as they are relevant to deciding the primary beneficiary;[126] thus, it seems inequitable to weigh the former but not the latter, lest the primary beneficiary test be biased as against the intern.

D. *Building Blocks: The Seventh Circuit Test*

In *Hollins v. Regency Corp*, the Seventh Circuit affirmed a district court's grant of summary judgment to a school operator where a trainer undertook a cosmetology program required by statute and performing various incidental tasks.[127] Addressing the intern's status, the court acknowledged the principle of immediate advantage advanced by *Portland Terminal*, as well as the DOL and the Second Circuit's seven-factor test (though refraining from identifying specific factors of analysis) [128] Crucial to this court's determination that the trainees were not employees was that the students "pay not just for the classroom time but also for the practical training time," that the program was a state mandated requirement for graduation from the cosmetology program,

[124] *Solis*, 642 F.3d at 531–32 (finding that "intangible benefits [that are] broad[ly] educational" are "significant enough to tip the scale of primary benefit in the students' favor even were the school receives tangible benefits from the students' activities").
[125] *See, e.g.*, *id.*
[126] *See, e.g.*, Honrubia, *supra* note 48, at 139.
[127] *Hollins*, 867 F.3d at 831–32.
[128] *Id.* at 835–36.

that the employer was in the educational field, albeit for business, providing practical experience so that the students did not need to "go out and find a place . . . to intern or [] extern," and that the students received not money but "licensing hours and academic credit" for their effort spent in the program.[129]

Notably, the fact that the students also performed a number of menial tasks, such as "acting as receptionists, cleaning and sanitizing the floor, selling salon beauty products, and restocking those products as needed," did not tip the analysis towards classifying them as employees. These tasks were instead classified as "time-management" components of the general educational curriculum provided by Regent so that the students could pass the "Salon Safety and Sanitation" subject area on the exam (which was heavily tested).[130]

From an analytical standpoint, the *Hollins* court's selective incorporation of several of the Second Circuit's factors into the broader cannon of structural (as opposed to primary beneficiary) analysis, presents a simplified and meaningfully shift. Students that undertake an internship in order to graduate are arguably the clear primary beneficiaries because the internship necessarily enables them to graduate and receive employment credentials. Thus, the Fifth Circuit has opened the path for a simpler rationale that examines the nature of the training program independent from both the qualities or offerings of the internship program and the relationship and expectations between the parties. This distinction is invaluable as it simplifies the Second Circuit's multi-factor balancing approach[131] and provides a cornerstone of analysis—that a statutory mandate that an internship is required for seeking future employment in the field, may unambiguously convey that

[129] *Id*. at 836.
[130] *Id*. at 837.
[131] *Compare Hollins*, 867 F.3d at 837 (framing any remedial or managerial performances received by the employer as a benefit received by interns because such actions were necessary requirements for interns to take state cosmetology licensing exam), *with Glatt*, 791 F.3d at 383-84 (examining primary benefits between the parties at face value, without inquiring into broader underlying local or state mandates motivating performance of interns).

the nature of the workplace is an internship.[132] Moreover, it is this very structural component that obstructs the efficacy of proposed solution of unionization or negotiation as protection against exploitation, as some commentators have suggested as solution to navigating the fragmented and unpredictable standards for intern classification among the courts.[133] Indeed, it is very difficult to obtain leverage against an employer when the internship is necessary—the intern cannot threaten to back out.

From a socio-economic standpoint, although the Second Circuit's test is not exhaustive, the *Hollins* court's structural focus in determining the essential nature of the program as an internship or employment fits the mold of modern higher education, which often requires an internship prior to graduation (either by statute or as a school rule).[134] This structural emphasis also improves upon proposed solutions which advocate for a standard of mutually induced consideration.[135] Mutually induced consideration alone, cannot be the test; after all, the mere presence of consideration fails to answer the question of who the primary beneficiary of the parties' relationship truly is.[136] For example, in one common internship scenario (where consideration for the intern is experience, and consideration for the employer is the provision of immediate assistance to the business) it would hardly make sense to pay the intern even when the intern's performance is extremely subpar to the extent that the employer's benefit is far lower than that of the intern. In this case, the intern is unjustifiably both the primary beneficiary and recipient of payment. Thus, the *Hollins* courts' structural emphasis preserves the principle of mutual

[132] *See, e.g.*, *Hollins*, 867 F.3d at 832.
[133] *See* Yamada, *supra* note 34, at 255–56.
[134] Nathalie Saltikoff, *The Positive Implications of Internships on Early Career Outcomes*, NACE (May 1, 2017), https://www.naceweb.org/job-market/internships/the-positive-implications-of-internships-on-early-career-outcomes/.
[135] *See, e.g.*, Durrant, *supra* note 40, at 186–87.
[136] *Id.*

consideration but goes further in helping answer the question of whether the intern occupies the position of primary beneficiary.[137]

In the same vein, the court's partial application of the Second Circuit's seven factor tests (excluding the factors relating to expectation of compensation and employment while focusing on the nature of the training program itself as either an internship or employment) presents a more streamlined and sensible test for determining an intern's status.[138] With respect to the latter, if the totality of circumstances—paying particular focus to the structure of the program, clearly indicates that interns are the primary beneficiaries, why should it matter what the expectations of the interns were in regards to receiving compensation or an employment offer at the end of the program ?[139] To be clear, the operative rationale here is the parties' expectations become irrelevant when a statute mandates the internship as a graduation requirement, as the legislature has already determined that the primary beneficiary is the student. To decide otherwise would be akin to allowing private parties to usurp the democratic determination by an elected legislature and to unnecessarily burden, as well as complicate, the legal framework of internship payment.

E. *Building Blocks: The Eighth Circuit's Test*

The Eighth Circuit has, in turn, addressed the intern's employment status through two important cases. First, in *Petroski v. H&R Block Enter.*, the Eighth Circuit held that tax professionals who prepared taxes as part of rehire training program while not providing client services for the firm were properly classified as interns, thereby affirming the district court's grant of summary judgement to the employer in the business of preparing tax.[140] Critical to this holding was the fact that the training was primarily for the benefit of the tax professionals and did not occur

[137] *Id.*
[138] *See Hollins*, 867 F.3d at 832–33.
[139] *Id.*
[140] *Petroski*, 750 F.3d at 977.

at a time when the professionals were rendering services on behalf of the employer.[141] This holding represents a partial endorsement of both the DOL's original six-factor test and the Second Circuit's primary beneficiary test; although again, no specific factors were elucidated in the latter analysis.[142] Moreover, that no federal tax regulations required tax professionals to take CLE courses in order for rehire, influenced this part of the court's reasoning that the program was an internship in nature (thus, presenting another example after Hollins, where the legislature's statutory action has factored into the primary beneficiary analysis).[143]

Likewise, in *Blair v Wills*, the Eighth Circuit affirmed a district court's grant of motion for judgement as a matter of law regarding FLSA claim for payment by students performing in-patient and residential treatment as part of probation program at boarding school.[144] Although the students performed chores and thereby defrayed the cost of maintenance on the part of the boarding school, the totality of circumstances indicated that the chores were for the student's own educational benefit rather than the schools, as the purpose of the chores was to instill a sense of teamwork and accomplishment.[145]

This holding presented an implicit, albeit similar line of analysis to the Seventh Circuit's framework in *Hollins*, which focused on structure, or facts indicating the objective nature of the workplace program.[146] In both cases, the respective plaintiff's work was fundamentally educational and for their own benefit (while the plaintiffs in *Hollins* performed work as a statutory requirement for graduation, the plaintiffs here performed work on a school probationary mandate).[147] Together, these two cases present a broader, more simple framework for deciding

[141] *Id.* at 981–82.
[142] *Id.* at 982.
[143] *Compare Petroski*, 750 F.3d at 978, *with Hollins*, 867 F.3d at 831–32.
[144] Blair v. Wills, 420 F.3d 823, 829–30 (8th Cir. 2005).
[145] *Id.* at 829.
[146] *See id.*
[147] *Id.*; *Hollins*, 867 F.3d 830 at 837.

cases in favor of the employer, instructing that deference be given where the legislature has already weighed the benefits towards the intern and has expressed this determination through requiring that the internship be essential for graduation or the hiring process. As governments and universities increasingly require internships prior to employment, this legal framework will serve to fairly and expediently resolve a growing number of similar future cases.[148]

In contrast to the Second Circuit's approach, the *Blair* framework leaves out the nexus of expectations between the student and employee, and justifiably so.[149] Instead, the *Blair* court's reasoning, turns, at least in part, on the economic reality of the situation rather than any set of factors to determine the primary beneficiary. Indeed, the court found for the school not only on the basis that chores performed would cultivate positive professional qualities in interns (thereby making them the primary beneficiaries) but also that the probationary program was essentially educational (presenting an objective, structural perspective independent from the nexus or relationship as between the parties).[150] Importantly, this court's analysis is fundamentally tethered to both the economic reality framework (as consistent with *Portland Terminal*) as well as the primary beneficiary test, as the basic structure of the internship (as determined by whether it is a required component of an educational program) is just as much a part of the "economic reality" as between the parties, as is examining who is the "primary beneficiary."[151]

V. RESOLVING THE CIRCUITY SPLIT: BROADENING AND EMPOWERING THE GOALS OF DIFFERENT MULTI-FACTOR FRAMEWORKS UNDER A UNIVERSAL PRINCIPLE-DRIVEN TEST

A fair and flexible method to resolve test the circuit split necessitates broad principles of analysis rather than any specific factors. As seen in each of the aforementioned circuit court

[148] Matthew T. Hora, *What's Wrong with Required Internships? Plenty*, THE CHRON. OF HIGHER EDUC. (Mar. 4, 2018), https://www.chronicle.com/article/whats-wrong-with-required-internships-plenty/.
[149] *See* CURRENT FACT SHEET, *supra* note 17; *Blair*, 420 F.3d at 829.
[150] *Blair*, 420 F.3d at 829–30.
[151] *See Glatt*, 803 F.3d at 1212.

approaches, any test based on specific listed factors—especially that of the Second Circuit—cannot capture the full range of internship contexts and thus fails to consistently and accurately measure who occupies the role of "primary beneficiary." Moreover, as previously discussed, various proposed solutions—including scholarship endorsing the universalization of an existing circuit court test, or more novel remedies such as the mutually induced consideration standard, each display fundamental shortcomings. Against this backdrop, this Comment proposes the universalization of a broader, principle-based test that draws on the analytical perspectives utilized in the decisions from the Fourth and Sixth Circuits, as well as the Seventh and Eighth Circuits.

Specifically, this test would pronounce broad principles to structure the analysis, rather than create an exhaustive or non-exhaustive list as seen in existing circuit court decisions. These principles are: 1) rather than enumerating specific factors, courts should examine only logical pertinent factors appropriate to the specific situation and parties at issue; what is logical depends on the particular circumstances of the party's specific interactions and industry (as best exemplified by the Seventh Circuit cases previously discussed); 2) in examining which party is the primary beneficiary, the court should examine both intangible and concrete benefits, but refrain from analyzing the parties' expectations—as such expectations particular to the Second Circuit's seven-factor test derive from tangential legal principles such as promissory estoppel rather than inhere in the weighing analysis; and 3) the court should move beyond the scope of the party's interactions to examine the broader underlying circumstance in which those interactions sit (including, but not limited to whether the training program or internship is required by an educational curriculum, or state or local regulations).

The first of the three foregoing principles would require examination of only logical factors pertaining to the specific case. This test is more flexible and sensible for the following reasons:

First, in the counterfactual, the Second Circuit's test would require in every case, a court to analyze receival of academic credit, correspondence to the academic calendar, as well as expectations of compensation after the completion of the internship. What about externships solicited and managed almost entirely by the student and dissociated from the school's curriculum, but nevertheless assist immensely in the employer's business? As the student's work may conflict with classes or be scheduled in close proximity, a court would find no academic credit and no correspondence to the academic calendar. The student, in seeking practical experience, may not understand or bother to learn whether compensation is provided. Despite the benefits to the employer, courts would have questionable leeway to weigh the totality of circumstances in favor of non-compensation—an unfair and strange outcome.

Without this constraint, a court would be free to examine only factors that more sensibly fit the interaction and underlying circumstances. Moreover, courts would be empowered to make more fair decisions as they could avoid adjudicating circumstances where employers simply structure their internship to match an academic program and get away with withholding payment.[152] Further, in such a case, an employer could manipulate the rule and all too conveniently satisfy arguably four of the seven DOL factors—that the internship is tied to an educational program through the integration of academic credit, that the duration is limited the time in which the intern is provided with beneficial learning, that the training provided is similar to that provided in an educational environment, and that there is no expectation of compensation given the nature of the internship program.)[153] The risk of such self-dealing inherent to the Second Circuit and

[152] *See* Bernadette T. Feeley, *Examining the Use of For-Profit Placements in Law School Externship Programs*, 14 CLINICAL L. REV. 37, 47 (2007).

[153] Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L. J. 184, 193 (2013) ("The more an internship program is structured to provide a 'classroom or

DOL approaches distorts the purpose of the primary beneficiary framework, which calls for objective and fair determination.

The second principle builds upon the first. This principle draws from the Fourth and Sixth Circuits in recognizing that there is analytical value in examining both tangible and intangible, business-related benefits as part of the primary beneficiary canon. This consideration enhances the accuracy in weighing benefits and preempts inconsistent evaluations among the circuit courts.[154] Particularly, such benefits on the part of the employer are those that go beyond the tasks interns accomplish on behalf of the employer, such as the benefits of hiring stability and security, public image, and a more streamlined process of monitoring and filtering qualified candidates, received by the employer. These are unquantifiable, and admittingly abstract advantages. Yet, any argument that such intangible factors create a slippery slope so as to render the test unworkable, falls short in light of the fact that the widely accepted 2018 DOL guidance already examines abstract, unquantifiable factors (for example, examination of the parties' expectations, which is by definition, a subjective perception and thus very difficult to measure)—which many circuit courts have come to accept.

Critically, of importance is that each of these intangible factors support the business of the employer and should sensibly be included in the "primary beneficiary" analysis. Yet an exception only with respect to the expectation of compensation as between the parties, should be made.[155] As stated previously, this expectation resembles principles of promissory estoppel—a contractual

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academic experience,' the more likely it is to be viewed as an extension of the intern's education and thus satisfy the requirement . . . that the experience be similar to training that would be given in an educational environment.").

[154] *See McLaughlin*, 877 F.2d at 1213 (Wilkins, J., dissenting) (finding that "the training of prospective employees does not, by itself, constitute an 'immediate advantage' to the employer because such a benefit is "present in every training-period case."). *But see Solis*, 642 F.3d at 531–32 (finding that "intangible benefits" that are "broad[ly] educational" are "significant enough to tip the scale of primary benefit in the students' favor even where the school receives tangible benefits from the students' activities").

[155] *See* CURRENT FACT SHEET, *supra* note 17.

doctrine grounded in broad equity considerations, and is thus irrelevant to comparing the benefits between the parties. In other words, this factor does not fit within the primary beneficiary analysis because it serves to decide "who suffers in reliance" rather than "who benefits" with respect to the employee-employer relationship.

Finally, the third and final principle requires examination, where applicable, of the objective overall structure of the internship (as independent of the nexus between the parties and how the parties treat their relationship). With respect to justification, this proposition already has support in the DOL's statement, expressing in a similar vein, that "where certain work activities are performed by students that are but an extension of their academic programs, we would not assert that an employer-employee relationship exists for the purposes of the FLSA."[156] Moreover, this cannon of measurement for determining the primary beneficiary should be universally adopted to supplement the aforementioned two principles, in recognition that in select cases where the internship is a graduation prerequisite and thus clearly in the interns benefit, the determination of who occupies the position of primary beneficiary need not focus on a larger, messier examination of multiple (possibly irrelevant) factors. This distinction is important, because as discussed before, examination of several of the Second Circuit's factors allows employers to manipulate the primary beneficiary test to their advantage. For example, whether an internship fits into the student's academic studies by accommodating their calendar, curriculum, and credits, runs the risk of corporate employers simply structuring otherwise exploitative internships to satisfy those particular factors and gaining the stamp of approval from the law.[157] The primary beneficiary

[156] Administrator's Opinion Letter, Interns/Employee Status (Dep't of Labor May 8, 1996).

[157] WILLIAM D. WELKOWITZ, BLOOMBERG BUREAU OF NAT'L AFFAIRS, U.S. SUPREME COURT MAY ULTIMATELY HAVE THE FINAL WORD ON THE FUTURE OF UNPAID INTERNSHIPS IN THE PRIVATE SECTOR 1 (2015), https://www.wdlaw.com/library/files/the_future_of_unpaid_internships_in_the_private_sector_by_bloomberg_bna.pdf.

canon must be grounded in consistency and practicability in order to provide a reliable and fair standard for addressing the internship payment question, and thus should not be construed in a manner that encourages self-dealing.

Consequently, this last principle promotes fairness and judicial efficiency when applied with a degree of caution. As both the Seventh Circuit in *Hollis*, as well as the Eighth Circuit in *Petroski* illustrates, where the basis for the internship being structured around the student's academic curriculum is that the internship is required by statute, this factor should weigh heavily in the primary beneficiary test.[158] Particularly, as in *Hollis*, where the statute mandates the internship as a criteria for graduation from an educational program, the parties' expectations must fall out of the equation as what matters is that the legislature has already democratically determined that the internship is necessary to prepare the student for graduation and thus is in the student's benefit (with any benefit to the employer as secondary).[159] In the counterfactual, both the DOL and Second Circuit's multi-factor approaches, which include the incorporation of the parties' expectations as one factor under the primary beneficiary framework, allow the parties and also the courts, the ability to overwrite the legislature's determination on the issue, thereby presenting injustice and confusion.

On a theoretical level, this third principle is also sensible because the fundamental nature of a training or educational program, as democratically determined by the legislature through enactment of a statute, represents the "economic reality" shared by the parties and thus accomplishes what the Second Circuit in *Glatt* could not: remain consistent with *Portland Terminal* and other precedent previously discussed.[160] This structural focus thereby presents an

[158] *E.g.*, *Hollins*, 867 F.3d at 836; *Petroski*, 750 F.3d at 978.
[159] *See generally Hollins*, 867 F.3d at 832–33.
[160] *See Glatt*, 791 F.3d at 384.

important guidepost for courts tasked with deciding similar internship questions in the modern era, where an increasing number of educational institutions have responded to economic competition by requiring internships to be completed prior to graduation.[161]

VI. CONCLUSION

A multi-factor approach is too restrictive and inflexible a framework to encapsulate the complexities of internships in the modern era. Given the sheer magnitude of internships, the disparate impact on many interns, many of whom are struggling and broke college students, and the confusing legal landscape in deciding the question, the time is ripe for the adoption of a uniform, principle-based framework as an adequate and fair substitute for courts struggling to decide the important question of who occupies the position of primary beneficiary, and thus whether payment is necessary.

Importantly, the patchwork of interpretations employed across the circuit courts indicate that each has chosen a test that presents unique strengths and weaknesses. Though the legal framework around deciding internship status has developed disjointly and in piecemeal, the unique perspectives and strengths of each circuit court's test is far from impossible to glean. From the DOL's seven-factor test to the Second Circuit's adoption of it, to the modified primary beneficiary tests of the Fourth and Sixth Circuits, to the Fifth Circuit's arguably aberrant six-factor approach, and finally, to the Seventh and Eighth Circuit's generalized focus on the statutory element underlying the internship program Circuit's, no uniform test integrating the merits of each court's approach has been drawn. Yet, each case evinces important perspectives and analytical building blocks. These building blocks reflect the pros and cons of each test, which this Comment has

[161] Hora, *supra* note 148.

integrated in a comprehensive effort to substantiate the fairness and flexibility of a uniform principle-driven test.

Specifically, this Comment's principle-based test both incorporates the analytical advantages and obviates the shortcomings[162] inherent in the aforementioned circuit court approaches. First, examining only logical factors, as defined by the circumstances of each internship as they come, presents a more accurate method of determining the primary beneficiary than any predetermined set of factors.[163] Second, even where the totality of circumstances is utilized—as shown in the foregoing analysis pursuant to the Fourth and Sixth Circuit decisions—more attention should be paid with respect to intangible benefits (which allow for a more comprehensive and sensible weighing of benefits). Finally, in applicable situations, courts should follow the Seventh and Eighth Circuit's focus on the basic overall structure of the internship as opposed to the relationship as the parties understand it. It is high time to replace existing narrow and unworkable multi-factor tests with a fairer and more flexible, principled framework, if the legal uncertainty surrounding when interns must be paid, is to be resolved once and for all.

[162] This principle-driven test is compatible with expansion. Additional guiding principles drawn from further caselaw development may well assist the underlying goal of establishing broad but flexible rules without specifying required factors of analysis.

[163] As previously stated, the definition of what constitutes a logical factor is purposefully ambiguous, ergo flexible, to suit the particular circumstances of the internship. A court would be well-advised to make close factual comparisons to precedent when justifying such logical factors to be examined.