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The Misfortune of the Unpaid Intern

Sean Hughes

Jerry Lagomarsine

THE MISFORTUNE OF THE UNPAID INTERN

"Don't point that gun at him, he's an unpaid intern."[1]

I. INTRODUCTION

The New York Times dubbed the millennial generation the "permanent intern underclass."[2] These internships are no longer restricted to college students either–they have "replac[ed] traditional entry-level jobs for many fresh out of college."[3] A culture of unpaid internships has developed where young people see working unpaid as the norm.[4] While some interns responded to this culture with lawsuits, the companies that were sued responded as well.[5] For example, NBC Universal started to pay its interns, but Condé Nast scrapped its intern program at all twenty-five of its magazines.[6]

The internship is one of the most common methods that students use to gain real world experience and attempt to secure employment for post-graduation.[7] In 2014, 68.4% of 2014 high school graduates were enrolled in colleges.[8] According to the National Association of Colleges and Employers' 2014 Student Survey, about 61% of college students in

1. *The Life Aquatic with Steve Zissou (2004): Quotes*, IMDB, http://www.imdb.com/title/tt0362270/quotes (last visited Apr. 9, 2015) (quoting Steve Zissou).

2. Alex Williams, *For Interns, All Work and No Payoff: Millennials Feel Trapped in a Cycle of Internships with Little Pay and No Job Offers*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/16/fashion/millennials-internships.html?_r=0.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 241 (1998).

8. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COLLEGE ENROLLMENT AND WORK ACTIVITY OF 2014 HIGH SCHOOL GRADUATES (Apr. 16, 2015), *available at* http://www.bls.gov/news.release/hsgec.nr0.htm.

their senior year have participated in an internship.[9] Nearly half of those interns did not receive any pay or compensation for their work.[10] These internships are considered valuable because students are able to build their professional networks, and they are more likely to be hired by employers because they have field experience.[11] Unfortunately, many employers take advantage of this learning experience for free labor.[12] These interns do the same work as employees and are paid in "experience."[13] In reality, the employer misclassifies employees as interns so that the employer does not have to provide wages, overtime, and other protections for these employees.[14]

Employee misclassification is not a new problem, but it has received greater attention since the economic downturn.[15] Additionally, both federal and state governments have cracked down on employee misclassification to recover billions of dollars in tax revenues.[16] In 2013, the government expected to make approximately eight billion dollars in revenue by implementing procedures to prevent employee misclassification.[17] In 2010, Secretary of Labor, Hilda Solis, stated that she would introduce new legislation that addressed employee

9. This year's survey was comprised of 43,864 students from 696 schools, of which 10,210 students were receiving bachelor's degrees. NAT'L ASS'N OF COLL. & EMPL'R.: THE CLASS OF 2014 STUDENT SURVEY REPORT 2, 6 (2014), *available at* http://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2014-student-survey-executive-summary.pdf.

10. 46.5% of the students surveyed held unpaid internships. *Id.* at 6.

11. Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), http://www.insidehighered.com/views/2010/07/13/aoun.

12. *See id.*

13. 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, 1538 (2010).

14. *See* Jamie N. Rotteveel, *Unpaid and Underpaid Internships May Cost Employers*, PEPPER HAMILTON LLP (Feb. 26, 2014), http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2857 (describing several recent accusations against employers of intentionally misclassifying workers as interns to exploit the workers for their cheaper labor).

15. *See generally* Press Release, Hilda L. Solis, Sec'y of Labor, U.S. Dep't of Labor, Statement on Introduction of Legislation Regarding Issue of Misclassification, (Apr. 22, 2010), *available at* http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20100422.xml.

16. *See* AM. RIGHTS AT WORK, BILLIONS IN REVENUE LOST DUE TO MISCLASSIFICATION AND PAYROLL FRAUD (2010), *available at* http://www.jwj.org/wp-content/uploads/2010/08/100809misclassificationfactsheetfinal_logo.pdf; U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMIN'S FISCAL YEAR 2013 REVENUE PROPOSALS 148, 204 (2012), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf.

17. AM. RIGHTS AT WORK, *supra* note 16.

misclassification.[18] The Secretary of Labor followed through in 2011 when she signed an interagency agreement to "[stand] united to end the practice of misclassifying employees."[19] The agreement allows the free flow of information between the U.S. Department of Labor, the Internal Revenue Service (IRS) and participating states in order to protect misclassified employees.[20] The purpose of the agreement was to protect employees who were misclassified as independent contractors.[21] Misclassification allows employers to disregard minimum wage, hours and paying into employee benefits.[22]

This paper starts by defining an employer and employee, as well as how a worker's classification or misclassification is determined. The definition for employee lays out the various tests the courts use to determine the classification of the employee. The employee's classification is important because it determines what protections are available to him under the law. Additionally, this paper discusses the definition of an intern, which shows the current standards set forth by the Department of Labor. These standards are the current guideline for employers, but, they are not equally applied by the courts.

Next, this paper will discuss the various issues that interns face and the recent case law involving those issues. The issues include sexual harassment, age discrimination, and class discrimination. In particular, recent events have demonstrated various loopholes in the law that show the little protection afforded to interns. For example, in a recent New York case, an unpaid intern was not protected by the New York City Human Rights Law (NYCHRL), and she did not have standing to file a complaint against her employer for sexual harassment.[23] As a result, both the NYCHRL and the New York State Human Rights Law (NYSHRL) now provide coverage for unpaid interns.[24]

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18. Press Release, Hilda L. Solis, Sec'y of Labor, *supra* note 15.

19. News Release, U.S. Dept. of Labor, Labor Sec'y, *IRS comm'r sign memorandum of understanding to improve agencies' coordination on emp. misclassification compliance and educ.* (Sept. 19, 2011), *available at* http://www.dol.gov/opa/media/press/whd/WHD20111373.htm.

20. *Id.* (signatory states are Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah, Washington).

21. *See* Press Release, Hilda L. Solis, Sec'y of Labor, *supra* note 15.

22. *See* CATHERINE RUCKELSHAUS ET AL., WHO'S THE BOSS: RESTORING ACCOUNTABILITY FOR LABOR STANDARDS IN OUTSOURCED WORK 28 (Nat'l Emp't Law Project, 2014).

23. *See* Wang v. Phoenix Satellite TV US, Inc., 976 F. Supp. 2d 527, 528-29 (S.D.N.Y. 2013).

24. *See* N.Y. EXEC. LAW § 296-c (McKinney 2014); N.Y.C., N.Y., ADMIN. CODE § 8-102 (2014); N.Y.C., N.Y., ADMIN. CODE § 8-107 (2014); *see also Interns*, NYC COMM'N ON HUMAN RIGHTS, www.nyc.gov/html/cchr/html/publications/interns.shtml (last visited Apr. 14, 2015).

Two significant cases recently decided on appeal in the Second Circuit are: *Glatt v. Fox Searchlight*, and *Wang v. Hearst.*[25] The key issue is whether an employment relationship was established under the Department of Labor Fact Sheet (DOL Fact Sheet).[26] The Second Circuit found the DOL Fact Sheet did not control and did not apply it.[27] The Second Circuit instead applied the primary beneficiary test and suggested its own non-exhaustive list of factors.[28]

Finally, this paper will discuss the current solutions to misclassification and a possible solution for the misclassification of interns. The issue involving unpaid interns is analogous to the issue of employers misclassifying employees as independent contractors. New York State passed the Construction Worker's Fair Play Act in 2010 to prevent the misclassification of construction workers as independent contractors.[29] The legislature accomplished this by creating a rebuttable presumption that all construction workers are employees unless proven to be independent contractors.[30] The legislature also created an interagency task force to ensure employer compliance with the legislation.[31]

This paper proposes that similar legislation be crafted for unpaid interns. A rebuttable presumption should be put in place that all interns are employees unless proven to be interns. This solution will ensure that employers cannot misclassify employees as unpaid interns unless that intern meets the requirements. The requirements to rebut the presumption will be primarily based on the lower court's decision in *Glatt*.[32] The factors focused on in this decision are what should be used to determine whether a worker is an employee or an intern.

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25. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015); Wang v. Hearst Corp., No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015).

26. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531-32 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015); *Wang*, 2015 WL 4033091, at *1; *see also* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET # 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT, (Apr. 2010) [Hereinafter Fact Sheet # 71], *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

27. *See Glatt*, 791 F.3d at 383.

28. *Id.* at 383-84.

29. *See infra* Part X.A.

30. *See infra* Part X.A.

31. *See infra* Part X.A.

32. *Glatt*, 293 F.R.D. at 539, *vacated*, 791 F.3d 376.

II. EMPLOYER DEFINED

There are two approaches to characterizing an entity as an "employer" under the law when an entity claims no liability for workplace violations.[33] The entity can be a "joint employer" where the entity employs the worker directly, or on a derivative or independent basis such as agent/principal.[34] The Supreme Court held that courts should apply common law principles of "agency" and "master-servant" to determine who is responsible when the applicable statutes are unclear.[35] The common law dictates that courts apply the "right to control" test.[36] The Court looks at the hiring party's ability to control the "manner and means by which the product is accomplished."[37] However, "it is often difficult to demonstrate the existence of a right to control without evidence of the actual exercise of that right."[38] Courts and administrative agencies have devised various factors to guide the application of that test in particular cases because the outcome of the "right to control" test is difficult to predict. The factors include the types of instructions given to the employee such as when and where to work, the tools or equipment to use, or where to purchase supplies and services.[39] Additional factors include the type of contract, the permanency of the employer/employee relationship, whether any benefits were provided for, and the type of services provided as the key activities of the business.[40]

An additional standard exists under the Fair Labor Standards Act (FLSA)[41] that is far more protective than the common law approach. The FLSA defines the verb "employ" as to "suffer or permit work."[42] The Supreme Court noted the "striking breadth"[43] given to the definition and how some parties that would not be covered under the traditional agency approach would be covered under the FLSA.[44] Unfortunately,

33. RUCKELSHAUS ET AL., *supra* note 22, at 4-5.

34. *Id.*

35. *See* Nationwide Mut. Ins. Co., v. Darden, 503 U.S. 318, 318 (1992).

36. Comm. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

37. *Id.*

38. *Id.* at 750 n.17.

39. *Behavioral Control*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Behavioral-Control (last updated Dec. 18, 2014).

40. *Type of Relationship*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Type-of-Relationship (last updated Dec. 18, 2014).

41. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012).

42. *Nationwide Mut. Inc. Co.*, 503 U.S. at 326.

43. *Id.*

44. *Id.*

the FLSA test became muddied through misinterpretation of the term "economic reality," which does not actually appear in the FLSA.[45] In *Rutherford Food Corp. v. McComb*,[46] the Court focused on a totality of the circumstances approach and stated, "[w]e think . . . that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."[47] The Second Circuit laid out its own multi-factor approach in *Zheng v. Liberty Apparel Co.*[48] The Second Circuit identified six factors to determine whether an entity is an employer under the FLSA:

> (1) whether [defendant's] premises and equipment were used for the plaintiffs' work; (2) whether the [contractors] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to[defendant's] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [] Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the [] Defendants.[49]

III. MISCLASSIFICATION

Employee misclassification occurs when an employer wrongly classifies an employee as an independent contractor or as an intern.[50] Employers misclassify employees for various reasons, but the predominant reasons are to avoid paying taxes, insurance, and other benefits that employees are statutorily entitled to.[51] There are multiple ways that an employer can misclassify an employee. Employers can classify employees as independent contractors by providing the employee with IRS Form 1099 instead of W-2, or by paying the employee off the books.[52] Employers are also known to require

45. Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947); RUCKELSHAUS ET AL., *supra* note 22, at 34.

46. *Rutherford Food Corp.*, 331 U.S. at 722.

47. *Id.* at 730.

48. Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003).

49. *Id.*

50. *See* RUCKELSHAUS ET AL., *supra* note 22, at 27.

51. *Id.* at 27-28.

52. *Leveling the Playing Field: Protecting Workers and Business affected by Misclassification: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 2 (July 17, 2010) (testimony of Catherine L. Ruckelshaus, National Employment Law Project).

employees to sign contracts that falsely claim the employee is an independent contractor or the contract will determine the choice-of-law/choice-of-forum to strengthen the employer's legal position and discourage employees from filing misclassification claims.[53]

A worker's classification determines whether he or she is provided with protection under the labor laws.[54] For example, independent contractors are not covered by the Fair Labor Standards Act and do not receive minimum wage and overtime protection.[55] Most independent contractors are also not protected by the National Labor Relations Act,[56] and are not covered by federal and state equal employment opportunity statutes.[57] Many independent contractors do not receive paid sick leave, vacation, health benefits, or pensions that are provided to employees.[58] Most independent contractors do not have the ability to organize as a union and collectively bargain for better working conditions.[59] Essentially, when an employer misclassifies his employees as independent contractors, he avoids all of the responsibilities and costs required under the statutory employer-employee relationship.[60]

IV. EMPLOYEE DEFINED

There is still debate over the term "employee," especially when the issue in litigation is whether an individual qualifies as an employee or an independent contractor.[61] Courts devised multiple tests in an attempt to better define this role.[62] These tests typically focus on the issue of

53. *See* Narayan v. EGL, Inc., 616 F.3d 895, 898-99 (9th Cir. 2010) (citing CBS, Corp. v. FCC, 535 F.3d 167 (2008)) ("Third Circuit held that federal [law] rather than New York law governed . . . whether performers were independent contractors or employees despite the presence of a choice-of-law clause . . . because the claims arose under a federal regulatory scheme.").

54. *See* RUCKELSHAUS ET AL., *supra* note 22, at 4-5.

55. *See* 29 U.S.C. § 203 (2012).

56. 29 U.S.C. § 152 (2012); *see Labor Law Obligations to Employees*, N.Y. STATE OFFICE OF THE ATT'Y GEN., http://ag.ny.gov/labor/labor-law-obligations-employees (last visited Apr. 16, 2015).

57. *Coverage*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://eeoc.gov/employers/coverage.cfm (last visited Apr. 16, 2015).

58. *See* RUCKELSHAUS ET AL., *supra* note 22, at 24.

59. *Collective Bargaining*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/topic/collective_bargaining.aspx (last visited Apr. 16, 2015).

60. RUCKELSHAUS ET AL., *supra* note 22, at 27.

61. Patricia Davidson, Comment, *The Definition of an "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 206-07 (1984).

62. *Id.* at 207.

control.[63] In an employer/employee relationship, the employer has the right to control both the results and the manner in which those results are accomplished.[64] The employer does not necessarily have to exercise this control but merely has to have the right to do so.[65]

The Supreme Court created a five factor test to be used in differentiating employees from independent contractors.[66] These factors, are known as the "economic reality test," are:

> (1) the degree of control exercised by the employer over the workers, (2) the worker's' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.[67]

No one factor is determinative and all the factors should be used to view the entire situation.[68] The reason for this test is to determine if the worker is relying on someone else's business or is in business for himself.[69]

The economic reality test has been used to distinguish employee from independent contractor as well as in the context of volunteers.[70] The Supreme Court, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, used the economic reality test in finding the "volunteers" were employees because they expected compensation.[71] The court defined a volunteer as a person who "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit."[72]

Some courts have attempted to reconcile these two approaches by creating a "hybrid test."[73] This "hybrid test" uses "the economic

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63. *See id.*

64. NLRB v. H&H Pretzel Co., 831 F.2d 650, 653-54 (6th Cir. 1987) (quoting Hilton Int'l Co. v. NLRB, 690 F.2d 318, 320-21 (2d Cir. 1982)).

65. *Id.*

66. *See* Brock v. Superior Care, Inc., 840 F.2d 1054, 1058 (2d. Cir. 1988) (citing United States v. Silk, 331 U.S. 704, 716 (1947)).

67. *Id.* at 1058-59.

68. *Id.* at 1059.

69. *Id.*; Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981).

70. *See* Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 165-66 (2006) (citing Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985)).

71. *Tony & Susan Alamo Found.*, 471 U.S. at 293-94..

72. *See id.* at 295 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947)).

73. *See* Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case*

realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative [of employee status]."[74] This test takes several factors into consideration such as supervision, skills required, termination process and the party's intentions.[75] These factors are very similar to those laid out by the Supreme Court.[76] This test, however, is not universally followed.[77]

Although these tests have been used to distinguish employees from independent contractors and volunteers, they have not been applied to interns.[78] In fact, the Wage and Hour Division of the Department of Labor has set out different factored tests for independent contractors and volunteers.[79] Also, an intern is easily distinguishable from an independent contractor or volunteer.[80] An independent contractor is considered to be in his own business and an employer does not have control over the means of his work.[81] A volunteer works solely for their pleasure and not compensation.[82] An intern is not in his own business and actually requires more supervision than a normal employee.[83] Also, interns work for more than their own pleasure as they expect to receive training and experience for their time.[84]

V. INTERN DEFINED

The current definition of intern can be traced back to a definition used to define a trainee.[85] The *Walling* case examined a situation where unpaid railroad trainees followed employees around learning the trade

for the Unpaid Intern, 66 FORDHAM L. REV. 2613, 2630 (1998).

74. *Id.* (alteration in original) (quoting Cobb. v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir. 1982)).

75. *See id.*; Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979).

76. *Compare* United States v. Silk, 331 U.S. 704, 716 (1947), *with Spirides*, 613 F.2d at 832.

77. Mitchell v. Tenney, 650 F. Supp. 703, 705-06, 708 (N.D. Ill. 1986).

78. *See* Ortner *supra* note 73, at 2642.

79. *See* U.S. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA), (2014), *available at* http://www.dol.gov/whd/regs/compliance/whdfs13.pdf.

80. *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 237 (2002); Ortner, *supra* note 73, at 2640, 2642.

81. *See* Ortner, *supra* note 73, at 2627-28, nn.101-02 & 108.

82. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985).

83. FACT SHEET # 71, *supra* note 26.

84. *See* Rubinstein, *supra* note 70, at 151 n.10; FACT SHEET # 71, *supra* note 26.

85. *See* Yamada, *supra* note 80, at 225-27.

before being hired.[86] The court found these individuals were not employees under the FLSA.[87] The court relied on several factors in its holding.[88] The trainees "[did] not displace any of the regular employees, who [did] most of the work themselves" and the trainees were supervised at all times.[89] The trainees did not make the job more productive and at times may have impeded the work.[90] The trainees did not expect to get paid and were not guaranteed a job.[91] They were only given a certificate of completion; which was necessary to be considered for hire.[92] The Court stated that the FLSA was not meant to penalize employers for providing free training that would otherwise be taught at a vocational school.[93]

The Department of Labor (DOL) established standards for employers to determine whether the employer may classify a worker as an unpaid intern.[94] However, this test applies only to "for-profit" private sector internships.[95] These factors mirror the factors used in deciding *Walling*.[96] The six factors include:

> 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; 2. The internship experience is for the benefit of the intern; 3. The intern does not displace regular employees, but works under close supervision of existing staff; 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded; 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[97]

An individual may not be classified as an unpaid intern unless all of

86. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 149-50 (1947).
87. *See id.* at 153.
88. *See id.* at 150-53.
89. *Id.* at 149-50.
90. *Id.* at 150.
91. *See id.*
92. *See id.*
93. *See id.* at 152-53.
94. FACT SHEET # 71, *supra* note 26.
95. *See id.*
96. *See* FACT SHEET # 71, *supra* note 26; Walling v. Portland Terminal Co., 330 U.S. 148, 149-50 (1947).
97. FACT SHEET # 71, *supra* note 26.

these factors are met.[98] By meeting these factors, employers do not have to pay their interns minimum wage or overtime.[99]

The goal set forth by the DOL is for employers to fashion internships like an extension of the classroom, so that the intern gains educational experience in the field.[100] The skills should not be particular to the employer's setting, but should be able to be used in multiple employment settings.[101] However, once the intern starts performing tasks that engage the operations of the employer, or is performing productive work from which the employer would otherwise profit, the intern will not be excluded from FLSA's minimum wage and overtime requirements.[102]

In addition, employers are not allowed to use interns "to augment its existing workforce during specific time periods."[103] If an employer does hire interns to replace employees or reduce employee hours, then the interns are classified as employees and are entitled to compensation under the FLSA.[104] The DOL advises that unpaid internships should not be used by the employer as trial periods for individuals seeking employment. If the individual is subject to this as an intern, then that individual generally would "be considered an employee under the FLSA."[105]

While the DOL six factor test is widely applied, not all courts agree on its importance.[106] In *Reich v. Parker Fire Protection Dist.*, the Court of Appeals for the Tenth Circuit decided that "the six criteria are relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA."[107] The court reviewed the distinction between employees and independent contractors and concluded that a rigid test would be unreasonable.[108] The court then focused on the "economic realities" of the situation and found that the trainees were not employees.[109] This decision leaves a lot of uncertainty

98. *Id.*
99. *Id.*
100. *See id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (involving fire fighter trainees who were being trained before being hired).
107. *Id.* at 1027.
108. *Id.*
109. *Id.*

because it rejects a clear definition of a trainee for a subjective test based on the facts.[110] The Court of Appeals for the Sixth Circuit found that the "economic realities" test is a "poor method for determining employee status in a training or education setting."[111] The Court found that the test is "overly rigid and inconsistent with a totality-of-the-circumstances approach . . . [and] suggests the ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed."[112]

VI. ISSUES UNPAID INTERNS FACE TODAY

While the issues related to protecting interns, both in the undergraduate and postgraduate stages are troubling, the monetary losses to both the federal and state governments from misclassification are equally egregious. Employers skirt income taxes, payroll taxes, unemployment insurance, and workers' compensation premiums.[113] A report in 2009 by the Government Accountability Office estimated that misclassification cost federal revenues $2.72 billion in 2006.[114] If only one percent of employees are misclassified as independent contractors, it would cost unemployment insurance trust funds $198 million annually.[115]

Much like independent contractors, interns are denied the same rights; however, interns are more vulnerable to harassment than regular employees.[116] The vulnerability of interns may be attributed to several factors.[117] Interns are not protected under employment protection laws and are unlikely to report incidents or abuse.[118] Interns are afraid that if they ask for pay they will be replaced,[119] or if they report an employer they will lose what would have been an excellent reference.[120] These

110. *See id.*

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

112. *Id.*

113. RUCKELSHAUS ET AL., *supra* note 22, at 28.

114. *Id.*

115. *Id.*

116. *See* Curiale, *supra* note 13, at 1537.

117. *Id.*

118. *See* Jenna Johnson, *Is your unpaid internship legal?*, WASH. POST (Apr. 23, 2010), http://voices.washingtonpost.com/campus-overload/2010/04/is_your_unpaid_internship_lega.html.

119. Victoria Pynchon, *Your Unpaid For-Profit Internship Likely Violates The Law And Other Bad News About Working Free*, FORBES (Nov. 15, 2012, 9:15 AM), http://www.forbes.com/sites/shenegotiates/2012/11/15/your-unpaid-for-profit-internship-likely-violates-the-law-and-other-bad-news-about-working-free/2/.

120. *See* Johnson, *supra* note 118.

interns do not want to risk destroying their careers[121] and feel that without an unpaid position, they will be unable to gain the necessary work experience.[122]

A. *Sexual Harassment*

Interns lack not only the benefits and protection of the labor laws, but also do not have standing to file complaints in general.[123] A study found that 49% of interns were subject to at least one kind of sexual harassment.[124] Recently, in *Wang v. Phoenix Satellite TV US, Inc.*, LiHuan Wang was unable to sue her employer for creating a hostile work environment and sexually harassing her because she was not considered an employee under the New York State and New York City Human Rights Law.[125]

Phoenix Satellite Television is an American subsidiary that maintains its headquarters in Los Angeles, and has bureaus in New York City and Washington D.C.[126] Zhengzhu Lieu supervised the New York City and Washington D.C. bureaus, and in his capacity as the bureau chief he had the power to hire and fire employees and interns; he had sole discretion to make these determinations.[127] The plaintiff, Ms. Wang, started an unpaid internship in the New York City office in December 2009.[128] Ms. Wang claimed that her internship was supposed to serve as a basis for future employment with Phoenix.[129] Ms. Wang also claimed that Mr. Liu indicated that Ms. Wang might be able to obtain employment after her student visa expired, if she could obtain a work visa.[130]

In January 2010, Mr. Liu emailed the New York office and told them he wanted to treat them to lunch.[131] Ms. Wang alleges that after lunch, Mr. Liu wanted to discuss job possibilities with Ms. Wang and

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121. *See id.*

122. Pynchon, *supra* note 119.

123. *See* Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013).

124. Vikki Ortiz Healy, *Sexually harassed interns often feel they have nowhere to turn*, CHI. TRIB., Nov. 25, 2011, http://articles.chicagotribune.com/2011-11-25/news/ct-met-intern-harassment-20111125_1_sexual-harassment-interns-superiors.

125. *Wang*, 967 F. Supp. 2d at 532.

126. *Id.* at 529.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 530.

invited her back to his hotel to drop off his belongings.[132] In his room, Mr. Liu threw his arms around Ms. Wang and attempted to kiss her by force; he also groped her.[133] After this incident, Mr. Liu stopped discussing future employment opportunities with Ms. Wang.[134] The only other contact between Ms. Wang and Mr. Liu was when Ms. Wang contacted Mr. Liu about a job at Phoenix during the summer of 2010.[135] Mr. Liu invited Ms. Wang to Atlantic City for the weekend to talk about possible jobs–but Ms. Wang did not attend and stopped trying to obtain employment with Phoenix.[136]

The court found that this was an issue of first impression in the circuit.[137] The court stated that although the NYCHRL states an employer shall not discriminate against any person, Wang did not raise this issue and did not invoke that protection.[138] Even if she had, another court already found that contention to be unsupportable.[139] The court refused to perform an employee analysis "under the preexisting test for NYCHRL claims–hire, power of dismissal, and supervision and control of tasks performed."[140] The court refused to apply the test because Wang was not able to cite a single case in which this balancing test was applied to an unpaid intern.[141] The court held that the balancing test is used "to determine whether a defendant is actually a plaintiff's 'employer' under the state and local civil rights laws," not if a plaintiff is an employee in the first instance.[142] Wang should thus be judged by the compensation standard.[143] The court bolstered its opinion by looking to the legislative history of the NYCHRL.[144] The court found that the New York City Council recently amended the statute to ensure "protection of

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 531.

136. *Id.*

137. *Id.* at 532.

138. *Id.*

139. *Id.*

140. *Id.* at 533 (showing the Court's disagreement with Ms. Wang's assertion that it should balance the factors of hire, power of dismissal, and supervision and control of tasks performed in determining an employment relationship).

141. *Id.* at 534.

142. *Id.*

143. *See id.* (using a case as an example of where the balancing test was appropriately used to decipher whether a defendant was a plaintiff's employer under the law, not if plaintiff is actually an employee under the law; therefore needing to use compensation as a dispositive factor in determining an employment relationship under NYCHRL).

144. *Id.* at 536.

the civil rights of all persons covered by the law."[145] However, a provision was not added to cover unpaid interns and volunteers.[146]

Although the judge dismissed the sexual harassment claims, Wang's failure-to-hire claims under the same law—NYCHRL—survived.[147] In order to sustain a claim for failure to hire, the plaintiff must allege that he or she applied for a position she was qualified for and was rejected with an inference of unlawful discrimination.[148] A crucial fact is that Wang was led to believe that her internship would serve as a potential basis for future employment the following year.[149] Since Wang plausibly alleged she applied for this position through informal channels, the court did not dismiss her claim.[150] The dismissal of sexual harassment cases is not a new issue for interns.[151] In 1997, the Court of Appeals for the Second Circuit found that an unpaid intern was not covered by sexual harassment laws.[152] Both New York State and New York City legislatures responded to the Wang decision by amending the NYSHRL and the NYCHRL to protect interns from discrimination and harassment.[153]

B. *Age Discrimination*

Interns may also face age discrimination.[154] Ms. Jackson was a forty-one year old woman who applied for an internship but was rejected based on her age.[155] The magazine company sent her a letter stating that their program had an age cut off point.[156] Ms. Jackson was appalled that this company would "spit in the face of . . . anti-discrimination laws."[157]

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145. *Id.*

146. *Id.*

147. *See id.* at 537-38.

148. *Id.* at 537.

149. *Id.* at 538.

150. *Id.* at 539.

151. *See* O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997) (showing the Court's willingness in 1997 to dismiss a sexual harassment claim made by an intern, unless Congress would create a remedy for interns in sexual harassment situations).

152. *Id.* (showing that an unpaid intern at the hospital brought a sexual harassment action against the hospital because a psychiatrist at the hospital made numerous sexual remarks to her; including that she should partake in an orgy and that she should remove her clothing in preparation for the next meeting).

153. *See* N.Y. EXEC. LAW § 296-c (McKinney 2014); N.Y.C., N.Y., ADMIN. CODE § 8-102 (2014); N.Y.C., N.Y., ADMIN. CODE § 8-107 (2014).

154. *See* Molly McDonough, *Turning Point for Interns*, 1 A.B.A. J. E-REPORT 8 (Mar.1 2002).

155. *Id.*

156. *Id.*

157. *Id.*

Mrs. Jackson was not the only one who filed a suit against the magazine company, *The Atlantic Monthly*.[158] Ms. Wozniak, a fifty-four year old, was also denied an internship at *The Atlantic Monthly* because of her age.[159]

C. *Benefits the Rich and Powerful*

An additional sociological issue with unpaid internships is that they favor wealthy students.[160] Many students are not able to afford to take an unpaid internship because these internships cost the intern money.[161] This is especially true for students who belong to a lower economic class.[162] The intern must pay the cost of transportation and may also have to pay for lunch.[163] Ultimately, an intern may look to his or her family for financial support, but that support is not always there.[164] This allows interns from wealthier families a competitive advantage in the job market.[165]

This competitive advantage has far reaching effects when the amount of debt many students incur by attending college is considered.[166] Some universities require students to take unpaid internships as part of their major or for academic credit costing thousands of dollars in tuition.[167] Students who cannot afford an unpaid internship will have a competitive disadvantage in getting a job and paying back their loans.[168]

Only a certain kind of student can afford to take these internships– the ones who can spend a summer working for free.[169] Less fortunate students may have to sacrifice an internship that would bring them a better job opportunity, in favor of a low paying job so that they can

158. *Id.*
159. *Id.*
160. Curiale, *supra* note 13, at 1536.
161. *See id.* at 1533-34.
162. *Id.*
163. *Id.* at 1533.
164. Yamada, *supra* note 80, at 218-19.
165. *Id.*
166. *Id.* at 223-24.
167. *See* Sharyn Jackson, *Future of Unpaid Internships Remains Unknown*, USA TODAY (July 3, 2013), http://usatoday.com/story/money/business/2013/07/03/future-of-unpaid-internships-remains-unknown/2485411/.
168. Yamada, *supra* note 80, at 218-19.
169. *See* David Carr, *Overlook the Value of Interns at Great Peril*, N.Y. TIMES (Nov. 24, 2013), http://www.nytimes.com/2013/11/25/business/media/overlook-the-value-of-interns-at-great-peril.html?smid=fb-share&_r=0.

make ends meet.[170] Internships create an unfair advantage for those who can afford to take them.

D. *Harassment is Widespread*

This harassment is not limited to any one field or area. Perhaps most disturbing is the fact that harassment is prevalent in the government sector.[171] Bill Clinton's presidency was over shadowed by the allegations of sex and harassment of interns, most notably Monica Lewinsky.[172] His actions towards Lewinsky were described as "predatory."[173] Clinton is not the only one in Washington D.C. who has taken advantage of young interns.[174] An article by Andrew Sullivan describes how one "Washingtonian" "even referred to each influx of interns, jokingly, as 'the flesh.'"[175] The article also points out that few interns were in position to say no to congressmen.[176] It may be hard to turn to Congress to pass laws protecting interns when members of Congress are part of the problem.[177]

VII. EMPLOYERS ARE AT RISK AS WELL

Employers potentially face a significant risk for litigation by keeping unpaid interns on staff.[178] "Unpaid internships, which are to the publishing business what the mailroom was to Hollywood studios, are under broad attack."[179] The publishing companies Hearst and Condé Nast were sued by former interns who claimed "they performed a great deal of work for little or no money."[180] The Charlie Rose Show was also

170. Jackson, *supra* note 167.

171. *See* Yamada, *supra* note 80, at 220-21.

172. *See* Kevin Cirilli, *Rand Paul blasts Bill Clinton on Lewinsky*, POLITICO (Jan. 26, 2014, 10:54 AM), http://www.politico.com/blogs/politico-live/2014/01/paul-blasts-predatory-clinton-for-lewinsky-181908.html.

173. *Id.*

174. *See* Yamada, *supra* note 80, at 220.

175. *Id.* (quoting Andrew Sullivan, *Sex and This City: Even Without the Harsh Glare of Scandal, Washington's Sexual Dynamic Has Always Had a Uniquely Predatory Cast*, N.Y. TIMES, July 22, 2001, at 15-16).

176. *Id.* at 221 (citing Sullivan, *supra* note 175, at 15-16).

177. *See* Rebecca Greenfield, *How Congress Gets Away with not paying Its Interns*, THEWIRE (Apr. 6, 2012, 8:13 AM), http://www.thewire.com/national/2012/04/how-congress-gets-away-not-paying-its-interns/50324/.

178. Carr, *supra* note 169.

179. *Id.*

180. *Id.*

sued by interns, but settled out of court for $110,000 or just $110 per week for the interns.[181]

Now, because of the litigation, Hearst is considering the termination of its intern program and Condé Nast has already stopped providing internships.[182] The list of companies terminating their unpaid internships continues to grow as well.[183] This is not the answer young job seekers are looking for. Interns still hope that the internship will lead to a low paying job at one of these companies.[184] The termination of internship programs will make obtaining a job at one of these companies even more difficult.[185]

Some employers are attempting to avoid potential litigation by paying their interns.[186] "Internships can be the key to the start of a successful career, but the positions are getting harder to find because many employers are now nervous to offer them."[187] Atlantic Media ended its unpaid internships three years ago and started a year-long fellowship that includes a living wage, health insurance, and an educational component.[188] Atlantic employs forty-five fellows that come from different age groups, races, regions, and classes.[189] As a result, there was a 34% growth in the first half of this year.[190]

In contrast, the Condé Nast interns worked incredibly long days performing menial work including running errands and picking up lunch.[191] Some employers were advised not to take interns on at all. CBS Moneywatch advised employers that if they did not have the

181. Amanda Beckerm, *PBS' Charlie Rose Settles with Unpaid Interns as Lawsuits Spread*, REUTERS (July 1, 2013, 7:47 PM), http://www.reuters.com/article/2013/07/01/entertainment-us-interns-lawsuit-charlie-idUSBRE9601E820130701.

182. *See* Carr, *supra* note 169.

183. *See* Susan Adams, *Is the Unpaid Internship Dead?*, FORBES (June 14, 2013, 11:47 AM), http://www.forbes.com/sites/susanadams/2013/06/14/is-the-unpaid-internship-dead/; Susan Adams, *Why Condé Nast felt it had to stop using interns*, FORBES (Oct. 24, 2013, 2:39 PM), http://www.forbes.com/sites/susanadams/2013/10/24/why-conde-nast-felt-it-had-to-stop-using-interns/.

184. *See* Adams, *Is the Unpaid Internship Dead?*, *supra* note 183.

185. *See* Carr, *supra* note 169.

186. *See* Adams, *Is the Unpaid Internship Dead?*, *supra* note 183.

187. Walter Olson, *Employers Grow Reluctant to Offer Internships Following Complaints*, OVERLAWYERED (Apr. 3, 2012), http://overlawyered.com/2012/04/employers-grow-reluctant-to-offer-internships-following-complaints/.

188. Carr, *supra* note 169.

189. *Id.*

190. *Id.*

191. Dana Schuster & Kirsten Fleming, *Condé Nast intern: 'I cried myself to sleep'*, N.Y. POST (Nov. 21, 2013, 6:36 AM), http://nypost.com/2013/11/21/conde-nast-interns-speak-out-on-program-shutdown/.

resources to mentor an intern, did not have room for them, did not have substantive work for them, or the company was undergoing significant change, then they should not hire an intern at all.[192] The article specifically references the Charlie Rose Show lawsuit as a potential consequence of hiring an intern.[193] Oddly enough, despite its lawsuit, Fox Searchlight has started to pay its interns, as have other well-known employers such as NBC News.[194]

Conde Nast's termination of its intern program has been received with mixed feelings.[195] Some interns feel that the end of the program is a good thing because it did not contribute to their education and left some of them feeling "belittled."[196] Others do not regret the internship and believe that it provided them with the "thick skin" necessary to work in the field.[197] One thing is certain; interns are not and should not be treated as a source of unpaid slave labor so that a company can save money on its bottom line.

VIII. RECENT CASE LAW

In 2013, two cases were filed in New York by unpaid interns who claimed that they were misclassified employees.[198] Even though the interns adamantly believe that their rights were violated, the courts were uncertain if the interns even had standing to bring the claims.[199] Both cases were heard in the Second Circuit and determined whether the unpaid interns qualified as statutory employees under the FLSA and New York Labor Law (NYLL), and decisions have been handed down in both cases.[200] This resolved an intra-district conflict because the district judge for each case found a different conclusion on standing.[201]

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192. Amy Levin-Epstein, *Stop! Don't Hire that Intern*, CBS MONEYWATCH (Apr. 24, 2012), http://www.cbsnews.com/news/stop-dont-hire-that-intern/.

193. *Id.*

194. *See* Adams, *Is the Unpaid Internship Dead?*, *supra* note 183.

195. *See id.*

196. Schuster, *supra* note 191.

197. *Id.*

198. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015); Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013), *vacated*, No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015).

199. *See Glatt*, 293 F.R.D. 516, 531, *vacated*, 791 F.3d 376; *Wang*, 293 F.R.D. at 492-94, *vacated*, 2015 WL 4033091.

200. Oral argument in both cases was heard by the Second Circuit on January 30, 2015.

201. *Compare Glatt*, 293 F.R.D. at 539, *vacated*, 791 F.3d 376 (holding that interns *were* employees covered by the FLSA and NYLL), *with Wang*, 293 F.R.D. at 498, *vacated*, 2015 WL 4033091 ("Plaintiff's motion for summary judgment regarding their status as 'employees' under the

These two cases illustrated some of the problems arising under the current definition of intern. Both courts used the same definition and came to opposite conclusions. That uncertainty not only hurts interns who may be unjustly unpaid, but also businesses. A business will have a hard time classifying their workers if the courts cannot provide a workable definition of an intern.

A. *Glatt v. Fox Searchlight Pictures, Inc.*

In *Glatt v. Fox Searchlight Pictures, Inc.*, the district court found that the interns were misclassified.[202] Glatt and other interns worked on the production of the film *Black Swan* in New York.[203] Glatt took a second unpaid internship related to the film's post production.[204] Another plaintiff, Gratts, was an unpaid intern who worked on *500 Days of Summer* in California.[205] A group of interns brought a class action lawsuit claiming that they were hired as interns, but were actually employees without pay.[206] Their work consisted of getting coffee and performing other menial tasks.[207] The court found this was not consistent with the definition of an intern and found that they were misclassified.[208]

The court relied on the work and training of the workers but found many other factors in defining an intern to be subjective.[209] The court concluded that the interns were not given any special training.[210] The interns were not taught anything beyond what a typical employee would learn by performing his job.[211] The court also pointed out that the interns only performed the tasks that a regular employee would be expected to perform.[212]

The court seemed to have difficulty deciding what benefit the intern received from his work.[213] Even in a classroom setting, students may

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FLSA and NYLL is DENIED.").

202. *Glatt*, 791 F.3d at 381.
203. *Glatt*, 293 F.R.D. at 522, *vacated*, 791 F.3d 376.
204. *Id.*
205. *Id.*
206. *Id.* at 521-22.
207. *See id.* at 532.
208. *See id.* at 534.
209. *See id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *See id.* at 533-34.

learn very little and the court cannot rely on what was learned to determine the benefit.[214] The court focused on what was provided and, in this case, found that very little was.[215] The only benefit given to these interns was a position to add to their resumes.[216] The court turned to the large benefit that the production company received from having free labor.[217]

The court also analyzed the last factor in the DOL six factor test—whether the worker understood that he would not be paid.[218] The court found that this factor has little to no weight.[219] It did not matter whether they knew this or not because employees are not allowed to waive their right to payment.[220] This is to ensure that the workers are protected and are not forced to "voluntarily" waive their pay.[221] "It also protects businesses by preventing anticompetitive behavior."[222] If an employee cannot waive this right, then judges will need to decide whether the worker is an employee or intern before analyzing this factor.

The court focused on two of the six factors, the work and training of the workers.[223] The court decided that the training needed to be beyond what an average employee would be expected to receive.[224] The court also implied that the work performed should not be the exact same as a comparable employee position.[225] Finally, the court stressed the huge benefit the employer received.[226] The court compared the two and found that the benefit to the intern should outweigh the benefit to the employer.[227]

214. *See id.* at 533.
215. *See id.*
216. *See id.*
217. *See id.*
218. *See id.* at 534.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *See id.* at 532-34 (applying the totality of the circumstances when considering plaintiff's employment classification, and only expounding on the work they performed and the training they received).
224. *See id.*
225. *See id.* at 534.
226. *See id.* at 533.
227. *See id.* at 534.

B. *Wang v. Hearst Corp.*

In another recent case, *Wang v. Hearst Corp.*, the Southern District initially granted the plaintiff Wang's cross-motion for conditional certification and notice to potential class members under the FLSA.[228] The complaint alleged that Hearst used interns at nineteen different magazines to complete tasks "necessary to its operations," which were essentially menial and clerical in nature.[229] The tasks included answering the phone, making deliveries, and organizing clothing.[230] Wang argued that two classes should be certified: the first was an intern class made up of unpaid and underpaid interns and the second was a class of interns who received college credit "on the theory that students' payments to their colleges for that credit amounted to an unlawful deduction from their wages."[231] Wang alleged that Hearst violated the FLSA and NYLL under minimum wage requirements, overtime provisions, and record keeping requirements.[232]

The Court held that at this stage under the FLSA, plaintiffs need only "'make a 'modest factual showing' that they . . . were victims of a common policy or plan that violated the law."[233] Furthermore, the "showing need only be 'based on plaintiffs' pleading and affidavits' and, should the court find such a showing to be sufficient, [it] . . . will conditionally certify the lawsuit."[234] In order for the lawsuit to continue the court must wait for a "stringent factual determination" to see whether the members of the class are similarly situated.[235] The court found that Wang established that the other employees were similarly situated to her by "providing allegations and affidavits to the effect that Hearst made a uniform determination that interns were not employees, require[ing] all interns to submit college credit letters, and us[ing] interns to perform entry-level work with little supervision."[236]

Wang submitted a motion for summary judgment as to the "employee" status of the class under the FLSA and NYLL; however, the Court "found a genuine issue of material fact under the totality of

228. Wang v. Hearst Corp., No. 12 CV793(HB), 2012 WL 2864524, at *1 (S.D.N.Y. July 12, 2012).
229. *Id.* at *1.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at *2.
234. *Id.*
235. *Id.*
236. *Id.* (internal citations omitted).

circumstances test established in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), and the Department of Labor's six-factor test . . . [from] 'Fact Sheet # 71.'"[237] The Court certified its opinion for interlocutory appeal because it found that a decision on certain questions "will significantly affect the conduct of other lawsuits now pending in the district courts which have relied on other legal standards or the same legal standard, but have come out differently."[238] Specifically, the Court referenced *Glatt v. Fox Searchlight Pictures*.[239] Both of these cases were difficult and of first impression.[240]

These cases had different outcomes primarily because the courts applied different standards to determine whether an intern is an employee.[241] The *Wang* court applied a test based on the totality of the circumstances[242] and the *Wang* court followed a year-old decision which focused on "who is the primary recipient of benefits from the relationship . . . ."[243] This "primary beneficiary" test has been adopted by several other district courts.[244]

The court in *Glatt* expressly rejects the "primary beneficiary" test.[245] The court in *Glatt* found that there is little support for the "primary beneficiary" test under *Walling*.[246] The court stated that *Walling* never weighed the benefits of the trainees against the benefits of the employer.[247] *Walling* looked to see the benefits that the trainees acquired and separately looked to ensure that the employer received "no immediate advantages."[248] Not only does *Glatt* find the "primary beneficiary" test inconsistent with *Walling* but goes further to state that the "test is subjective and unpredictable" and "[s]uch a standard is unmanageable."[249] The court ultimately agrees with the rationale of

237. Wang v. Hearst Corp., 12 CV 793(HB), 2013 U.S. Dist. LEXIS 92091, at *4 (S.D.N.Y. June 27, 2013).

238. *Id.* at *6.

239. *Id.*

240. *Id.*

241. *Compare* Wang v. Hearst Corp., 293 F.R.D. 489, 493-94 (S.D.N.Y. 2013), *vacated*, No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015), *with* Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 525-34 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015).

242. *Wang*, 293 F.R.D. at 493, *vacated*, 2015 WL 4033091.

243. *Id.* (quoting Velez v. Sanchez, 693 F.3d 308, 326, 330 (2d Cir. 2012)).

244. *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011); McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989).

245. *Glatt*, 293 F.R.D. at 531-32, *vacated*, 791 F.3d 376.

246. *Id.*

247. *Id.*

248. *Id.* at 532.

249. *Id.*

United States v. Rosenwasser in that there is "no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded."[250] After discrediting the "primary beneficiary" test, the court began to analyze the circumstances under the six factors set out in *Walling* and the Department of Labor Fact Sheet # 71.[251]

The district court granted the motion for an immediate appeal based on the fact that the *Glatt* court and the *Wang* court reviewed their classes thoroughly and came to opposite conclusions.[252] The controlling standard was not clear.[253] The second circuit determined the appropriate test.[254]

C. *Second Circuit Court of Appeals*

In *Glatt*, the Court reviewed the motion for summary judgement as to employment status *de novo*.[255] While the DOL asked the Court for deference, the Court declined to grant deference because an "agency has no special competence. . . in interpreting a judicial decision."[256] Further, the Court found the DOL test too rigid for precedent to withstand and delinked to find it persuasive.[257] The Court instead relied on the primary beneficiary test because it looks to what benefit the intern receives, and it provides the Court flexibility to examine the intern-employer relationship.[258] The Court also created a list of non-exhaustive factors as well:

> 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

250. *Id.* (quoting United States v. Rosenwasser, 323 U.S. 360, 362 (1945)).
251. *See id.* at 531.
252. *See* Glatt v. Fox Searchlight Pictures Inc., No. 11 CIV. 6784 WHP, 2013 WL 5405696, at *1 (S.D.N.Y. Sept. 17, 2013).
253. *See id.* at *2.
254. Glatt v. Fox Searchlight Pictures Inc., 791 F.3d 376, 381-85 (2d Cir. 2015).
255. *Id.* at 381.
256. *Id.* at 383 (quoting State of N.Y. v. Shalala, 119 F.3d 175, 180 (2d Cir. 1997)).
257. *Id.*
258. *Id.* at 383-84.

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.[259]

The Court held that not one factor is dispositive, nor does every factor need to point in the same direction.[260] The Court found that this test focuses on an important aspect of the intern-employer relationship, the educational aspect.[261] The Court vacated the district court order and remanded for further proceedings on this issue.[262] The Second Circuit heard oral arguments in *Wang v. Hearst* in tandem with *Glatt*.[263] The Second Circuit held that its full decision was explained in *Glatt*, and that the district court should address whether plaintiff was an employee under the FLSA based on this new decision.[264] The Court vacated and remanded for further proceedings.[265]

IX. DOL FACTORS CRITIQUE

The first problem with the factors developed by the DOL is how to decide when an employer derives an immediate advantage, and therefore fails to meet one of the six criteria.[266] If the intern is performing "considerable, bona fide work" for an employer–then the all or nothing approach does not pose a problem.[267] The totality of the circumstances

259. *Id.* at 384.
260. *Id.*
261. *Id.* at 385.
262. *Id.*
263. Wang v. Hearst Corp., No. 13-4480-cv, 2015 WL 4033091, at *1 (2d Cir. July 2, 2015).
264. *Id.*
265. *Id.*
266. Yamada, *supra* note 80, at 233.
267. *Id.*

approach requires the trier of fact to engage in a great deal of subjective judgment–it "virtually ensures inconsistent results."[268]

David Yamada points out a second problem with the DOL standards–the difference between "training" and "work."[269] The blurred lines here occur when an employer assigns an intern work similar to that given in a vocational school, despite the fact that the work involves the "actual operation of the facilities of the employer."[270] For example, an advertising agency that assigns students to create ads for real companies to be posted on a fictional website, where those ads will be presented for use on that website, straddles the line between employer benefits and intern education.[271] In this case, the student's responsibilities are so akin to that of a real advertiser that the "training" would most likely meet the criteria as a "vocational" program.[272]

The third difficulty with the six part test according to Yamada is how the test is applied to internships that are sponsored by colleges or universities.[273] Yamada looks at the opinion letters from the DOL to demonstrate the internal inconsistencies that may have a significant impact on students.[274] In 1995, the Wage and Hour Division asserted the six part test, "but added commentary to the effect that if this 'internship program is predominantly for the benefit of the college students, [it] would not assert an employment relationship.'"[275] However, in 1996, an opinion letter also repeats the six part test but then states that if the six criteria are not met, students will be considered employees even though the purpose of the program is to further the student's education and training.[276]

Yamada points out two more weaknesses in the six factor test: the fact that an intern is not entitled to a job at the end of his or her internship and that an intern is "not entitled to wages for the time spent in training."[277] Essentially, all an employer must do to satisfy these criteria is emphasize to the intern verbally or by way of contract that the intern is not entitled to a job or wages, which allows employers "to require extensive unpaid training periods for a group of prospective

268. *Id.*
269. *Id.*
270. *Id.*
271. *See id.* (discussing similar examples in the context of a journalism school).
272. *See id.*
273. *Id.*
274. *Id.*
275. *Id.* at 233-34.
276. *See id.* at 234.
277. *Id.*

hires, then to 'cherry pick' the best for purposes of hiring."[278]

Another consideration of the existing law under the FLSA is the learner exemption.[279] This exception allows employers "to hire 'learners,' 'apprentices,' and 'messengers' at 'wages lower than the minimum wage.'"[280] The reason for this exception is to prevent a decline in employers hiring untrained workers such as interns.[281] In order to utilize the provision, the employer must apply for a special certificate for the exemption.[282] The problem is that neither the opinion letters, nor the six factor test mentions the learner exemption.[283] Without that guidance, employers are only required to demonstrate that the exemption is necessary to prevent the curtailment of employment opportunities, and that the employer make reasonable effort to find a minimum wage worker to perform the task before hiring an intern.[284] The DOL should not allow for this learn exemption because interns will jump at the chance to work for minimum wage.[285]

X. STATUTES

A. *New York's Solution to Misclassification*

Previously, New York used a two-prong test to determine whether a worker was an employee or an independent contractor.[286] The first prong of this test is control over the results and the second prong is control over the means used to achieve the results.[287] The court found that control over the means was the most important consideration when deciding if the employer had control.[288] "[I]ncidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship."[289]

New York also took another step forward in resolving the issue of

278. *Id.*
279. *See* Fair Labor Standards Act, 29 U.S.C. § 214(a) (2012).
280. Yamada, *supra* note 80, at 237 (quoting 29 U.S.C. § 214(a)).
281. *See id.*
282. *Id.*
283. *See id.*
284. *See id.* at 237-38.
285. *See id.* at 238.
286. *See In re* Ted is Back Corp., 475 N.E.2d 113, 114 (N.Y. 1984).
287. *See id.*
288. *See id.*
289. *Id.*

misclassification. In New York City, nearly one out of four construction workers was misclassified or paid off the books and not reported by construction contractors.[290] To battle this overwhelming problem New York passed the Fair Play Act in 2010.[291] The legislature created a rebuttable presumption that construction workers were employees unless proven to be independent contractors.[292] The test used to rebut this presumption is referred to as an "ABC test."[293] There are three criteria that must be met in order for an employee to be considered an independent contractor.[294] Those criteria are:

> (a) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (b) the service must be performed outside the usual course of business for which the service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.[295]

New York expanded the Fair Play Act in January 2014 to include delivery drivers.[296] New York is at the "forefront" of putting an end to employee misclassification.[297] New York also has an interagency task force to carry out such legislation.[298] This task force was charged with "coordinating efforts by appropriate state agencies to ensure that all employers comply with all the State's employment and tax laws."[299] Its task included joint agency sweeps of the construction industry, retail businesses, and follow-up on complaints and information shared among

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290. *See Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City's Construction Industry*, FISCAL POLICY INSTITUTE 1 (Dec. 5, 2007), *available at* http://www.fiscalpolicy.org/publications2007/FPI_BuildingUpNY_TearingDownJobQuality.pdf.

291. *See* Richard J. Reibstein & Janet B. Barsky, *Effective Date of New York Commercial Goods Transportation Industry Fair Play Act in Limbo*, INDEPENDENT CONTRACTOR COMPLIANCE (Mar. 10, 2014), http://independentcontractorcompliance.com/2014/03/10/effective-date-of-new-york-commercial-goods-transportation-fair-play-act-in-limbo/.

292. *Id.*

293. *Id.*

294. *See* N.Y. LAB. LAW § 861-c (McKinney 2010).

295. *Id.*

296. Reibstein & Barsky, *supra* note 291.

297. *Id.*

298. N.Y. STATE DEP'T OF LABOR ET AL., REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION TO ELIOT SPITZER, GOVERNOR OF STATE OF NEW YORK 2 (2008), *available at* http://www.labor.state.ny.us/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf.

299. *Id.*

the agencies.[300]

The New York State Task Force of Labor Misclassification released a report on February 1, 2014 detailing the year's success.[301] "New York State Department of Labor completed in 2013 over 13,000 audits and investigations, in which nearly 127,000 workers were found to have been misclassified as independent contractors in the state and over $55 million in unpaid unemployment contributions were found to be due."[302] Since 2007, the task force has recovered almost two billion dollars in unreported wages.[303] The industries that misclassified employees vary greatly from adult entertainment venues to ambulatory health care services and educational services.[304] While this is impressive, some believe that this is still only a small fraction of workers that are misclassified in the state.[305]

Aside from these cases, there has been action in the New York State assembly by Democratic lawmakers to protect unpaid interns.[306] The bill would amend the human rights law to protect interns against workplace discrimination that is granted to regular employees.[307] While this protection is primarily aimed at employer discriminatory practices, there are also provisions for protection against sexual harassment and whistle blowing.[308] The bill was put forth after the decision in *Wang v. Phoenix Satellite*, which held that the unpaid intern did not have standing under local human rights law.[309] Unpaid interns are also not covered under federal law.[310]

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300. *See id.* at 11-13.

301. Richard Reibstein, Lisa Petkun & Andrew Rudolph, *127,000 Workers Found Misclassified in 2013 by New York Regulators, According to State's Latest Annual Task Force Report on Worker Misclassification*, INDEP. CONTRACTOR COMPLIANCE L. BLOG (Feb. 28, 2014), http://independentcontractorcompliance.com/2014/02/28/127000-workers-found-misclassified-in-2013-according-to-the-latest-annual-task-force-report-on-worker-misclassification-in-new-york-state.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Jacob Gershman, *New Bill Would Outlaw Discrimination Against Unpaid Interns*, WALL ST. J. L. BLOG (Oct. 18, 2013, 5:43 PM), http://blogs.wsj.com/law/2013/10/18/new-bill-would-outlaw-discrimination-against-unpaid-interns/?mod=WSJBlog.

307. *Id.*

308. *Id.*

309. *See id.*; *see also* Wang v. Phoenix Satellite TV US, Inc., 976 F. Supp. 2d 527, 528-29 (S.D.N.Y. 2013).

310. *Id.*

XI. REMEDIES

As of now, unpaid interns only have two legal remedies against their employers: the intern can argue that he has been misclassified as an intern or the intern may attempt to bring a tort claim.[311] However, this may be limited to physical or psychological abuse under common law.[312] An Illinois case found that an employer can be liable for the assault of an intern if committed by an employee.[313] In general, a plaintiff cannot sue a third party for a criminal act. The Illinois Court, however, found an exception to that rule.[314] The court found that there was a duty of care because of the special relationship between an intern and employer.[315] However, the intern must prove foreseeability as well as the other elements of the tort.[316] This remedy is far from satisfactory. The intern must take extra steps in order to receive a remedy from the employer.[317] It is also important to realize that this tort action is not universally followed.[318]

The courts in New York were split as to what was the definition of an intern,[319] but now use the primary beneficiary test to determine whether or not an intern is actually an employee under the FLSA.[320] An intern must prove that he has been misclassified and is actually an employee.[321] After this is proven the intern can begin proving that he was mistreated.[322] These legal barriers would likely make going to court unpredictable and expensive. To overcome these barriers, recent interns

311. *See, e.g.*, Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 539 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015) (discussing the issue of whether interns *were misclassified* employees covered by the FLSA and NYLL); Wang v. Hearst Corp., 293 F.R.D. 489, 492, 498 (S.D.N.Y. 2013), *vacated*, No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015) ("Plaintiffs' motion for summary judgment regarding their status as 'employees' under the FLSA and NYLL is DENIED."); Yamada, *supra* note 80, at 253 ("An intern who has been subjected to work-related physical or psychological injury also may have common-law tort remedies available to her.").

312. Yamada, *supra* note 80, at 253.

313. Platson v. NSM, Am., Inc., 748 N.E.2d 1278, 1286 (Ill. App. Ct. 2001).

314. *Id.*

315. *Id.* at 1288.

316. *See id.* at 1283-84.

317. *See id.*

318. *See* Yamada, *supra* note 80, at 254. Statutory remedies are not always available and interns may need to turn to common law tort remedies, which "is not an easy alternative means for recovery." *Id.*

319. *See* discussion *supra* Parts VIII.A-B.

320. *See* Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 384-85 (2d Cir. 2015); Wang v. Hearst Corp., No. 13-4480-cv, 2015 WL 4033091, at *1 (2d Cir. Jul. 2, 2015).

321. *See* discussion *supra* Parts VIII.A-B.

322. *See* discussion *supra* Parts VIII.A-B.

have turned to class action law suits to attempt to get justice.[323] Even this is another hurdle because the interns must prove they are part of the same class.[324] Further, in *Glatt* and *Hearst* the Second Circuit did not grant class certification to the interns.[325] These may be a major deterrence to an intern who is unpaid.

XII. SOLUTION

A. *University Solutions*

As the tension between employers and unpaid interns escalates some universities have decided to implement policies to support their students.[326] Universities including Columbia and NYU are restricting the internships that their undergraduate students are able to apply for, in an attempt to push employers to comply with the DOL guidelines.[327] Columbia "will no longer offer its undergraduates registration credits in exchange for internship experience."[328] NYU did not preclude students from receiving credit for an internship, but instead required that any employer listed on its website "read and comply with schoolwide and federal internship regulations."[329] The NYU career center is also providing its students with information about applicable labor laws and "illegitimate job postings."[330]

NYU cracked down on employers that do not comply with school and federal guidelines after an NYU student, Christina Isnardi, filed an online petition urging NYU's Career Center remove postings of unpaid

323. *See, e.g.*, Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 521 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015); Wang v. Hearst Corp., 293 F.R.D. 489, 494 (S.D.N.Y. 2013), *vacated*, No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015).

324. *See Wang*, 293 F.R.D. at 494, *vacated*, 2015 WL 4033091.

325. *See* Glatt v. Fox Searchlight Pictures Inc., 791 F.3d 376, 377-78 (2d Cir. 2015); Wang v. Hearst Corp., No. 13-4480-cv, 2015 WL 4033091, at *3 (2d Cir. July 2, 2015).

326. Zach Schonfeld, *In Another Blow to Free Labor, Columbia University Halts Academic Credit for Internship*, NEWSWEEK (Feb. 28, 2014, 12:54 PM), http://www.newsweek.com/another-blow-free-labor-columbia-university-halts-academic-credit-internship-230554.

327. *Id.*

328. *Id.*

329. Zach Schonfeld, *Internships Where You Do Real Work for Free Are Illegal, but Colleges Haven't Treated Them That Way*, NEWSWEEK (Feb. 17, 2014, 2:35 PM), http://www.newsweek.com/internships-where-you-do-real-work-free-are-illegal-colleges-havent-treated-them-229349.

330. Christopher Zara, *NYU Wasserman Center Bends On Unpaid Internship Guidelines, But Is It Bending Far Enough?*, INT'L BUS. TIMES, (Feb. 12, 2014, 2:39 PM), http://www.ibtimes.com/nyu-wasserman-center-bends-unpaid-internship-guidelines-it-bending-far-enough-1555016.

internships that are illegal.[331] Eric Glatt, a production intern for *Black Swan*, who took Fox Searchlight to court in 2013, stated that he hopes the ruling in his case "sends a very loud and clear message to employers and to students doing these internships, and to the colleges that are cooperating in creating this large pool of free labor—for most for-profit employers, this is illegal."[332]

Universities in the United States are not the only ones that have begun pushing back against illegal internships.[333] At least five universities in the United Kingdom (U.K.) have also begun to pass policies to support their students.[334] These universities have stopped posting unpaid internships on their student websites.[335] The laws in the U.K. differ from the laws in the U.S.[336] Interns are given the status of a worker, volunteer, or employee.[337] The intern's rights are determined by their employment status.[338] A student involved in the initiative says that many employers were unaware of the legality of their internship.[339] Most were oblivious to the fact that under U.K. law they had to pay the interns if they performed ordinary work.[340]

Still, some universities help to mitigate the damage of some internships by helping to pay students who intern in certain fields.[341] Maurice A. Dean School of Law at Hofstra University helps fund students who get unpaid legal internships in public interest law.[342] The University is able to provide this service through the Public Justice Foundation (PJF).[343] Shany Kirshner, the Vice President of PJF,

331. *Id.*

332. Steve Greenhouse, *Judge Rules That Movie Studio Should Have Been Paying Interns*, N.Y. TIMES, June 11, 2013, http://www.nytimes.com/2013/06/12/business/judge-rules-for-interns-who-sued-fox-searchlight.html?_r=0.

333. *See* Laura Tucker, *Unpaid Internships Still a Problem for Students in 2014*, TOPUNIV. (Jan. 16, 2014, 12:00 AM), http://www.topuniversities.com/student-info/university-news/unpaid-internships-still-problem-students-2014.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Employment rights and pay for interns*, GOV.UK, http://www.gov.uk/employment-rights-for-interns (last updated Mar. 9, 2015).

338. *See id.* If the intern is classified as an employee they are entitled to things like minimum wage. *Id.*

339. Tucker, *supra* note 333.

340. *Id.*

341. *See, e.g.*, *Public Justice Foundation (PJF)*, MAURICE A. DEANE SCHOOL OF LAW, HOFSTRA UNIV., http://law.hofstra.edu/StudentLife/studentorganizations/pjf/index.html (last visited Apr. 20, 2014).

342. *Id.*

343. *Id.*

explains that this is a student run organization that holds various fundraisers to support its fellowships.[344] The program allows students to take unpaid internships they would not otherwise be able to afford.[345] The PJF fundraisers and the "In Honor of Justice" Alumni Reception also helps to raise awareness to public interest issues.[346] Last year the organization was able to raise $58,767–which was used to award forty stipends.[347] Programs like this help mitigate the costs of an unpaid internship while benefiting those "who would otherwise be marginalized or forgotten in [sic] justice system."[348]

However, other universities are not so quick to protect their student's rights.[349] Many universities grant credit and collect tuition from students who work at certain unpaid off-campus internships.[350] In 2010, after the guidelines were released concerning interns, thirteen university presidents sent letters to the DOL asking them "to go easy on regulation efforts for unpaid internships."[351] While some advocate that universities should be protecting their students, others point out the ethical dilemma.[352] The universities that are being asked to protect the student's rights are also making money by having them work as unpaid interns.[353]

B. *Proposed Solution*

We agree with the lower court's decision in *Glatts* that the primary beneficiary test is simply too subjective and unpredictable.[354] Such a standard creates uncertainty that ultimately injures both employers and unpaid interns. Employers will likely be unable to confidently create an internship program that conforms with an unpredictable standard.[355]

344. Interview with Shany Kirshner, Vice President, Public Justice Foundation, Hofstra Law, in Hempstead, NY (Mar. 18, 2013).

345. *Id.*

346. *Id.*

347. *Id.*

348. *PJF*, *supra* note 341.

349. *See* Melissa Schorr, *The revolt of the unpaid intern*, THE BOS. GLOBE, Jan. 12, 2014, http://www.bostonglobe.com/magazine/2014/01/12/unpaid-internships-are-they-doomed/vi8MVMlqfeJQHlMY3vlBpJ/story.html.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531-32 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015).

355. *See id.* at 532.

While the Second Circuit attempted to clarify the primary beneficiary test, the suggested factors are non-exhaustive and ambiguous.[356] A subjective balancing test of tangible and intangible benefits is not manageable.[357] A concrete test is necessary.

To address this issue the legislature should pass a rebuttable presumption test similar to New York's Fair Play Act.[358] This law has proven to be successful in New York in putting a stop to misclassification.[359] Similar to the Fair Play Act, there would be a rebuttable presumption that interns are employees unless the prongs of the test are satisfied.[360] This presumption would be a three prong test based on the lower court's decision in *Glatts*.[361] This new presumption would require employers to first show that a) the intern received training or mentorship above and beyond what a comparable employee position would receive and b) the intern did not perform the same tasks and have the same responsibilities as a comparable employee. If an employer can satisfy both of these prongs then the court will look to the third prong of the test. An employer will need to show that it did not receive any unjust benefits from the work provided by interns. This three prong test is more concrete and goes to the heart of the issue.

The first two prongs determine whether the intern is provided the training and experience that is expected of an internship. These factors are more concrete because they focus on what the employer actually provided to the intern regardless of what the intern subjectively learned. As noted by the lower court in *Glatts*, even in a classroom setting students may learn very little.[362] Employers should not be held to a standard that even some teachers fail to meet. Only after it is shown that the employer provided the intern requisite benefits would the court turn to look at the benefit the employer is receiving. This will ensure that the employer is not being unjustly enriched and taking advantage of free labor.

Legislation should also be implemented which requires the DOL to investigate and supervise internship programs. The DOL would conduct on site investigations as well as respond to whistle blowing and complaints. Unlike construction projects, internship programs are not

356. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 384 (2d Cir. 2015).
357. *See Glatt*, 293 F.R.D. at 531-32, *vacated*, 791 F.3d 376.
358. *See* N.Y. LAB. LAW § 861-c (McKinney 2010); *supra* notes 291-95.
359. *See* Reibstein, Petkun & Rudolph, *supra* note 301.
360. *See* Reibstein & Barsky, *supra* note 291.
361. *See Glatt*, 293 F.R.D. at 530-34, *vacated*, 791 F.3d 376.
362. *See id.* at 533.

always easily identifiable and any agency or task force would have difficulty locating them. To overcome this difficulty, employers will be able to submit an internship program application. This process would need to be simple and easy. Employers would answer a questionnaire and describe the training and work that interns would perform. The DOL would review the application, make suggestions for improvements and ultimately approve or reject the internship program.

While acquiring approval would not be mandatory, it would have many benefits for both employers and interns. First, it would allow internship programs to be reviewed prior to the program beginning and the DOL would be able to identify possible issues before they occur. Receiving DOL approval would give employers some peace of mind and help ensure that interns have a proper experience. Second, the application provides an excellent opportunity to educate employers on the requirements of a legal unpaid internship. Third, if interns are provided with the descriptions in the application, it may be easier for them to identify when they are being misclassified. Finally, this application process would likely reduce the amount of litigation.[363] An employer, with an approved internship program, should be able to rebut the presumption that its interns are employees by using the information provided within the DOL application and showing that the program was approved. The intern would then need to present evidence that the employer did not provide the experience that was described in the application.

This law would be an active stance to protect interns. Not only will the DOL be proactively protecting interns but so will employers. This legislation will help to educate employers and allow them to confidently hire unpaid interns. This will help honest employers better protect themselves and provide meaningful experiences to interns.

XIII. CONCLUSION

The Department of Labor Fact Sheet #71 has yielded inconsistent results when interpreted by the courts, and when interpreted by employers.[364] The standards will almost always yield these inconsistent results because they require the courts to take a totality of the

363. *See* Yamada, *supra* note 80, at 246.

364. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015); Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013), *vacated*, No. 13-4480-cv, 2015 WL 4033091 (2d Cir. July 2, 2015); FACT SHEET # 71, *supra* note 26.

circumstances approach.[365] The difficulty is finding an appropriate bright line—is there a difference between work assigned for training or work akin to a vocational program if both involve operating the employer's facility? Additionally, since employers are not required to pay interns, or provide them with a job at the completion of the internship, the employer can take advantage of the period of unpaid work in order to pick only the best interns for hiring. Even the DOL itself has been inconsistent in its interpretation of its factors.[366]

As employers continue to take advantage of unpaid interns, the push back, and hostility between the groups will most likely continue to grow. However, we believe that there will be a strong push to establish protection for interns and to reform the traditional unpaid internship model in the future. The legislature has shown that it can act when it needs to, perhaps it can take further steps to complete the task.

Sean Hughes & Jerry Lagomarsine***

365. *See supra* Part II.

366. *See* Yamada, *supra* note 80, at 233-34.

* J.D. Candidate, 2015, Maurice A Deane School of Law at Hofstra University.

** J.D. Candidate, 2015, Maurice A Deane School of Law at Hofstra University.