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PRACTITIONERS' NOTES

GET YOUR OWN COFFEE: ADVICE FOR EMPLOYERS FACING INCREASING UNCERTAINTY WITH RESPECT TO THE FLSA AND UNPAID INTERNSHIPS

*Nina K. Markey, * Holly E. Rich, ** and Ryan D. Freeman ****

I. INTRODUCTION

Internships, paid or unpaid, continue to be a rite of passage for college students.¹ One recent study concluded that seventy-five percent of four-year college students will hold at least one internship before graduating.² One-third to one-half of those internships will be without

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1. See Melissa Schorr, *The Revolt of the Unpaid Intern*, BOS. GLOBE MAGAZINE (Jan. 12, 2014), <http://www.bostonglobe.com/magazine/2014/01/12/unpaid-internships-are-they-doomed/vi8MVMlqfeJQHIMY3vIBpJ/story.html>; N'ATL ASS'N OF COLLS & EMP'RS, THE COLLEGE CLASS OF 2012: STUDENT SURVEY REPORT 6 (2012), <http://www.naceweb.org/uploadedFiles/NACEWeb/Research/Student/2012-student-survey-executive-summary.pdf> (reporting that more than half of students surveyed have internship experience).

2. Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. TIMES (Apr. 2, 2011), <http://www.nytimes.com/2011/04/03/opinion/03perlin.html?pagewanted=all>.

compensation.³ This glut of unpaid internships is at least partly attributable to the recent economic woes in the United States.⁴ It was only a matter of time before unpaid internships were challenged in the court system during this era of seemingly endless wage and hour litigation.⁵ The number of lawsuits filed by unpaid interns asserting that they were unlawfully denied minimum wage and overtime wages has proliferated in recent years.⁶ Most of these cases have been filed under the Fair Labor Standards Act (FLSA), but some have asserted state law claims as well.⁷ The flood of litigation has had a ripple effect on both educational institutions and employers.⁸ Educational institutions are left wondering whether or not to give academic credit for unpaid internships, and if they do choose to give credit, how long employers will continue to make the internships available.⁹ Employers are left questioning whether or not to keep their programs or change them in order to minimize vulnerability to costly wage and hour litigation.¹⁰ This article provides a survey of the current legal landscape and offers strategic compliance suggestions for employers.

A. *The Fair Labor Standards Act and Birth of the “Trainee” Exception*

The Fair Labor Standards Act of 1938 was enacted to eliminate “labor conditions detrimental to the maintenance of the minimum

3. *Id.*

4. See PHIL GARDNER, COLLEGIATE EMP’T RESEARCH INST., FRAMING INTERNSHIPS FROM AN EMPLOYERS’ PERSPECTIVE: LENGTH, NUMBER, AND RELEVANCY 13 (2013), <http://www.ceri.msu.edu/wp-content/uploads/2010/01/internshipCERI-Research-Brief-XX.pdf>.

5. This article focuses mainly on lawsuits under the FLSA, but it is important that employers note their local state laws as well. Many of the state laws parallel the FLSA, *see* *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 284811 (2d Cir. Jan. 25, 2016), and employers would be wise to research their local laws or contact outside counsel regarding compliance.

6. *See, e.g., Glatt*, 2016 WL 284811, at *3-9; *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013), *vacated in part*, 617 F. App’x 35 (2d Cir. 2015).

7. Pete Brush, “*Wendy Williams Show’ Interns Close to Deal with Lions Gate*,” LAW360 (Feb. 27, 2015, 1:29 PM ET), <http://www.law360.com/articles/625983/wendy-williams-show-interns-close-to-deal-with-lions-gate>; *see, e.g.,* Jessica Corso, “*Wendy Williams Show’ Interns Hit Lions Gate with Wage Suit*,” LAW360 (Oct. 7, 2014, 5:12 PM), <http://www.law360.com/articles/585074/wendy-williams-show-interns-hit-lions-gate-with-wage-suit> (discussing federal and state claims brought by plaintiffs). *But see* *Marc Jacobs is Being Sued by a Former Intern*, THE FASHION LAW (Oct. 20, 2014), <http://www.thefashionlaw.com/marc-jacobs-is-being-sued-by-a-former-intern> (bringing claims under New York law only).

8. *See* discussion *infra* Part III.

9. *See* Schorr, *supra* note 1.

10. *See, e.g.,* Mary Swanton, *Unpaid Internships Pose a Litigation Risk for Employers*, INSIDE COUNSEL (May 1, 2013), <http://www.insidecounsel.com/2013/05/01/unpaid-internships-pose-a-litigation-risk-for-empl>.

standard of living necessary for health, efficiency, and general well-being of workers . . . without substantially curtailing employment or earning power.”¹¹ The FLSA attempts to eliminate these conditions by imposing a mandatory minimum wage that employers must pay employees—currently \$7.25 an hour—as well as requiring higher overtime pay rates for every hour worked in excess of a forty-hour work week.¹² Any individual properly classified as an “employee” under the FLSA is therefore entitled to, at a minimum, payment of \$7.25 an hour, and depending on how many hours the individual works, higher rates for overtime work.¹³

The FLSA’s definition of employee is “the broadest definition that has ever been included in any one act.”¹⁴ To be considered an employee, an individual must only be someone “employed by an employer,” though it may also be someone the employer “suffer[s] or permit[s] to work.”¹⁵ Perhaps recognizing the breadth of a straightforward reading of the FLSA, the Supreme Court created a “trainee” exception to the Act in *Walling v. Portland Terminal Co.*¹⁶ The *Walling* Court stated that:

[The FLSA] cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. . . . [Because the Act] was not intended to penalize [employers] for providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner which would most greatly benefit the trainees.¹⁷

Thus, in 1947, the FLSA “trainee” exception was born.¹⁸ Individuals working under an employer, but for their own interest, are not considered “employees,”¹⁹ and the employers that employ these individuals do not have to pay them a minimum wage or overtime wages.²⁰

11. Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (2012).

12. *Id.* §§ 206(a)(1)(C), 207(a)(1).

13. *See id.* §§ 203(e)(1), 206(a)(1)(C), 207(a)(1).

14. *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting Senator Black).

15. *See* 29 U.S.C. § 203(e), (g).

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

17. *Id.* at 152-53.

18. *See id.* at 153.

19. *See id.* at 152.

20. *See* 29 U.S.C. §§ 206(a), 207(a) (requiring employers to pay employees minimum wage and overtime).

B. Application of the “Trainee” Exception Today

There are two main approaches to applying the Supreme Court’s decision in *Walling* to determine whether interns fall under the FLSA’s trainee exception.²¹ The Department of Labor (DOL), which is responsible for government enforcement of FLSA violations, has established a six-factor test for deciding whether an unpaid intern qualifies as an employee.²² Some circuit courts, however, have refused to strictly apply the six-factor test, including, most recently, the Second Circuit.²³ The majority of these circuits instead apply the primary-beneficiary test,²⁴ which favors employers.²⁵ The Second Circuit recently expanded on the primary-beneficiary test by identifying a set of non-exhaustive factors for district courts to consider.²⁶

1. The DOL’s Six-Factor Test

In order for the “trainee” exception to apply under the DOL’s six-factor test, each of the following factors must be met:

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

21. *Compare* *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 284811, at *7 (2d Cir. Jan. 25, 2016) (holding that the court conduct a primary-beneficiary analysis), *and* *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026-27 (10th Cir. 1993) (holding that the court examine the totality of the circumstances), *with* *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127-28 (5th Cir. 1983) (applying the criteria set forth by the agency).

22. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter DOL FACT SHEET #71], <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

23. *Glatt*, 2016 WL 284811, at *7; *Wang v. Hearst Corp.*, 617 F. App’x 35, 37 (2d Cir. 2015) (directing the district court to follow the standard set forth in *Glatt*).

24. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 528 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-1210 (4th Cir. 1989).

25. *See infra* Part I.B.2.

26. *See infra* Part II.

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.²⁷

If *any* one factor is not met, the DOL will consider the intern to be an employee.²⁸ This is an important point for employers to keep in mind: the DOL and courts tend to narrowly construe the “trainee” exception simply because the FLSA’s definition of employer is so broad.²⁹ Punctuating this point, Nancy J. Leppink, Acting Director of the DOL’s Wage and Hour Division, candidly stated that, “[i]f you’re a for-profit employer or you want to pursue an internship with a for-profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.”³⁰

2. The Primary-Beneficiary Test

The primary-beneficiary test adopted by many of the circuit courts is largely interpreted as more subjective than the six-factor test and is certainly more flexible.³¹ Under the primary-beneficiary test, a court will review “which party derives the primary benefit from the relationship.”³² If the company is the primary beneficiary, then the intern is considered an employee, and the employer is obligated to comply with the FLSA’s minimum wage and overtime requirements as well as other statutory protections such as workers’ compensation and unemployment compensation.³³ If the intern receives the primary

27. DOL FACT SHEET #71, *supra* note 22.

28. *See id.*

29. *See id.* The FLSA construes the definition of employer broadly because it was meant to be a “remedial law,” i.e. it seeks to broadly allow individuals to “enforce rights or redress injuries.” *Reiseck v. Universal Commc’ns of Miami, Inc.*, 591 F.3d 101, 104 & n.2 (2d Cir. 2010).

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

31. *See, e.g., Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 284811, at *5 (2d Cir. Jan. 25, 2016) (finding that the DOL’s six-factor test was “too rigid”).

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

33. *See* 29 U.S.C. §§ 206(a), 207(a) (2012); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 (4th Cir. 1989) (holding that the employer “received more advantage than the workers,” so the

benefit of the relationship, however, he or she falls under the trainee exception to the FLSA and is not entitled to any of these types of compensation.³⁴

The primary-beneficiary test looks at a multitude of factors, some of which are taken from the DOL's six-factor test.³⁵ These factors include "whether the [intern] displace[s] paid employees[,] whether there is educational value derived from the relationship," and any other factors that "shed light on which party primarily benefits from the relationship."³⁶ The most important difference between the primary-beneficiary test and the six-factor test is that none of the factors in the primary-beneficiary test are considered dispositive.³⁷ Whereas a company in a six-factor jurisdiction will have to pay interns if *any* of the factors in that test are not met, a company in a jurisdiction following the primary-beneficiary test will only have to succeed in convincing a court that the benefits received by the intern outweigh those gained by the employer.³⁸ An employer in the Second Circuit's jurisdiction will, while showing that the benefits received by the intern outweigh those gained by the employer, have to place emphasis on the education received by the intern.³⁹ This flexibility is why employers advocate for the adoption of the primary-beneficiary test.⁴⁰

workers were employees covered by the FLSA).

34. See 29 U.S.C. §§ 203(e), 206(a), 207(a) (setting forth the FLSA definition of employee and the benefits employees receive); *Solis*, 642 F.3d at 532 (finding that the "primary benefit of the program runs to students" so they "are not employees for the purposes of the FLSA").

35. *Solis*, 642 F.3d at 529 ("Additional factors that bear on the inquiry should also be considered insofar as they shed light on which party primarily benefits from the relationship."); DOL FACT SHEET #71, *supra* note 22.

36. *Solis*, 642 F.3d at 529.

37. *Id.* at 525.

38. See, e.g., *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026-29 (10th Cir. 1993) (applying a similar "totality of the circumstances" approach and finding that, although the trainees performed paramedical services for the defendants, "the benefit to the defendant was de minimus"); *Demayo v. Palms West Hosp., Ltd.*, 918 F. Supp. 2d 1287, 1290-92 (S.D. Fla. 2013) (finding that, although plaintiff performed menial work for the employer such as taking out the trash, the primary benefit of the relationship flowed to the plaintiff as she received hands on training).

39. See *infra* Parts II, IV.B.1.

40. See Brief of the Chamber of Commerce of the U.S. and Cal. Emp't Law Council as Amici Curiae in Support of Defendants-Appellants at 18-21, *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 1:11-CV-6784), 2014 WL1395698.

II. CURRENT LEGAL LANDSCAPE

Employers, in order to evaluate their compliance with the FLSA, should first determine whether the relevant circuit court has adopted a framework for analyzing the trainee exception with regard to unpaid interns, and more specifically whether it applies the DOL's six-factor test,⁴¹ the primary-beneficiary test,⁴² or another framework.⁴³

Of particular note is the Second Circuit's recent decision in *Glatt v. Fox Searchlight Pictures, Inc.*, which resolved a split between two Southern District of New York opinions: *Wang v. Hearst Corp.* and *Glatt v. Fox Searchlights Pictures, Inc.*⁴⁴ Given the two different outcomes in the *Wang* and *Glatt* cases, the Second Circuit granted a consolidated interlocutory appeal in order to determine the proper framework for analyzing the "trainee" exception with respect to unpaid internships.⁴⁵

Wang v. Hearst Corp. involves unpaid internship programs operated at a number of Hearst magazines.⁴⁶ The plaintiffs alleged that they held a variety of internship positions and performed duties ranging from conducting surveys on the street to selecting beauty products for potential inclusion in the magazine.⁴⁷ At least some of the plaintiffs attended educational classes, including four one-hour sessions where editors discussed their careers with interns.⁴⁸ The plaintiffs should have understood that their positions were unpaid and that there was no guarantee of employment after completing the internship.⁴⁹ The plaintiffs urged the district court to apply an "immediate advantage test" or, in the alternative, find that the unpaid internship program had to meet

41. This includes the Fifth Circuit. See e.g., *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127-28 (5th Cir. 1983). The Eleventh Circuit will not. See, e.g., *Schuman v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1202-03 (11th Cir. 2015).

42. The Fourth and Sixth Circuits utilize the primary-beneficiary analysis. See, e.g., *Solis*, 642 F.3d at 529; *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 & n.2 (4th Cir. 1989).

43. The Tenth Circuit uses the "totality of the circumstances" inquiry, which is more akin to the primary beneficiary test than the six-factor test. See, e.g., *Reich*, 992 F.2d at 1029.

44. *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 2848111 (2d Cir. Jan. 25, 2016); *Wang v. Hearst Corp.*, 617 F. App'x. 35 (2d Cir. 2015).

45. See Ben James, Fox, *Hearst Intern Classes Shot Down at 2nd Circ.*, LAW360 (July 2, 2015, 12:42 PM), <http://www.law360.com/articles/675265/fox-hearst-intern-classes-shot-down-at-2nd-circ>.

46. *Wang v. Hearst Corp.*, 293 F.R.D. 489, 490 (S.D.N.Y. 2013), *vacated in part*, 617 F. App'x 35 (2d Cir. 2015).

47. *Id.* at 491-92.

48. *Id.* at 492.

49. *Id.*

each of the six factors outlined by the DOL.⁵⁰ Hearst, on the other hand, argued that the district court should “adopt a ‘balancing of the benefits test’ which [would look] to the totality of the circumstances” when deciding whether a compensable employment relationship was present.⁵¹ The district court did not specifically adopt either approach, instead stating that the six-factor test “suggests a framework for an analysis of the employee-employer relationship.”⁵² The district court also found that, even if it were to apply the six-factor test, there was a genuine issue of fact relating to the first through fourth factors, and thus, refused to grant summary judgment to plaintiffs on the issue of whether they were employees under the FLSA.⁵³ Specifically, the district court noted that “there was *some* educational training, *some* benefit to individual interns, *some* supervision, and *some* impediment to Hearst’s regular operations.”⁵⁴

Glatt v. Fox Searchlight Pictures, Inc., on the other hand, involves unpaid internship programs for the film productions of *Black Swan* and *500 Days of Summer*.⁵⁵ One plaintiff’s duties “included assembling office furniture, arranging travel plans, taking out trash, taking lunch orders, answering phones, watermarking scripts, and making deliveries.”⁵⁶ Another plaintiff’s duties included “pick[ing] up paychecks for coworkers, track[ing] and reconcil[ing] purchase orders and invoices, . . . and travel[ing] to the set to get managers’ signatures.” He also “performed basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands.”⁵⁷

Plaintiffs and defendant both moved for summary judgment on the issue of whether plaintiffs were “employees” covered by the FLSA and New York Labor Law (NYLL).⁵⁸ The plaintiffs asked the district court to apply the DOL’s six-factor test, whereas Fox Searchlight sought

50. *Id.* at 493.

51. *Id.*; see *supra* note 43 and accompanying case (discussing the totality of the circumstances test).

52. *Wang*, 293 F.R.D. at 493-94.

53. *Id.* at 494. It is worth noting that the court in *Wang*, stated it was not applying a “winner-take-all test,” implying that, while the six-factor test was instructive, not all factors needed to be met in order for the individuals to rightfully be subject to the trainee exception. See *id.*

54. *Id.*

55. *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 522 (S.D.N.Y. 2013), *vacated*, No. 13-4478-cv, 2016 WL 284811 (2d Cir. Jan. 25, 2016).

56. *Id.* at 533.

57. *Id.*

58. See *id.* at 525. Functionally, the test for whether Searchlight is an “employer” also determines whether the plaintiffs are “employees.” See *id.* at 530-31.

application of the primary-beneficiary test.⁵⁹ The district court found that the primary-beneficiary test did not have support under *Walling*, because in that case “[t]he Supreme Court did not weigh the benefits to the trainees against those of the railroad.”⁶⁰ Instead, the district court interpreted *Walling* as relying on the “findings that the training program served *only* the trainees’ interests and that the employer received *no* immediate advantage from any work done.”⁶¹ The district court conservatively determined that the six-factor test was entitled to deference because it was “promulgated by the agency charged with administering the FLSA and [is] a reasonable application of it.”⁶² The court held that, “[c]onsidering the totality of the circumstances, [the plaintiffs] . . . are employees covered by the FLSA and [related state law].”⁶³ In so finding, the district court emphasized that plaintiffs performed “low-level tasks not requiring specialized training,” such as drafting cover letters and making copies, and did not receive an education similar to that of an academic setting.⁶⁴ The district court also deemphasized the benefits claimed by defendant, stating:

The benefits they may have received—such as knowledge of how a production or accounting office functions or references for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer.⁶⁵

In addressing the plaintiffs’ appeal, the Second Circuit set out to answer the question of “under what circumstances an unpaid intern must be deemed an ‘employee’ under the FLSA and therefore compensated for his work.”⁶⁶ In order to answer this question, the Second Circuit had to determine whether to give deference to the DOL’s six-factor test, the standard used by the district court in *Glatt*, or whether it was prudent to adopt a primary-beneficiary analysis, as the district court did in *Wang*.⁶⁷

59. *See id.* at 530-31 (discussing *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)).

60. *Id.* at 531.

61. *Id.* at 531-32 (quoting *Walling*, 330 U.S. at 153).

62. *Id.* at 532.

63. *Id.* at 534.

64. *Id.*

65. *Id.*

66. *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 284811, at *3 (2d Cir. Jan. 25, 2016).

67. *See id.* at *3-5.

The Second Circuit declined to defer to the DOL's six-factor test, finding it to be "too rigid" and inappropriate in its attempt to apply the facts of *Portland Terminal* to all workplaces.⁶⁸ Instead, the court agreed with the defendants and, to an extent, the district court in *Wang*, that the primary-beneficiary test was the appropriate method for evaluating whether unpaid interns are "employees" under the FLSA.⁶⁹ The Second Circuit noted that the primary-beneficiary test focuses on the value received by the interns, provides a more flexible analysis for evaluating the "economic reality as it exists between the intern and the employer," and acknowledges that interns' relationship with their employer is different than a traditional employee-employer relationship because interns expect nonmonetary benefits "that are not necessarily expected with all forms of employment."⁷⁰

In an effort to aid district courts in determining whether an unpaid intern is an "employee," the Second Circuit set forth a "non-exhaustive set of considerations," including:

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

68. *Id.* at *5.

69. *Id.* at *6.

70. *Id.*

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.⁷¹

The Second Circuit made clear that none of these factors are to be considered dispositive by a district court.⁷² The court focused the analysis “on the educational aspects of the internship,” which it believed best reflected “the role of internships in today’s economy.”⁷³ Because the *Glatt* district court opinion applied the DOL’s six-factor test, the Second Circuit vacated that decision and remanded for further proceedings.⁷⁴ As of the publication date of this article, those further proceedings had not yet taken place.

The Second Circuit’s opinion in *Glatt* will ultimately shape how employers within the Second Circuit, including a notable number of fashion and entertainment companies with internship programs in New York City, tailor these programs going forward in order to comply with the FLSA.⁷⁵ While the Second Circuit found that the more employer-friendly primary-beneficiary test is the appropriate standard in evaluating whether unpaid internships create an employment relationship, employers within this jurisdiction still need to evaluate their own programs to determine whether they meet the standards set forth in *Glatt*.⁷⁶

71. *Id.* at *6-7.

72. *Id.* at *7.

73. *Id.*

74. *Id.*; see also *Wang v. Hearst Corp.*, 617 F. App’x 35, 37 (2d Cir. 2015) (noting that the district court applied a totality of the circumstances approach but remanding for consideration of the factors set forth in *Glatt*).

75. See, e.g., *Glatt*, 2016 WL 284811, at *7; James, *supra* note 45. See generally Class Action Complaint, *Tart v. Lions Gate Entm’t Corp.*, No. 14-CV-8004 (S.D.N.Y. Oct. 3, 2014), 2014 WL 4951942 (alleging FLSA compliance issues in entertainment); Class Action Complaint, *Behzadi v. Int’l Creative Mgmt. Partners, L.L.C.*, No. 14-CV-4382 (S.D.N.Y. June 17, 2014), 2014 WL 2764090 (alleging FLSA compliance issues concerning talent and literary agents). It is worth noting that, at least in regards to New York, the state law seems to parallel the FLSA. See *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 n.2 (S.D.N.Y. 2012); *Glatt*, 2016 WL 284811, at *3 (finding the definition of “employee” within the FLSA and NYLL to be materially identical).

76. See *infra* Part IV. for recommendations for compliance and litigation strategy.

III. CONSEQUENCES OF THE RISE IN INTERN LAWSUITS UNDER THE FLSA

The recent trend of FLSA lawsuits filed by unpaid interns has generated various reactions from both the educational and business spheres.⁷⁷ Educational institutions, including New York University, are tightening the screening process for providing academic credit for internships by requiring that companies list the federal and state regulations relating to wage payments on their materials; provide greater detail in their job descriptions; that companies not simply state whether the job is “paid” or “unpaid” but state, for example, “[u]npaid in compliance with NYU and Department of Labor guidelines”; and that they refer students to DOL resources in order to “encourag[e] them to educate themselves.”⁷⁸ Columbia University has taken a more extreme approach; the school has altogether stopped giving undergraduates registration credits in exchange for unpaid internships in the hope that employers will begin to compensate interns.⁷⁹ It is unclear whether pressure from educational institutions will lead to an increase in paid internships, but it is clear that educational institutions are boldly reacting to this erratic legal climate.⁸⁰

Even where an educational institution maintains academic credit available to students participating in unpaid internships, courts have nonetheless found that this is not the end of the employment relationship inquiry, though it remains an important consideration.⁸¹ Employers are therefore unable to use academic credit as a shield from FLSA suits.

77. See, e.g., Jena McGregor, *Schools Crack Down on Unpaid Internships*, WASH. POST (May 16, 2014), <http://www.washingtonpost.com/blogs/on-leadership/wp/2014/05/16/schools-crack-down-on-unpaid-internships>.

78. See, e.g., *id.*; 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>.

79. E.g., McGregor, *supra* note 77; Zach Schonfeld, *In Another Blow to Free Labor, Columbia University Halts Academic Credit for Internship*, NEWSWEEK (Feb. 12, 2014, 12:54 PM), <http://www.newsweek.com/another-blow-free-labor-columbia-university-halts-academic-credit-internship-230554>.

80. See, e.g., McGregor, *supra* note 77. See generally Brief of the Am. Council on Educ. et al. as Amici Curiae, *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013) (No. 13-4480-cv), 2014 WL 7232416 (arguing against the adoption of the DOL's six-factor test).

81. See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 284811, at *6-7 (2d Cir. Jan. 25, 2016) (finding that the educational aspects of an unpaid internship should be the focus when analyzing whether the intern is an “employee” under the FLSA); *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831, 834-35 (11th Cir. 2013) (analyzing academic credit as part of the inquiry into whether the worker benefits from the internship).

Instead, employers should make sure that all facets of their programs comply with all of the relevant legal factors in their respective jurisdictions. At a minimum, employers have to be sure that the intern is receiving more of the benefit from the relationship than the employer is.⁸² As already discussed, in certain jurisdictions, the employer may have to make sure all of the factors in the DOL test have been met.⁸³

There are options available for employers other than a total restructuring of their internship programs. One option is to simply pay interns, which is what companies such as Atlantic Media and Al Jazeera have done.⁸⁴ This may not be an option for all employers, particularly those that are very small. On the opposite end of the spectrum, employers such as Condé Nast, which faced lawsuits from two former interns, shuttered its internship program altogether.⁸⁵ While some commentators have prognosticated that the majority of employers would react in the same way as Condé Nast, the evidence has not yet borne out such a dramatic result.⁸⁶

IV. COMPLIANCE AND LITIGATION STRATEGY SUGGESTIONS

Employers that choose to maintain an unpaid internship program should structure their programs so that they comply with the most conservative applicable interpretation of federal and state regulations. Even if an employer's intern program is clearly within the DOL guidelines, the employer can unfortunately still face litigation.⁸⁷ It is thus important for companies to consider proactive measures for future interns, as well as conciliatory measures for past interns.

82. One of the DOL factors requires that the internship be for the benefit of the intern (not the employer), and the benefits to the intern must outweigh the benefits to the employer under the primary-beneficiary test. See discussion *supra* Part I.B.1-2.

83. See *supra* Part I.B.1-2; see also *infra* Part IV. for recommendations for compliance and litigation strategy.

84. Linda Federico-O'Murchu, *March of the Interns: Good or Bad for the Economy?*, NBC NEWS (Nov. 18, 2013, 7:44 AM), <http://www.nbcnews.com/business/march-interns-good-or-bad-economy-2D11603306>.

85. Cara Buckley, *Sued over Pay, Condé Nast Ends Internship Program*, N.Y. TIMES (Oct. 23, 2013), http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html?_r=0.

86. See McGregor, *supra* note 77.

87. See Peter I. Minton, *6 Legal Requirements for Unpaid Internship Programs*, FORBES (Apr. 19, 2013, 9:09 AM), <http://www.forbes.com/sites/theyec/2013/04/19/6-legal-requirements-for-unpaid-internship-programs> (explaining that some of the DOL's factors are subjective and therefore difficult to satisfy).

A. Options to Cure Past and Present Infractions by Employers

The first step for an employer currently operating an unpaid internship program is to review its options with legal counsel.⁸⁸ Perhaps the most obvious compliance option is to simply pay the interns. As discussed above, in reaction to the glut of wage and hour litigation, some employers have begun to pay their interns, while some that already paid their interns have increased payments to ensure compliance with the minimum wage.⁸⁹ If the employer chooses to pay its current and future interns the minimum wage and applicable overtime rates, then the employer has effectively mitigated the relief available to interns who file lawsuits.⁹⁰

Similarly, employers may try to reduce or eliminate the threat of litigation from current and former interns by paying them for past hours worked.⁹¹ Settling potential claims for past hours requires consideration of these factors: (1) there may be no record of the hours worked,⁹² (2) the settlement must be in resolution of a “bona fide dispute,”⁹³ and (3) settlements likely have to be approved by a court or the DOL.⁹⁴ Thus,

88. See Rochelle Kaplan, *Legal Issues: Common Questions About Internships*, NAT’L ASS’N C. & EMPLOYERS (Winter 2005), http://ucanintern.com/NACE_Common_Questions_about_Internships.pdf.

89. See Blair Hickman, *Nation Institute to Pay Interns Minimum Wage*, PROPUBLICA (Aug. 2, 2013, 2:18 PM), <http://www.propublica.org/article/nation-institute-to-pay-interns-minimum-wage>.

90. See Swanton, *supra* note 10.

91. Employers should note that employees may also pursue other types of damages other than wages under the FLSA and under state law, including liquidated damages and attorney’s fees. See Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2012). Settlements should be vetted by legal counsel experienced with wage and hour matters.

92. Where a company treats an intern as a trainee, it has no incentive to keep the intern’s hours as that intern is presumptively not eligible for overtime payment. Ironically, this may be helpful to employers who want to show that there is a genuine dispute as to how much the interns should be paid for a release of their claims. See Ben James, *How to Have Unpaid Interns and Not Get Sued*, LAW360 (May 8, 2014, 5:29 PM), <http://www.law360.com/articles/534321/how-to-have-unpaid-interns-and-not-get-sued>.

93. See *Picerni v. Bilingual Seit & Preschool, Inc.*, 925 F. Supp. 2d 368, 371 (E.D.N.Y. 2013) (“All courts seem to agree that if an FLSA release is going to be upheld, it must be where there is a bona fide dispute as to the number of hours worked or computation of the employees’ pay . . .”), *abrogated by* *Barnhill v. Stark Estate*, 2015 U.S. Dist. LEXIS 125115 (E.D.N.Y. Sept. 17, 2015).

94. Compare *Martin v. Spring Break ‘83 Prods., L.L.C.*, 688 F.3d 247, 255 (5th Cir. 2012) (“[W]e hold that the payment offered to and accepted by Appellants, pursuant to the Settlement Agreement, is an enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and *not* as a compromise of guaranteed FLSA substantive rights themselves.”) (emphasis added), *with* *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982) (stating that FLSA settlements for back wages must be supervised by the Secretary of Labor or be reviewed by the district court). Companies may also want to avoid having a settlement approved by a district court if they want the proceedings to be confidential, as district court approval

before settling claims and obtaining a voluntary release from past or present interns, an employer should take extra precautions to determine whether such a settlement would be enforceable. For instance, in evaluating whether a settlement is enforceable, district courts have to “scrutiniz[e] the settlement for fairness” and ensure that it is made as a result of a bona fide dispute between the two parties.⁹⁵ Some courts evaluate the settlement through the same prism as settlement of a class action under section 23(e) of the Federal Rules of Civil Procedure.⁹⁶

A second option available to employers is to modify the internship program so that it is compliant with state and federal regulations. Legal counsel should determine the framework for analyzing the trainee exception utilized in the employer’s jurisdiction.⁹⁷ Such advice will require legal counsel to conduct a thorough review of the interns’ tasks and activities to determine whether there is a basis to assert that each intern is not an employee.⁹⁸ An intern is likely to be considered a trainee pursuant to both tests if he or she is: gaining knowledge and experience in a fashion similar to a classroom, being appropriately supervised, and at some points actually slows down the speed of work at the company.⁹⁹ On the other hand, interns are likely to be considered employees under every test if they do menial tasks, like getting coffee, displace paid employees, and receive little supervision.¹⁰⁰ Regardless of the test utilized, it should be communicated to interns that they are not necessarily entitled to a job at the end of the internship, and there should be a written agreement demonstrating that the intern understands that he or she is not entitled to wages because the employer is treating him or

of settlements will not be under seal. *See* *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015). Alternatively, the company could also suggest a public settlement in an attempt to gain positive publicity from its proactive approach.

95. *See Lynn’s Food Stores, Inc.*, 679 F.2d at 1353, 1355.

96. *Camp v. Progressive Corp.*, No. Civ.A. 01-2680, 2004 WL 2149079, at *4 (E.D. La. Sept. 23, 2004).

97. Where the employer is in a jurisdiction without a clear framework, legal counsel should be prepared to argue for the court in that jurisdiction to adopt a primary-beneficiary test, or something similar, because it is the most employer-friendly of all options. *See supra* Part I.B.2.

98. *See James, supra* note 92.

99. *See Demayo v. Palms West Hosp., Ltd.*, 918 F. Supp. 2d 1287, 1290-91 (S.D. Fla. 2013).

100. *See Wolfe v. AGV Sports Group, Inc.*, No. CCB-14-1601, 2014 WL 5595295, at *3 (D. Md. Nov. 3, 2014) (finding unpaid intern stated valid claim under FLSA where he pleaded facts that the employer’s workforce consisted almost entirely of unpaid interns who received little supervision). *But see Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 530-32 (6th Cir. 2011) (holding that the benefits received by the students outweighed the benefits to the employer, even when the students performed school maintenance); *Demayo*, 918 F. Supp. 2d at 1292 (finding that, although plaintiff performed menial work for the employer such as taking out the trash, the primary benefit of the relationship flowed to the plaintiff).

her as a trainee.¹⁰¹ Finally, employers should review the unpaid internship criteria and advice from legal counsel with their managers and executives so they can ensure that interns are performing the appropriate functions. We also recommend that employers regularly audit their internship programs to ensure compliance.

B. *Limiting Future Liability*

After the employer has conducted a review of its current internship program, it should consider whether it wants to retain an unpaid internship program. This is an individual inquiry and it will be up to each employer to weigh the pros and cons of fielding an unpaid internship program. Employers should consider the following precautionary measures if they choose to keep their unpaid internship programs intact.

1. Working with Academic Institution

In the wake of the Second Circuit's decision in *Glatt*, employers, (particularly those with operations in Connecticut, New York, and Vermont) that choose to maintain unpaid internship programs should consider the educational value provided to the interns.¹⁰² One way for employers to do so is to engage in a documented conversation with the interns' academic institutions regarding the enriching opportunities that the employer intends to provide for the interns.¹⁰³ For example, the employer may offer to allow interns to "shadow" employees in certain positions for a set period of time. After the first shadowing period is over, the intern could move to the rest of the areas, which would help show that "the internship's duration is limited to the period in which the internship provides the intern with beneficial learning."¹⁰⁴ Another way for employers to help ensure their internship program complies with the FLSA is to engage with the academic institution to create assignments, such as writing papers or giving presentations, that tie-in to the internship program.¹⁰⁵ These assignments may help demonstrate that the

101. See DOL FACT SHEET #71, *supra* note 22; see also James, *supra* note 92.

102. *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478-cv, 2016 WL 284811, at *6 (2d Cir. Jan. 25, 2016).

103. See James, *supra* note 92.

104. See *Glatt*, 2016 WL 284811, at *6.

105. See *id.*

internship mirrors the training in an educational environment.¹⁰⁶ Overall, working with an academic institution at the front-end will demonstrate that internships are being provided for valid educational purposes and not to supplement employee labor.¹⁰⁷

2. Written Employment Agreements

Employers may consider committing an unpaid internship agreement to writing.¹⁰⁸ This agreement should contain clauses stating that: (1) the term of the internship is tied to an academic year; (2) the internship is unpaid; (3) no job is offered or promised at the end of the internship; (4) the intern will write a report demonstrating what he or she has learned from their experience with the employer; and (5) whether or not academic credit will be given for such a report.¹⁰⁹ Such a written agreement will, at a minimum, demonstrate two of the six DOL factors and lend evidence toward a third.¹¹⁰ However, such an agreement does not necessarily mean the interns are not entitled to wages, given the Supreme Court's pronouncement that "the purposes of the [FLSA] require that it be applied even to those who would decline its protections."¹¹¹ Thus, while an agreement between the employer and the interns is not likely to constitute conclusive proof that the relationship is outside the purview of the FLSA, it can be persuasive evidence with

106. See *id.* at *6-7 (discussing a non-exhaustive set of considerations to assist courts in the determination of whether an individual is an "employee" with respect to the FLSA); see also DOL FACT SHEET #71, *supra* note 22 ("[T]he more an internship program is structured around a classroom or academic experiences as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individuals' educational experience . . .").

107. See *Glatt*, 2016 WL 284811, at *4-5 (discussing the benefits and drawbacks of internship programs).

108. See *James*, *supra* note 92.

109. See DOL FACT SHEET #71, *supra* note 22. Employers may want to partner with colleges so that the interns can receive academic credit. See *James*, *supra* note 92 ("[C]ollege credit can go a long way toward showing that a particular intern's experience is akin to the training one would receive in an educational environment, according to attorneys."). Doing this will increase the benefits to the intern and will also provide the employer with an outside analysis of whether or not the internship program is sufficiently educational to justify not paying wages. See DOL FACT SHEET #71, *supra* note 22; *James*, *supra* note 92.

110. Such an agreement would cover the employer's responsibilities under factors five and six, and the writing requirement would provide evidence of the first factor. See DOL FACT SHEET #71, *supra* note 22.

111. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302, 306 (1985) (finding that the Foundation's businesses constitute a "common business purpose" within the meaning of the Act and are not beyond the Act's reach because of the Foundation's religious character, and that its associates are employees under the Act entitled to full protection).

respect to certain DOL factors and can show that the employer is taking seriously the required educational component.¹¹²

While a written unpaid internship agreement may help employers avoid liability, there are certain provisions that could be added for the benefit of the interns as well. One of the chief complaints against the use of the trainee exception with regard to unpaid interns is that it takes them out of the protection of other workplace statutes, such as Title VII of the Civil Rights Act of 1964.¹¹³ While some individual states are beginning to pass laws protecting unpaid interns in the workplace,¹¹⁴ incorporating certain protections into the unpaid internship agreement would help alleviate the dangers posed from lack of coverage under the federal laws.¹¹⁵ These agreements may increase the liability of employers in states that have not passed amendments to their antidiscrimination laws, but providing a degree of protection for harassment complaints by interns should also help those employers protect against discriminatory behavior and thus make the workplace safer and more efficient. Furthermore, such provisions would demonstrate that the employer takes its responsibilities towards protecting interns seriously, which a court may look favorably upon.¹¹⁶

112. See James, *supra* note 92.

113. See Brief for Am. Fed'n of State, Cty. & Mun. Emps. et al. as Amici Curiae Supporting Plaintiffs-Appellees, *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (S.D.N.Y. July 7, 2014) (No. 13-4478-cv); 2015 WL 5076744, at *10-16; see also *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997) (holding that the plaintiff was not an employee of the defendant for purposes of Title VII where there was no "direct or indirect economic remuneration").

114. Cindy S. Minniti & Mark S. Goldstein, *New York State Becomes the Fourth Jurisdiction to Protect Unpaid Interns from Employment Discrimination*, FORBES (July 28, 2014, 12:45 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/07/28/new-york-state-becomes-the-fourth-jurisdiction-to-protect-unpaid-interns-from-employment-discrimination/>.

115. See Zach Schonfeld, *The Fight to Protect Unpaid Interns Against Sexual Harassment*, NEWSWEEK (Mar. 20, 2014, 2:43 PM), <http://www.newsweek.com/fight-protect-unpaid-interns-against-sexual-harassment-232567> (noting that the proposed amendment in New York City will extend harassment and civil rights protections to unpaid interns who previously did not have a legal avenue to pursue their claims).

116. For instance, under some states' discrimination laws, remaining "deliberately indifferent" toward harassment of non-employees (such as unpaid interns) can result in liability for the employer. *Lopez-Arenas v. Zisa*, Civ. No. 10-2668, 2012 WL 933251, at *10 (D.N.J. Mar. 19, 2012) (finding that employers can be held liable for "aiding and abetting" harassment by remaining deliberately indifferent); see N.J. Stat. § 10:5-12 (allowing discrimination claims to be brought against any person, whether an employer or not).

3. Arbitration Agreements

A second and related precautionary measure that employers might consider is to maintain an arbitration agreement with their interns in the event of future claims. The employer and intern could sign an agreement whereby both the employer and the intern agree to arbitrate any claims against each other arising out of the internship. The employer should also include a section prohibiting litigation of any claims on a class, collective, or representative basis.¹¹⁷ Such a provision may not prevent interns from bringing a wage and hour lawsuit against the employer, but it may deter future lawsuits or limit the costs of litigation.¹¹⁸ Further, since arbitrations are decided by a single arbitrator or group of arbitrators, the likelihood for a “runaway jury” verdict is limited, if not eliminated.¹¹⁹

V. CONCLUSION

The increase in FLSA claims for unpaid interns has put companies, educational institutions, and plaintiffs’ attorneys on notice of potential liability.¹²⁰ Companies should review their intern programs for compliance with applicable legal standards and decide whether or not to proceed with such programs. If they continue with unpaid internship programs, they should consider taking some or all of the above discussed measures in order to limit their liability. At minimum, companies

117. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (“Section 2 [of the FAA] requires courts to enforce arbitration agreements according to their terms.”) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295 (2d Cir. 2013) (noting the Supreme Court’s liberal policy in favor of arbitration agreements). It is worth noting that the National Labor Relations Board (NLRB) has found such class litigation prohibitions violate the National Labor Relations Act. See *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), *overruled by Knight v. Rent-A-Center East, Inc.*, 2013 U.S. Dist. LEXIS 179774 (D.S.C. Dec. 20, 2013), and *Herrington v. Waterstone Mortg. Corp.*, 993 F. Supp. 2d 940 (W.D. Wis. 2014). The majority of circuit courts to consider the NLRB’s holding in *D.R. Horton*, however, have refused to apply its blanket prohibition. See *Sutherland*, 726 F.3d at 296 (holding that the waiver of collective action claims are not precluded by the FLSA); *Owen*, 702 F.3d at 1054 (“[A]lthough no court of appeals has addressed *D.R. Horton*, nearly all of the district courts to consider the decision have declined to follow it.”).

118. See *Sutherland*, 726 F.3d at 298.

119. *Steering Clear of the Runaway Jury*, FINDLAW (Mar. 26, 2008), <http://corporate.findlaw.com/human-resources/steering-clear-of-the-runaway-jury.html>.

120. See, e.g., James, *supra* note 92 (“In recent years, a wave of class actions have been brought by former *unpaid interns* who claim that they were actually ‘employees’ under federal state law and are owed minimum and overtime wages—a trend that has raised doubts about whether internship programs remain feasible.”).

should, after conducting an audit of their programs, train their management level employees with respect to what assignments to give unpaid interns and the extent of supervision required for their work. There is no provision in the FLSA for the use of unpaid interns to get dry cleaning or coffee.¹²¹ However, if unpaid internship programs are utilized as an educational opportunity and not as a replacement for employees' work, then they may safely continue under the trainee exception of the FLSA.¹²²

121. See Swanton, *supra* note 10 (noting that an intern is likely to be classified as an employee under the FLSA if the opportunity is not analogous to that of an educational environment).

122. See DOL FACT SHEET #71, *supra* note 22 ("The more the internship provides the individual with skills that can be used in multiple employment settings . . . the more likely the intern would be viewed as receiving training.").