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The Ongoing Abuse of Unpaid Interns: How Much Longer Until I Get Paid

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NOTE

THE ONGOING ABUSE OF UNPAID INTERNS: HOW MUCH LONGER UNTIL I GET PAID?

I. INTRODUCTION

Anyone who has ever worked in the entertainment industry knows that to make it to the top, you have to start at the bottom.[1] And starting at the bottom means jumping at any internship you are offered in the hope of getting your foot in the door.[2]

However, the government seems to have a different view on internship expectations than the persons being "employed,"[3] and even the employers themselves.[4] In 2010, the U.S. Department of Labor ("DOL") issued a fact sheet containing a six-factor test to help courts determine the difference between a paid employee and an unpaid intern.[5] However, there is currently no federally regulated definition of "intern."[6]

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1. *See* Eriq Gardner, *How All Those Intern Lawsuits Are Changing Hollywood*, HOLLYWOOD REP. (Nov. 6, 2014, 5:00 AM), http://www.hollywoodreporter.com/thr-esq/how-all-intern-lawsuits-are-746945 (quoting Rick Levy, partner and general counsel at ICM Partners, stating that "[t]here is a long, long tradition of intern programs being an integral part of careers in Hollywood").

2. *See* Sam Hananel, *Unpaid Internships in Jeopardy After Court Ruling*, AP (June 13, 2013, 8:27 PM), http://bigstory.ap.org/article/unpaid-internships-jeopardy-after-court-ruling (stating that students and recent graduates have long looked to unpaid internships as resume padders and opportunities to get their foot in the door in many industries).

3. Technically, interns are not "employed," as they fall under the unpaid "trainee exemption" and are not "employees." Walling v. Portland Terminal Co., 330 U.S. 148, 152-53 (1947).

4. *See* Gardner, *supra* note 1 (quoting Jason Rindenau, a plaintiff in the proposed class action suit against ICM, as saying that "they sell the internship experience as getting a foothold into employment, . . . [b]ut it's kind of a smoke screen, a 'chew you up, spit you out' experience that's absolutely exploitation"). However, the recent decision in *Glatt v. Fox Searchlight Pictures Inc.* may persuade companies to rethink their intern programs and whether it is worth the legal risk to hire interns without pay. *See* 293 F.R.D. 516, 521-22, 539 (S.D.N.Y. 2013).

5. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

6. *See* Louis C. LaBrecque, *Bills Would Bar Bias Against Unpaid Interns by Government, Congress and Private Sector*, [2015] Daily Lab. Rep. (BNA) No. 144, at A-8 (July 28, 2015) (reporting on the recent introduction of the Unpaid Intern Protection Act, which defines "intern" and, if enacted, would protect interns from "workplace harassment and discrimination" in the

The test determines whether a worker legally falls into the unpaid intern category, or whether their job description better categorizes them as an employee, thereby entitling the worker to minimum wage and other protections under the Fair Labor Standards Act of 1938 ("FLSA").[7] Unfortunately (or fortunately for the unpaid interns' argument), the DOL test is not enforceable as law, and many courts thus use parts of the test as a way to determine liability.[8] Coupled with the lack of enforcement by the DOL's Wage and Hour Division ("WHD"), the test suggested by the DOL has little effect in helping interns seek justice.[9]

This Note focuses on the major issue regarding the lack of a federal regulation for interns, resulting in their exploitation and abuse.[10] Part II discusses the history of employee protection under the FLSA and how the six-factor DOL test identifies when an intern meets the legally unpaid "trainee exemption."[11] Further, Part II details the trend in litigation,[12] which has led to a decrease in internship opportunities, and how it has impacted the entertainment industry.[13] This Note also discusses why the test is not asking the right questions to best regulate the exploitation of unpaid interns.[14] Lastly, Part IV proposes a cap on working hours for unpaid interns, requiring companies to pay an "intern specific overtime" wage for any time worked in excess of those hours, and how this proposal is a win-win situation for all involved.[15]

II. BACKGROUND

To understand the impact unpaid intern litigation is having on today's young job seekers, the accession of regulation in this area must first be explained.[16] Part II begins with the history of the FLSA,[17] which provides certain protections to employees.[18] Subpart A further explains

private sector, as well as at state and local government levels).

7. WAGE & HOUR DIV., *supra* note 5; *see* 29 U.S.C. §§ 201–219 (2012).

8. *See infra* note 46 and accompanying text.

9. *See infra* Part III.B.

10. *See infra* Part III.

11. *See infra* Part II.A.1–2.

12. *See infra* Part II.C.1–3.

13. *See infra* Part II.C.4; *see also* Cara Buckley, *Sued over Pay, Publisher Ends Internship Program*, N.Y. TIMES, Oct. 24, 2013, at A23.

14. *See infra* Part III.A.1–2; *see also* Amy Levin-Epstein, *Why Internships Aren't Just for College Students*, CBS NEWS (Apr. 4, 2011, 6:43 PM), http://www.cbsnews.com/news/why-internships-arent-just-for-college-students (noting that a growing number of persons searching for internships are recent graduates and older).

15. *See infra* Part IV.

16. *See infra* Part II.A.

17. 29 U.S.C. §§ 201–219 (2012); *see infra* Part II.A.

18. *See infra* Part II.A.

how the "trainee exemption" to the FLSA came to be, and the six-part test that defines it.[19] Next, Subpart B discusses new legislation extending protection to unpaid interns solely from discrimination and harassment.[20] Finally, Subpart C details recent cases regarding unpaid interns in the entertainment industry and how those cases have affected present and future job opportunities.[21]

A. The History of the Fair Labor Standards Act

In 1938, the FLSA was introduced to set federal provisions for, inter alia, minimum wage and overtime pay.[22] By implementing the Act, lawmakers specifically attempted to compensate overworked laborers and spread employment through forcing employers to reduce hours.[23] According to the FLSA, protection under these provisions applies to "employees,"[24] who are defined as "any individual employed by an employer."[25] The term "employ" is defined in the FLSA as to include "to suffer or permit to work."[26] Persons who meet the definition of "employee"[27] are entitled to payment of at least the federal minimum wage, as well as a rate of one and a half times their regular pay for hours worked in excess of forty per workweek.[28] The question being raised is whether unpaid interns fall into this category, and are therefore eligible for protection under the FLSA.[29] Thus, if interns do fall into the

19. *See infra* Part II.A.1–2.

20. *See infra* Part II.B.

21. *See infra* Part II.C.

22. 29 U.S.C. §§ 201–219; *see also* ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 64 (Verso 2012).

23. Michael Spellman & Jeff Slanker, *The Fair Labor Standards Act: Separating Myth from Fact, and Avoiding Common Pitfalls*, TRIAL ADVOC. Q., Spring 2014, at 29 ("[L]awmakers attempted 'to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost.'" (quoting Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1948))).

24. *Wages and Hours Worked: Minimum Wage and Overtime Pay*, U.S. DEP'T LAB. (last updated Sept. 2009), http://www.dol.gov/compliance/guide/minwage.htm. There are multiple employee exemptions under the Act, including but not limited to farm workers employed on small farms, certain skilled computer workers, newspaper deliverers, and salaried administrative and executive workers. *Id.*

25. 29 U.S.C. § 203(e)(1).

26. *Id.* § 203(g).

27. The statutory definition of "employee" has not offered consistent assistance amongst the courts in determining employee status. *See* Cody Elyse Brookhouser, Note, *Whaling on* Walling*: A Uniform Approach to Determining Whether Interns Are "Employees" Under the Fair Labor Standards Act*, 100 IOWA L. REV. 751, 754 (2015) ("[T]his circular definition [of employee] is of little interpretive assistance.").

28. *See Wages and Hours Worked: Minimum Wage and Overtime Pay*, *supra* note 24.

29. *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV.

employee category, "they must be paid the minimum wage."[30] However, it is also possible that interns fall into the "trainee exemption" and are not entitled to protection under the FLSA.[31] For over sixty years the courts have been referring to *Walling v. Portland Terminal Co.* as the standard for determining the "trainee exemption."[32] This case is where the Supreme Court first introduced the six criteria currently used by the WHD in evaluating intern status.[33]

1. *Walling v. Portland Terminal Co.* Leads to the Creation of the "Trainee Exemption"

Walling involved prospective yard brakemen who were trained by a railroad company.[34] Over the course of seven or eight days, each accepted prospect first learned by observing an experienced yard crew, and then was allowed to perform actual work under the close scrutiny of the supervising yard crew.[35] The Supreme Court considered this aspect of supervised training in making their decision, and concluded that since most of the work was done by regular employees of the railroad, the trainee's work did not "displace" any of the company's actual employees.[36] Upon successful completion of this training, the prospective brakemen's names were then added to a list of potential hiring possibilities for when the company needed their service.[37] This

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215, 225 (2002).

30. Andrew Mark Bennett, Comment, *Unpaid Internships & The Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 300 (2011).

31. *Id.* at 301 ("The FLSA minimum wage provisions do not apply to 'trainees' or 'volunteers.'").

32. 330 U.S. 148 (1947); *see* Brookhouser, *supra* note 27, at 756.

33. Yamada, *supra* note 29, at 227-28 ("The Wage and Hour Division . . . borrowing heavily from the reasoning in *Portland Terminal*, has applied the following six-part test to determine whether an individual is an employee for purposes of the FLSA . . . ."); *see also* Brookhouser, *supra* note 27, at 752 ("The United States Supreme Court shed light on the FLSA's definition of 'employee' only once, in *Walling v. Portland Terminal Co.* . . . .").

34. 330 U.S. at 149.

35. *Id.*

> An applicant for such jobs is never accepted until he has had this preliminary training, the average length of which is seven or eight days. If accepted for the training course, an applicant is turned over to a yard crew for instruction. Under this supervision, he first learns the routine activities by observation, and is then gradually permitted to do actual work under close scrutiny.

Id.

36. *Id.* at 149-50; Brookhouser, *supra* note 27, at 755 ("[The Court] relied heavily upon the fact that the trainee's work performance was closely supervised, and that most of the actual work was done by regular railroad employees.").

37. *Walling*, 330 U.S. at 150 ("If these trainees complete their course of instruction satisfactorily and are certified as competent, their names are included in a list from which the company can draw when their services are needed.").

factor, which was taken by the Court to imply a lack of guaranteed employment following completion of the training, coupled with the lack of expectation of compensation, was weighed heavily.[38] The Court also mentioned that there was "no question" the trainees engaged in the kind of activities covered by the FLSA; however, the Court did question whether or not the trainees fell under the Act's definition of "employee."[39]

With reference to the Act's definition of "employ,"[40] the Court stated that the FLSA obviously did not intend "to stamp all persons as employees who . . . might work for their own advantage on the premises of another."[41] The Court defended this statement by adding that had the trainees taken courses in railroading at a vocational school, "it could not reasonably be suggested that they were employees of the school within the meaning of the Act."[42] Further, because the company received no "immediate advantage" from, and was even at times impeded by, the trainees' work, the Court held that the trainees could not be considered employees under the Act.[43] And thus, the "trainee exemption" was born.[44]

2. The Six-Part Department of Labor Test

Stemming from the factors weighed by the Supreme Court in *Walling*, the WHD has been following a six-factor test for over sixty years.[45] Though fact sheets and opinion letters do not hold the necessary force of law to bind our courts, the DOL has strongly encouraged that its test be followed.[46] All of the following criteria must be met for an

38. *See* Brookhouser, *supra* note 27, at 755 ("The Court also relied on the trainee's lack of a guaranteed job following completion of the training program, as well as his lack of expectation of compensation.").

39. *Walling*, 330 U.S. at 150 ("There is no question but that these trainees do work in the kind of activities covered by the Act. . . . But in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance.").

40. 29 U.S.C. § 203(g) (2012).

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

42. *Id.* at 152-53.

43. *Id.* at 150, 153.

44. *See id.* at 153; *see also* WAGE & HOUR DIV., *supra* note 5 (describing the test that must be met in order for interns in the "for-profit" private sector to be lawfully exempt from the FLSA as trainees).

45. *See* Lauren K. Knight, *The Free Labor Standards Act? A Look at the Ongoing Discussion Regarding Unpaid Legal Internships and Externships*, 44 U. BALT. L. REV. 21, 22 (2014).

46. *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (stating that interpretations of opinion letters lack the force of law); WAGE & HOUR DIV., *supra* note 5 ("This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations."); *cf.* Matthew Tripp, Note, *In the Defense of Unpaid Internships: Proposing a Workable Test for Eliminating Illegal Internships*, 63 DRAKE L. REV. 341, 365-66

employment relationship not to exist, and for the FLSA not to apply to a particular case:

1. The internship . . . 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.[47]

However, this test does not define what constitutes an "intern," as it claims to do; in actuality, this test essentially declares that individuals who are not employees are interns.[48]

When evaluating the employment status of an intern using this test, opinion letters issued by the WHD in response to questions regarding the facts and circumstances of specific internship programs are also taken into account.[49] One particular letter, dated May 8, 1996, discussed the WHD's view on college-affiliated student intern programs.[50] Specifically, the letter stated that when students are volunteering for internships under a college program for which they are receiving academic credit, an employment relationship is not believed to exist.[51] Conversely, an earlier letter stated that an employment relationship can be found to exist between a student intern and an employer where the internship program is established independent of the school and the

(2015) (noting that some courts have denied the DOL fact sheet any deference, as it is subject to much criticism for its inconsistency with prior DOL interpretations).

47. WAGE & HOUR DIV., *supra* note 5.

48. *See id.* Thus, instead of awarding protection to unfairly treated interns, the test tends to limit protection to only those persons that meet the requirements of employee classification. *See id.*

49. Troy D. Warner, Unpaid Interns & the Practice of Unprotected Working: Building from a History of Learning on the Job 21-22 (Jan. 12, 2015) (unpublished note), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=troy_warner (discussing opinion letters released by the WHD which provide guidance on specific internship situations).

50. U.S. Dep't of Labor, Opinion Letter (May 8, 1996).

51. *Id.* The letter explained as follows:

> [W]here students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction.

Id.

intern is performing work that is to the immediate advantage of the employer.[52]

While it seems to be clear that interns of school-sponsored programs are unlikely to be awarded employee status under the FLSA, the reality is not so black and white.[53] For this reason, the WHD has also looked to whether the work performed by the intern outweighs the burden imposed on the employer.[54] Despite the DOL's efforts to clearly establish intern versus employee status in regards to FLSA protection, student interns currently fall into a grey area.[55] Recently, increased attention to this problem has sparked a trend across states, causing the implementation of regulations for the protection of unpaid interns from some of the same types of discrimination from which employees themselves are protected.[56]

B. Introduction of New Legislation Protecting Unpaid Interns

In 2013, Oregon became the first state to enact legislation extending discrimination and sexual harassment protection to unpaid interns.[57] The legislation passed was an amendment to existing law, which created an employment relationship between the intern and employer for enumerated protection purposes, yet continued to ignore minimum wage and hour protection.[58] Other states slowly began to follow suit, with New York, California, Washington, D.C., Illinois, and Connecticut enacting laws over the last three years.[59] Following in

52. Yamada, *supra* note 29, at 230 (citing U.S. Dep't of Labor, Opinion Letter (Mar. 25, 1994)).

53. *See id.* (noting that the awarding of academic credit to an individual tends to blur the lines between student intern and employee).

54. *Id.* (citing U.S. Dep't of Labor, Opinion Letter (Mar. 13, 1995)).

55. *Id.* at 217 ("[S]tudent interns now exist in a legal void, falling between the cracks of legal protection for workers and legal protection for students.").

56. *See* Cindy Schmitt 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.

57. *See* Pamela Wolf, *Oregon Bill Protecting Unpaid Interns from Employment Discrimination May Be the Handwriting on the Wall*, WOLTERS KLUWER, http://www.employmentlawdaily.com/index.php/news/oregon-bill-protecting-unpaid-interns-from-employment-discrimination-may-be-the-handwriting-on-the-wall (last visited Dec. 31, 2016).

58. *Id.*

59. *See* Press Release, Liz Krueger, Senator, N.Y. State Senate, Senator Krueger Introduces Bill to Protect Interns from Sexual Harassment, Discrimination (Oct. 15, 2013), https://www.nysenate.gov/newsroom/press-releases/liz-krueger/sen-krueger-introduces-bill-protect-interns-sexual-harassment; Kirsten A. Milton, *Illinois Enacts Legislation Protecting Unpaid Interns Against Sexual Harassment in the Workplace*, JACKSON LEWIS (Sept. 16, 2014), http://www.jacksonlewis.com/resources-publication/illinois-enacts-legislation-protecting-unpaid-interns-

Oregon's footsteps, these states each amended their existing statutes to include protection for unpaid interns and volunteers against discrimination or harassment, which was previously afforded only to employees.[60]

New York State did the same, choosing to amend in response to a loophole in its then-current legislation, which affected interns' ability to seek justice on sexual harassment claims.[61] In 2013, Lihuan Wang filed suit in the Southern District of New York, alleging sexual harassment and a hostile work environment.[62] Ms. Wang had been working as an unpaid intern at Phoenix Satellite Television US, Inc. in 2009, performing such tasks as video editing, drafting scripts, and assisting in shooting news footage.[63] Within the first two weeks of her internship, Ms. Wang had been in touch with bureau chief, Zhengzhu Liu, regarding future permanent employment.[64] After attending a lunch with Mr. Liu and other coworkers, Mr. Liu invited Ms. Wang to his hotel to further discuss her employment opportunities.[65] Ms. Wang attempted to talk about her internship with him, however, Mr. Liu, she alleges, was only interested in becoming physical with her.[66] After the incident, Mr. Liu carried on business as usual at work, only he no longer expressed interest in permanently hiring Ms. Wang.[67] After completing her degree, Ms. Wang reached out to Mr. Liu once more to inquire about permanent

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against-sexual-harassment-workplace; Daniel Schwartz, *General Assembly Passes Bill Protecting Interns from Discrimination and Harassment*, CONN. EMP. L. BLOG (May 29, 2015), http://www.ctemploymentlawblog.com/2015/05/articles/general-assembly-passes-bill-protecting-interns-from-discrimination-harassment; Jonathon A. Siegel, *California Law Protects Unpaid Interns and Volunteers from Harassment and Discrimination*, JACKSON LEWIS (Oct. 2, 2014), http://www.californiaworkplacelawblog.com/2014/10/articles/legal-articles/california-law-protects-unpaid-interns-and-volunteers-from-harassment-and-discrimination. States such as Michigan and New Jersey are working to pass similar legislation. *See* Samantha Lachman, *A Shocking Number of States Don't Protect Unpaid Interns from Discrimination and Sexual Harassment*, HUFFINGTON POST (May 27, 2015, 4:17 PM), http://www.huffingtonpost.com/2015/05/27/unpaid-interns-harassment_n_7453826.html?1432757874.

60. *See* Milton, *supra* note 59; Schwartz, *supra* note 59; Siegel, *supra* note 59.

61. Press Release, Liz Krueger, *supra* note 59; *see also* Matthew Weinick, *Unpaid and Unprotected? Interns, Sexual Harassment, and the Law*, NASSAU LAW., Jan. 2015, at 3, 3, 16 ("Reacting to the [*Wang*] decision, in March 2014, New York City amended its Human Rights Law to include protection for unpaid interns.").

62. Weinick, *supra* note 61, at 3.

63. Wang v. Phx. Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013).

64. *Id.* Mr. Liu exercised authority over the hiring and firing of both interns and employees. *Id.*

65. *Id.* at 530.

66. *See id.* ("[He] told her, 'your eyes are so beautiful' . . . Mr. Liu then held Ms. Wang tightly . . . and tried to kiss Ms. Wang by force, but Ms. Wang turned her face away . . . .").

67. *See id.*; Weinick, *supra* note 61, at 3 ("Afterwards, Liu allegedly began to insist that he could not permanently hire Wang because of visa issues.").

employment, to which he responded by inviting her to accompany him to Atlantic City for the weekend "to discuss job opportunities."[68]

As a case of first impression in New York State, the court first looked to the plain statutory language, which reads "'[i]t shall be an unlawful discriminatory practice' for an 'employer' to discriminate against 'any person . . . in compensation or in terms, conditions or privileges of employment.'"[69] The court held that Ms. Wang, as an unpaid intern, could not be afforded protection from discrimination since no employment relationship existed.[70] Accordingly, Ms. Wang insisted that the court look to other indications of an employment relationship by using the preexisting test for New York City Human Rights Law ("NYCHRL")[71] claims, which evaluates hiring and firing power, power of control over the worker, and payment of wages.[72] Despite the court's reference to a case that held the most important factor to weigh in the relationship is right of control,[73] it disagreed with Ms. Wang again over the use of this test,[74] noting that "remuneration is the threshold inquiry in establishing the existence of an employment relationship."[75] The last factor the court looked to in its holding was previous amendments to the NYCHRL, which had never been altered to add protective coverage to unpaid interns or volunteers.[76]

Due to increased publicity over the *Wang* decision, both New York City and New York State took action in 2014 to amend their laws, extending to interns[77] protection from harassment and discrimination.[78]

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68. *Wang*, 976 F. Supp. 2d at 531.

69. *Id.* at 532 (quoting N.Y.C. CHARTER & ADMIN. CODE § 8-107(1)(a) (2015)).

70. *See id.* ("The plain terms . . . make clear that the provision's coverage only extends to employees, for an 'employer' logically cannot discriminate against a person . . . if no employment relationship exists.").

71. ADMIN. CODE §§ 8-101 to 14-151 (2015) (Title 8).

72. *See Wang*, 976 F. Supp. 2d at 533; *see also* Weinick, *supra* note 61, at 3 ("[Wang] urged the Court to adopt a balancing test, arguing the Court should look at the purported employers' ability to hire, dismiss, supervise and control tasks, and then balance such factors with whether the employer compensated the plaintiff.").

73. *See Wang*, 976 F. Supp. 2d at 533 (citing State Div. of Human Rights on Complaint of Emrich v. GTE Corp., 109 A.D.2d 1082, 1083 (N.Y. 1985)).

74. *See id.* at 534 (reasoning that Ms. Wang was unable to cite to any case that used this balancing test for claims concerning unpaid interns).

75. *Id.* at 535-36 ("'Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist . . . .'" (quoting O'Connor v. Davis, 126 F.3d 112, 115-16 (1997))).

76. *Id.* at 536-37 (weighing this heavily due to frequent amendments to the statute, none of which ever addressed unpaid interns). Since this case has been decided, New York, as well as many other jurisdictions, have amended their statutes to address protection of unpaid interns. *See* Minniti & Goldstein, *supra* note 56.

77. Minniti & Goldstein, *supra* note 56. The New York City Charter and Administrative Code was amended by adding a definition of "intern":

Yet, despite the major changes made by these jurisdictions, one key element still missing is protection for interns from wage and hour abuse.[79] Hopefully the recent decision regarding the unionization of student teaching assistants at Columbia University will be the glimmer of hope interns need.[80] The National Labor Relations Board ("NLRB") overruled a 2004 decision and held that student assistants are in fact employees and thus can unionize.[81] This is good news for interns seeking protection from wage and hour laws, as it is a ruling in favor of student-working relationships with a university that is also considered employment.[82] Hopefully, the rise in recent litigation will help bring much-needed change.[83]

C. Examples of Recent Litigation and How It Has Affected the Industry

In 2013, the Southern District of New York became the first court to find in favor of unpaid interns, categorizing them as employees entitled to minimum wage under the FLSA.[84] This decision, in *Glatt v. Fox Searchlight Pictures Inc.*,[85] sparked a trend in unpaid intern litigation across the country.[86] The recent increase in attention from these cases has focused primarily on major industry players and whether

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> [A]n individual who performs work for an employer on a temporary basis whose work: (a) provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff. The term shall include such individuals without regard to whether the employer pays them a salary or wage.

N.Y.C. CHARTER & ADMIN. CODE § 8-102, *amended by* N.Y.C. CHARTER & ADMIN. CODE § 8-102(28) (2014).

78. *See* ADMIN. CODE § 8-107, *amended by* ADMIN. CODE § 8-107(23) (2014) (expanding provisions of this chapter relating to employees to also apply to interns).

79. *See* Minniti & Goldstein, *supra* note 56.

80. *See* Matthew Bultman, *NLRB Rules Grad Students Are Employees, Can Unionize*, LAW 360 (Aug. 23, 2016, 12:31 PM), http://www.law360.com/employment/articles/831269?nl_pk=6b730a14-5b55-40ee-ac74-5f908f74bfcd&utm_source=newsletter&utm_medium=email&utm_campaign=employment.

81. *Id.*

82. *See id.*

83. *See infra* Part II.C.

84. *See* Brookhouser, *supra* note 27, at 765. This decision was later overturned. *See infra* note 111 and accompanying text.

85. 293 F.R.D. 516, 539 (S.D.N.Y. 2013).

86. *See* Brookhouser, *supra* note 27, at 766 (noting that before *Glatt*, there were very few, if any, examples of unpaid interns suing under the FLSA, yet post-*Glatt* similar cases have been barraging the courts); David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L.J. 357, 390 (2016) ("In the immediate aftermath of the *Glatt* decision came a marked increase in filings of legal claims for unpaid wages by former interns."); Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PROPUBLICA (June 25, 2013), https://projects.propublica.org/graphics/intern-suits (listing lawsuits filed after the date of the *Glatt* decision).

or not their intern programs are legal.[87] Such is the problem plaguing the industry today, as internship opportunities decrease while the amount of seekers continues to steadily increase.[88] Below, this Note discusses some headline-making cases that have recently caused major shake-ups for interns in the entertainment industry.[89]

1. *Glatt v. Fox Searchlight Pictures Inc.*

Eric Glatt and Alex Footman were both interns working on Fox Searchlight movie productions.[90] They, along with two other named plaintiffs, filed a class action lawsuit claiming that they should have been categorized as employees and were entitled to back wages under the FLSA.[91] Glatt, a forty-year-old former Wall Street employee with a master's degree in business administration, accepted the internship as a way to transition into a new industry,[92] knowing it was the only way to get his foot in the door in Hollywood.[93] Advertised as an "accounting clerk," he performed duties such as running to the set to drop off cash, picking up receipts, and having checks signed,[94] as well as handling timesheets and reimbursements and delivering paychecks.[95] Footman performed similar tasks, such as "tracking purchase orders and invoices, drafting cover letters, . . . and answering telephones."[96] Though both Glatt and Footman began their internship programs knowing they were unpaid, they felt the work they did constituted employment status and deserved wages under the FLSA.[97] The central question

87. *See* Brookhouser, *supra* note 27, at 766 (noting the list of corporations involved in post-*Glatt* litigation).

88. *See* Mehroz Baig, *Unpaid Internships for Graduates Now the New Norm?*, HUFFINGTON POST (Sept. 12, 2013, 10:57 AM), http://www.huffingtonpost.com/mehroz-baig/unpaid-internships-for-gr_b_3908475.html (noting that high unemployment rates coupled with the length of the current recession has impacted the nature of jobs available).

89. *See infra* Part II.C.1–3.

90. *See* Diana Shaginian, Note, *Unpaid Internships in the Entertainment Industry: The Need for a Clear and Practical Intern Standard After the Black Swan Lawsuit*, 21 SW. J. INT'L L. 509, 516 (2015).

91. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 521-22 (S.D.N.Y. 2013).

92. Paul Solman, *How Unpaid Interns Are Exploited, Fighting Back and Winning*, PBS (Sept. 27, 2013, 11:19 AM), http://www.pbs.org/newshour/making-sense/how-unpaid-interns-are-exploit; *see also* Tripp, *supra* note 46, at 346 (noting that many experienced workers have recently sought entry-level positions due to high levels of unemployment).

93. Solman, *supra* note 92 (quoting Glatt, who stated that he "was transitioning into an industry for which that is your foot in the door . . . a third of the jobs on the UTA jobs list are internships"); *see supra* note 1 and accompanying text.

94. Solman, *supra* note 92.

95. Gardner, *supra* note 1.

96. *See* Brookhouser, *supra* note 27, at 762-63.

97. *See* Shaginian, *supra* note 90, at 516-17.

in the case became whether or not the interns fell under *Walling*'s trainee exemption.[98]

Before beginning its analysis, the New York court noted, "'[t]he Second Circuit ha[d] not addressed the "trainee" exemption,' allowing it to apply its own analysis to derive the employee versus trainee distinction."[99] Despite the defendant's urge to use the primary beneficiary test,[100] the court ultimately weighed the totality of the circumstances by looking to all six factors promoted by the DOL.[101] The court first looked at whether the training received by the interns was similar to that which they would have received in an educational environment and determined it was not.[102] Next, it looked to whether the internship was for the benefit of the intern, and though they noted the interns received incidental benefits such as a resume listing and job references, the court found Fox Searchlight to have been the real beneficiary in the relationship.[103] This step gave way to the next factor looked at by the court, which was whether the plaintiffs displaced regular employees.[104] The court did not have to ponder this question for long, as Glatt's supervisor openly stated that if he "had not performed this work, another member of [the supervisor's] staff would have been required to work longer hours to perform it, or we would have needed a paid production assistant or another intern to do it."[105] Fox Searchlight further conceded the next factor, confessing that it obtained an immediate advantage from Glatt and Footman's work.[106] It has already been mentioned that Glatt and Footman began their internships knowing they would receive no pay, however, the court felt it was important to mention that this factor holds very little weight since the FLSA does not allow employees to waive entitlement to wages.[107] The last factor, whether or not plaintiffs were entitled to a job at the end of their internships, was not considered, as there was no evidence that

98. Brookhouser, *supra* note 27, at 763.

99. *Id.* (quoting Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013)).

100. The "primary beneficiary test" considers whether the benefits received by the intern outweigh the benefits received by the business providing the opportunity. *See* Yamada, *supra* note 86, at 366.

101. *See* Brookhouser, *supra* note 27, at 763-64.

102. *See Glatt*, 293 F.R.D. at 532 ("Footman did not receive any formal training or education during his internship. He did not acquire any new skills aside from those specific to Black Swan's back office . . . .").

103. *Id.* at 533 ("Searchlight received the benefits of their unpaid work, which otherwise would have required paid employees.").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 534.

either plaintiff was in fact entitled to a job or that they thought they would be.[108]

After weighing all six factors in totality of the specific circumstances suffered by Glatt and Footman, the court found that they were improperly classified as interns and awarded them back pay.[109] The court's decision appeared to be the ruling that opened up the golden gates to wage and hour protection for all interns—paid or unpaid—who suffered from circumstances similar to Glatt and Footman.[110] Unfortunately, in July 2015, the Second Circuit Court of Appeals overturned this ruling, holding that the six-factor test was improperly applied, and that the Second Circuit should have instead used the primary beneficiary test to determine employment status.[111] Despite their victory in the appellate court, Fox Searchlight now pays all of their interns.[112]

2. *Wang v. Hearst Corp.*

As part of a putative class, Xuedan Wang filed suit against former employer, The Hearst Corporation, after working as an unpaid intern at its magazine, *Harper's Bazaar*.[113] Xuedan claimed that as an intern in the accessories department, working five days a week for eleven hours a day, she was entitled to minimum wage as an employee under the FLSA and New York Labor Law ("NYLL").[114] Both parties and the court agreed that the Supreme Court's decision in *Walling* provided the governing case law for this suit.[115] However, the parties did not agree as to which test the court should use to determine employee status under

108. *Id.*

109. *See id.* The court stated:

> [They] were classified improperly as unpaid interns and are "employees" covered by the FLSA . . . . They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. . . . They received nothing approximating the education they would receive in an academic setting or vocational school.

Id.

110. *See infra* note 133 and accompanying text.

111. *See* Glatt v. Fox Searchlight Pictures Inc., 791 F.3d 376, 383-85 (2d Cir. 2015) (explaining that the primary beneficiary test is salient for two reasons: "[f]irst, it focuses on what the intern receives in exchange for his work" and "[s]econd, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer").

112. *See* Daniel Miller, *Hollywood Intern Case Dealt Setback by Federal Appeals Court*, L.A. TIMES (July 2, 2015, 5:47 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-unpaid-hollywood-intern-legal-case-dealt-blow-by-u-s-appeals-court-20150702-story.html.

113. Wang v. Hearst Corp., 293 F.R.D. 489, 490-91 (S.D.N.Y. 2013).

114. *Id.* at 490-92.

115. *Id.* at 492.

the *Walling* exemption.[116] The plaintiffs urged the court to use the "immediate advantage" test,[117] while the defendants urged a "balancing of the benefits."[118] The court ultimately sided with the defendants, stating that the *Walling* court's focus on the totality of the circumstances, coupled with the six-factor DOL test is the correct evaluation.[119] Consequently, the plaintiffs' motion for summary judgment on that matter was denied, as there was found to be "[a] genuine dispute and material issues of fact" with respect to the first four factors of the DOL test.[120]

On appeal, the plaintiffs argued that the district court erred by failing to award summary judgment, as Hearst was unable to establish four of the six DOL criteria, and thus, the interns should have been classified by the court as employees.[121] The court referred to the final decision in *Glatt*, noting their definitive use of the primary beneficiary test to determine employee status.[122] The appeal was subsequently denied, and the Second Circuit held the internships could be deemed legal if they satisfied the educational standard.[123] In late August 2016, Judge Oetken ruled in favor of Hearst based on the internships having met the aforementioned educational standard, holding that said internships provided beneficial academic experience centered in some way around academic studies and provided hands-on training—thus, not meeting a level of employment requiring compensation under the FLSA.[124] Yet, according to Glassdoor.com, Hearst began paying

116. *Id.* at 493.

117. *Id.* ("[Plaintiffs] contend[ed] that the outcome in *Walling* 'would have been different if the railroads had obtained an immediate advantage from the trainees. . . . When an employer obtains a direct or immediate benefit from work, if has "suffered or permitted" work and must compensate for it.'").

118. *Id.* (defining the "balancing of the benefits" test as looking to the "totality of circumstances to evaluate the 'economic reality' of the relationship").

119. *Id.* at 493-94.

120. *Id.* at 494 ("Hearst has shown with respect to each Plaintiff that there was *some* educational training, *some* benefit to individual interns, *some* supervision, and *some* impediment to Hearst's regular operations . . . .").

121. Wang v. Hearst Corp., No. 13-4480-cv, 2015 WL 4033091, at *1 (2d Cir. July 2, 2015).

122. *Id.* ("As we explained fully in *Glatt*, an unpaid intern is an employee under the FLSA when the employer, rather than the intern, is the primary beneficiary of the parties' relationship.").

123. *Id.*; Jordan Weissmann, *Companies That Exploit Unpaid Interns Just Won a Huge Victory at Court*, SLATE (July 2, 2015, 4:19 PM), http://www.slate.com/blogs/moneybox/2015/07/02/second_circuit_s_black_swan_ruling_this_is_a_big_victory_for_companies_that.html.

124. *See* Matthew Guarniaccia, *Academic Benefits to Hearst Interns Sink FLSA Class Suit*, LAW 360 (Aug. 24, 2016, 6:13 PM), http://www.law360.com/media/articles/832161?nl_pk=b8c87d07-a2a0-4b7f-94aa-857c4c9c7afa&utm_source=newsletter&utm_medium=email&utm_campaign=media.

their interns above minimum wage rates since the commencement of the lawsuit.[125]

3. *Ballinger v. Advance Magazine Publishers, Inc.* (Condé Nast)

In 2014, two former interns of Condé Nast Publications filed suit alleging employee status under the FLSA.[126] The suit claimed the plaintiff-interns were entitled to minimum wage because Condé Nast did not meet two of the six DOL criteria.[127] Lauren Ballinger, an intern at *W Magazine*, claimed to have earned just $12 a day for her work delivering accessories;[128] while Matthew Leib, an intern for *The New Yorker*, was paid just $300 for the summer of 2009, and $500 for the summer of 2010—both of which he spent proofreading and editing articles for the magazine.[129] This case was filed just two days after the original *Glatt* holding in favor of unpaid interns, which is presumably what influenced Condé Nast to settle the matter.[130] Consequently, just four months later, Condé Nast shut down its internship program indefinitely.[131]

4. The Effect These Cases Have Had on the Industry

The aforementioned cases have had a ripple effect on the entertainment industry.[132] Since 2011, over thirty lawsuits have been filed concerning unpaid interns' wage and hour disputes, with a notable

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125. *See Hearst Intern Salaries*, GLASSDOOR, https://www.glassdoor.com/Intern-Salary/Hearst-Internship-Salary-E2823.htm (last updated Oct. 31, 2016).

126. *See* Aaron Taube, *Condé Nast Settled Its Unpaid Internship Lawsuit—Here's How Much Each Intern Gets*, BUS. INSIDER (Nov. 14, 2014, 4:49 PM), http://www.businessinsider.com/conde-nast-settles-unpaid-intern-lawsuit-2014-11.

127. *See id.* ("[T]heir work allegedly benefited Condé Nast and did not provide educational value.").

128. *Id.*

129. *Id.*

130. *See* Brookhouser, *supra* note 27, at 766. The Condé Nast intern settlement awarded back wages to all interns that worked for the company since June 13, 2010, under the FLSA, as well as all interns that worked for the company in the state of New York since June 13, 2007, under the NYLL. *See* Ballinger v. Advance Magazine Publishers, Inc., No. 13 Civ. 4036(HBP), 2014 WL 7495092, at *1, *3 (S.D.N.Y. Dec. 29, 2014).

131. *See* Taube, *supra* note 126. It is rumored that Condé Nast will soon be launching a paid fellowship program, which will be run quite differently than its former internship program. *See* Erika Adams, *Condé Nast Replacing Internships with Paid Fellowship Program*, RACKED (May 19, 2015, 10:00 AM), http://www.racked.com/2015/5/19/8621611/conde-nast-editorial-fellowships.

132. *See* Brookhouser, *supra* note 27, at 766 ("The list of corporations involved in post-*Glatt* litigation includes media giants such as Warner Music Group, Fox Entertainment Group, NBCUniversal, Sony, and Viacom, among others."); *see also* Rachel Feintzeig & Melissa Korn, *Colleges, Employers Rethink Internship Policies*, WALL ST. J., (Apr. 22, 2014), http://www.wsj.com/articles/SB10001424052702304049904579517671151334870 ("Since last year's class [of interns] vacated the lowest rungs of the corporate totem pole, a string of high-profile lawsuits by unpaid interns has worked its way through the courts . . . .").

increase in filings occurring after the *Glatt* decision.[133] In 2014, Casey O'Jeda filed a class action suit against Viacom[134] in which she and other interns argued that the company's program violated minimum wage and other labor laws.[135] As a result of the litigation, Viacom began paying all of its interns in 2013[136] and made a $7.2 million settlement deal to pay back wages to former interns.[137] Similarly, a New York federal judge threw out a proposed class action suit against Gawker Media LLC in March 2016, citing the holding in *Glatt*, stating that under the primary beneficiary test, the experience gained by the interns in this case outweighed the benefit provided to *Gawker*.[138] Specifically addressing the educational benefit received by the interns, the judge noted that publication through *Gawker*'s *Kotaku* provided at least as much of a benefit to the intern, a journalism student, as it did to the company.[139]

Prior to *Glatt*, interns had long bit the bullet on filing complaints out of fear of losing their potential for future employment.[140] And, while some companies have reformed their programs to offer pay to their interns, others have moved in the complete opposite direction, causing fewer opportunities to be available.[141] Although the *Wang* decision was

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133. Yamada, *supra* note 86, at 369 (citing Suen & Brandeisky, *supra* note 86); *see also* Gardner, *supra* note 1 ("[T]he [*Glatt*] decision has ushered in a wave of lawsuits against the likes of Sony, Warner Bros. and Viacom."). Additionally, a July 2015 *L.A. Times* article noted:

> [A]fter Glatt and Footman filed their lawsuit, similar cases were brought against the likes of NBCUniversal, Viacom, Warner Music Group and Condé Nast. Each of those companies reached multimillion-dollar settlements with their former workers. Those companies now pay their interns, or have done away with their programs altogether.

Miller, *supra* note 112.

134. O'Jeda v. Viacom, Inc., No. 13 Civ. 5658(JMF), 2014 WL 1344604, at *1 (S.D.N.Y. Apr. 4, 2014).

135. *Id.* The class action suit was closed as of January 2016. *See* Eriq Gardner, *Viacom Settles Intern Class Action Lawsuit (Exclusive)*, HOLLYWOOD REP. (Jan. 5, 2016, 7:46 AM), http://www.hollywoodreporter.com/thr-esq/viacom-settles-intern-class-action-761106.

136. Meg James, *Viacom Agrees to Pay up to $7.2 Million to Settle Intern Lawsuit*, L.A. TIMES (Mar. 12, 2015, 12:14 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-viacom-settles-intern-lawsuit-20150312-story.html.

137. *Id.*

138. *See* Y. Peter Kang, *Gawker Escapes Unpaid Intern FLSA Suit*, LAW 360 (Mar. 29, 2016, 9:52 PM), http://www.law360.com/media/articles/777787?nl_pk=b8c87d07-a2a0-4b7f-94aa-857c4c9c7afa&utm_source=newsletter&utm_medium=email&utm_campaign=media ("Mark's time with Kotaku was a bona fide internship in which Mark traded his labor for significant vocational and educational benefits, and these benefits outweighed those received by defendants in the form of Mark's work and the ability to evaluate him for future employment . . . .").

139. *Id.* ("The fact that Mark's work could be published (after editing) on Kotaku benefited defendants, but it benefited Mark as a journalism student at least as much.").

140. Yamada, *supra* note 29, at 232 ("[S]tudents at least may suspect that they have a legal right to compensation . . . , but they opt not to make an issue of it lest they jeopardize the benefits and future opportunities implicitly promised in return for their free labor.").

141. *See* Feintzeig & Korn, *supra* note 132 ("Some companies are moving toward paid programs. Others, like magazine publisher Condé Nast, are getting rid of internship programs

reached earlier than in Condé Nast's case, the abrupt end to its internship program may influence Hearst to follow suit.[142] Condé Nast's move was an "industry game changer," potentially influencing other industry-defendants to react similarly.[143] However, as one of the biggest magazine publishers in the world, young journalism hopefuls have long coveted a spot in Condé Nast's internship program,[144] and this is not the sort of reaction justice-seeking interns had in mind.[145] Yet, due to the lack of clear legislation, it is possible that many other companies may soon follow in Condé Nast's footsteps.[146]

If that becomes the case, many college students and graduates looking to enter the industry will be without the valuable work experience employers today require for entry-level jobs.[147] And despite the importance of obtaining a paid internship,[148] they are very hard to come by in today's economy.[149] Yet, having an internship listed on one's resume is viewed today as a prerequisite to being hired for almost every

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altogether. The pressures could result in better pay and educational experiences for interns who win the coveted openings—but fiercer competition for the spots that remain.").

142. *See* Shaginian, *supra* note 90, at 524.

143. *See id.* The Charlie Rose Show also canceled its internship program and settled on back wages for former interns. *Id.*

144. *See* Buckley, *supra* note 13.

145. *Id.*

146. *See* Brookhouser, *supra* note 27, at 766-67; *see also* Tripp, *supra* note 46, at 363 ("[A] rigid application of the Fact Sheet sends a message to employers that they must pay interns minimum wage or eliminate their internship programs altogether. As a result, many employers have become less willing to retain interns, which decreases students' and recent graduates' opportunities for gainful employment.").

147. *See* Andrew Soergel, *Paid Interns More Likely to Get Hired*, U.S. NEWS & WORLD REP. (May 5, 2015, 5:30 PM), http://www.usnews.com/news/articles/2015/05/05/study-suggests-college-graduates-benefit-more-from-paid-internships ("[P]rofessional experience—often gained through an internship—is becoming more and more important for prospective new hires.").

148. In a study conducted by the National Association of Colleges and Employers, it was found that 65.4% of the class of 2014 that completed a *paid* internship received full time job offers prior to graduation. NAT'L ASS'N OF COLLS. & EMP'RS, THE CLASS OF 2014 STUDENT SURVEY REPORT 40-41 (2014), http://career.sa.ucsb.edu/files/docs/handouts/2014-student-survey.pdf.

149. *See* Baig, *supra* note 88 ("[T]here is widespread agreement that the number [of college graduates taking unpaid internships] has significantly increased, not least because the jobless rate for college graduates age 24 and under has risen to 9.4 percent . . . ."); *see also* Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183, 1187 (2015) ("Unpaid internships are particularly desirable in fields where barriers of entry are particularly high and paid internships are rare, including industries such as entertainment, public relations, and publishing."); Dawn Gilbertson, *Glamorous Internships with a Catch: There's No Pay*, N.Y. TIMES, Oct. 19, 1997, at 16 ("Internship experts estimate that 50 to 60 percent of all student internships are unpaid. The figure is closer to 100 percent in glamorous fields like entertainment and politics . . . .").

job.[150] Many current and former industry interns, despite feeling exploited, understand the necessity of what they are doing and willingly participate in these unpaid programs simply to get their foot in the door.[151] Because of this willingness, many companies are currently not feeling the pressure to reform to paid programs.[152] What needs to be considered is a way for companies to continue offering internships without the fear of litigation, while also extending protection to the unpaid interns from wage and hour abuse.[153]

III. THERE CURRENTLY IS NO REGULATION PROTECTING UNPAID INTERNS FROM WAGE AND HOUR ABUSE

Although multiple jurisdictions across the country have recently amended their labor laws to extend protection to unpaid interns from discrimination and sexual harassment, missing still from these amendments is protection from minimum wage and hour abuse.[154] The current DOL test is not federally enforced, and even if it were, it only applies to internship situations where an employment relationship is found.[155] Arguably, the most important issue to be discussed is that the federal government is pushing a test that too heavily focuses on which party is receiving the benefit, rather than which party needs more protection.[156] Below, Subpart A discusses issues that have arisen in the wake of *Walling*'s trainee exemption, including the effect of requiring interns to receive academic credit.[157] Subpart B details the outrageous lack of enforcement by the WHD for internship programs.[158]

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150. *See* Tripp, *supra* note 46, at 346 ("[I]nternships are a matter of economic survival, as they provide the work experience that is necessary to be competitive in today's labor market."); *see also* Soergel, *supra* note 147 (quoting Matt Sigelman, CEO of Burning Glass Technologies, who stated that "[i]t really feels increasingly like you're expected to have the job skills that get you the internship that gets you the job").

151. *See supra* note 1 and accompanying text.

152. *See* Kaitlin Madden, *The Ongoing Debate over Unpaid Internships*, CHI. TRIB. (Feb. 14, 2012), http://articles.chicagotribune.com/2012-02-14/classified/chi-unpaid-internship-rules-20120214_1_unpaid-internships-companies-in-competitive-industries-past-interns ("Companies in competitive industries are well aware that students will line up to work for them without pay.").

153. *See infra* Part IV (proposing implementation of capped hours for unpaid interns, coupled with an "intern specific overtime" for all hours worked in excess).

154. *See supra* Part II.B.

155. *See* WAGE & HOUR DIV., *supra* note 5.

156. *See* Barbara E. Hoey, *The Unpaid Internship: Who "Really" Benefits from This Arrangement?*, LAB. DAYS (July 10, 2015), http://www.labordaysblog.com/2015/07/the-unpaid-internship-who-really-benefits-from-this-arrangement.

157. *See infra* Part III.A.

158. *See infra* Part III.B.

A. *The* Walling *Trainee Exemption Leads to the Wrong Kind of Reformation for Intern Legislation*

Since the Supreme Court ruled in *Walling*, courts look to the holding as guidance in determining intern status.[159] Despite not being federally enforceable, multiple jurisdictions have interpreted ways of determining intern status based on the DOL's six factors.[160] The problem here is that the DOL test is asking the wrong question.[161] The test focuses heavily on whether the intern is receiving the benefit of educational training similar to what he or she would receive in a vocational school, as opposed to training tailored to that particular job.[162] However, such educational training is not beneficial to all interns.[163] First, not all interns are students; many are post-graduates looking to enter the work force or older workers seeking to change fields.[164] Second, the point of an internship, traditionally, is to teach young workers about the industry in which they are interested.[165] Focusing on educational training is not helpful to a student looking to gain real world experience for his or her future career.[166]

Further, the DOL test creates only two possible categories: (1) interns who fall into the employee category and are thus entitled to minimum wage under the FLSA; and (2) legally unpaid interns who

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159. *See* Malik, *supra* note 149, at 1197.

160. *See* Shaginian, *supra* note 90, at 515.

161. *See supra* Part II.A.2.

162. Malik, *supra* note 149, at 1193 ("The WHD advises that the more an internship program is structured away from the employer's actual operations, such as providing an academic experience or skills pertaining to several employment settings, the more likely it is to be viewed as nonpaid work, acceptable as an unpaid internship.").

163. *See* Tripp, *supra* note 46, at 346-47. For example:

> [I]nternships provide many intangible benefits that are important to a student's education and difficult to replicate in a permanent job. Internships allow students to explore an industry before taking on the . . . debt required to obtain a postsecondary education. Other intangible benefits include building basic workplace skills like accountability, work ethic, leadership, and responsibility. Unfortunately, courts often fail to consider the value of intangible benefits when analyzing the legality of unpaid internships.

Id.

164. *See* Levin-Epstein, *supra* note 14 (quoting Internships.com CEO, Robin Richards, who stated, "We have noticed that 20 percent of the people searching our site for internships are either recent graduates or older. So it's clear that internship seekers are no longer undergrads alone").

165. *See* Yamada, *supra* note 29, at 219 ("One of the main purposes of an internship is to expose an individual to the workings of the real world."); *see also* Kevin Carey, *Giving Credit, but Is It Due?*, N.Y. TIMES, Feb. 3, 2013, at 12 ("The best way to learn business often involves working in a business.").

166. *Cf.* Ariel Kaminer, *The Internship Rip-Off*, N.Y. TIMES MAG., Mar. 11, 2012, at MM20, http://www.nytimes.com/2012/03/11/magazine/the-internship-rip-off.html (stating that even internships that violate employment laws are sometimes beneficial to the intern, giving them a firsthand glimpse inside).

meet the "trainee exemption" and do not qualify for any protection under the FLSA.[167] Even more concerning is that many companies think requiring college credit puts them in a safe space legally,[168] when it actually creates a grey area.[169] The WHD has twice noted in opinion letters that students receiving college credit for internships most likely will not be found to have an employee relationship.[170] On the one hand, there are students who are not being paid to work but are required to register for college credit, for which they are paying full tuition.[171] On the other, there are post-graduates who do not qualify for college credit since they are no longer in school, and thus are falling between the cracks into illegally unpaid internship programs.[172] Neither companies nor young workers want to see internship opportunities continue to disappear due to confusion over legality.[173] This Note proposes a solution that may help both sides come out on top.[174]

1. The Problem with Unpaid Interns Earning College Credit

According to the FLSA, internships are supposed to be for the benefit of the student; and yet, requiring college credit does not necessarily exempt the employer from a violation.[175] However, as previously mentioned, many companies require their interns to be

167. WAGE & HOUR DIV., *supra* note 5.

168. Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it ("Fox and others seem to argue that they can get around not paying interns by offering college credit . . . .").

169. Yamada, *supra* note 29, at 217 ("[S]tudent interns now exist in a legal void, falling between the cracks of legal protections for workers and legal protections for students.").

170. *Id.* at 229. One letter stated: "[I]f 'this internship program is predominately for the benefit of the college students, we would not assert an employment relationship.'" *Id.* (quoting U.S. Dep't of Labor, Opinion Letter (Mar. 13, 1995). Another letter stated the following: "In situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program . . . involv[ing] the students in real life situations and provid[ing] the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists . . . ." *Id.* (quoting U.S. Dep't of Labor, Opinion Letter (May 8, 1996)).

171. *See infra* notes 178-79 and accompanying text.

172. *See* Sanburn, *supra* note 168 ("Fox and others seem to argue they can get around not paying interns by offering college credit, but Glatt says he wasn't enrolled in school at the time, and to the best of his knowledge, neither were any of the dozen or so unpaid interns."); *see also infra* Part III.A.2.

173. *See* Gilbertson, *supra* note 149 ("And both interns and the businesses seem to enjoy, or at least tolerate, the benefits of the system enough to not rock the boat.").

174. *See infra* Part IV.

175. *See* Soergel, *supra* note 147 (quoting Michael Harper, professor at Boston University School of Law, who stated that "if they're doing any work that's useful to the employer, it's a violation of the Fair Labor Standards Act for the employer not to pay them a minimum wage, even if they're getting school credit").

eligible to receive college credit as a prerequisite to joining their programs.[176] Further, it is often through college career offices that student interns first learn about these programs.[177] The school schedules the student to interview with a company; once the student is subsequently hired as an intern, they then must pay tuition to the school for the necessary credit.[178] Thus, not only is the student intern receiving no wage in return for their hard work, they are being forced to pay to do said work in the form of tuition credit to their school.[179]

In such situations, the student intern is clearly not the beneficiary of the relationship;[180] however, this is not the type of benefit courts are looking at when determining the legality of an internship.[181] Due to the stringent "educational benefit" guidelines of the DOL fact sheet,[182] many internship programs that award college credits have skirted liability for nonpayment of wages, though this certainly does not apply to all.[183] Further, interns in today's industry are looking to receive practical working experience.[184] Specifically, entertainment industry interns have been accustomed to starting at the bottom for years, fully aware that the unpaid mailroom job at a major talent agency is much more valuable for their future career than a paid job at a restaurant.[185] But what if the unpaid intern is not a student at all? The so-called "educational benefit"

176. *See supra* note 168 and accompanying text.

177. *See* PERLIN, *supra* note 22, at 70-71 (quoting a college career counselor, who discussed multiple large-scale companies contacting her with suspicious offers of illegal internship programs for students and stated: "Our college has noticed an increase in elaborate payment schemes employers are concocting to try to get around the laws").

178. *See* Carey, *supra* note 165. The situation can be stated as follows:

> [T]he academic internship, in which colleges get tuition to not teach students and businesses pay little or nothing for students' work. Tuition for for-credit internships is free money. Instead of receiving no wages, students are, in effect, receiving a negative wage. They are paying for the privilege of working.

Id.

179. *Id.*

180. *See* Yamada, *supra* note 86, at 379.

181. Unlike the test used by courts, the "primary beneficiary test" would consider whether the benefits received by the intern outweigh the benefits received by the business providing the opportunity. *See id.* at 366.

182. *See* WAGE & HOUR DIV., *supra* note 5.

183. *See* Blair Hickman & Christie Thompson, *When Is It OK to Not Pay an Intern?*, PROPUBLICA (June 14, 2013, 1:05 PM), http://www.propublica.org/article/when-interns-should-be-paid-explained ("Many companies attempt to use academic credit as legal justification for an unpaid internships. But this week's 'Black Swan' ruling suggests college credit is not a reason to not pay your interns, a move that, as [David] Yamada put it, opens an 'interesting door.'").

184. Yamada, *supra* note 29, at 219 ("One of the main purposes of an internship is to expose an individual to the workings of the real world.").

185. *See* Kaminer, *supra* note 166, at MM20 (stating that even internships that violate employment laws are sometimes beneficial to the intern, giving them a "firsthand glimpse" inside).

requirement is of no use to a non-student who cannot earn college credit for time worked.[186]

2. Where Post-Graduates Fit In

> *Given we were light years from this being a self-sustaining business, and that with the economy in the sh***er we didn't have excess financial resources to subsidize this effort, I decided to use unpaid interns. One silver lining of a "great recession" that we are now in is that there are a lot of incredibly talented people without jobs, or who have lost their jobs.*
> – Mark Cuban[187]

The government is ignoring the fact that a growing number of interns in this country are not college students.[188] Post-college graduates and career-changers are a large group of persons seeking internships in today's job market.[189] However, most companies attempt to avoid paying their interns by adhering to the strict educational training guidelines, which is not beneficial to these non-student interns.[190] Not only are non-student interns ineligible to receive college credit,[191] but they are also failing to receive the real-life work experience they are looking for when they accept a position in such an internship program.[192] That is not what these people are signing up for.[193] Non-student interns want to work—they want to learn about an industry and how to perform a specific job.[194] Just like student interns, they are happy to take on the

186. *See* Sanburn, *supra* note 168 (stating that companies such as Fox use the college credit excuse to get around paying interns, yet its legal opponent, Eric Glatt, was not enrolled in school when he worked for them and says that, to his knowledge, neither were any of the other unpaid interns).

187. PERLIN, *supra* note 22, at 123.

188. *See* Levin-Epstein, *supra* note 14 (quoting Internships.com CEO, Robin Richards, who stated that "[w]e have noticed that 20 percent of the people searching our site for internships are either recent graduates or older" and it is thus "clear that internship seekers are no longer undergrads alone").

189. *Id.*

190. *See* 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. As a college graduate, Lisa Denmark was not able to receive college credit, and remained uncompensated in any way, despite the other interns receiving credit from their schools. *See id.*

191. *See id.*

192. PERLIN, *supra* note 22, at 68-71 (discussing multiple examples of unfulfilling internship programs).

193. *See* Levin-Epstein, *supra* note 14 (discussing the advantages of an internship, including keeping your work and social skills sharp, as well as aiding in changing careers).

194. *See* PERLIN, *supra* note 22, at 68-71.

subpar assignments generally associated with an internship, if it means getting their foot in the door at their dream job.[195]

However, in today's still-suffering economy, many post-graduate job seekers are resorting to internships as a way to simply enter a field.[196] And, with so many internships being unpaid, it is common for these persons to take such a position in the hopes of working their way up.[197] But what value does an internship that only offers college credit have to post-college graduates? None.[198] Take, for example, former *Vogue* intern, Lisa Denmark.[199] Though she was not one of the plaintiffs in the case against Condé Nast, which caused it to end the internship program indefinitely, she felt the program ending was a "blessing."[200] Calling it "one of the worst internships [she] ever had," Ms. Denmark quit after two months of twelve-hour days spent running personal errands for editors, being scolded when the tape on "mood boards"[201] was not laid correctly, and crying herself to sleep three nights a week.[202] To top it all off, Ms. Denmark could not even receive college credit for her work, as she had already graduated.[203] Non-student interns like Ms. Denmark are not being paid actual wages and are not eligible to receive academic credit, and thus fall into the grey area of illegality.[204]

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195. *See* Saba Hamedy, *Climbing the Hollywood Ladder, One Coffee or Script Delivery at a Time*, L.A. TIMES (May 23, 2014, 1:00 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-hollywood-production-assistants-20140525-story.html ("Like many, Erickson moved to Hollywood to pursue filmmaking, and he's working as a PA in hopes of one day rising in the industry as many have done before him."); Madden, *supra* note 152 (stating that students working in fields such as the entertainment industry are often willing to work for free in order to get a leg up and unpaid internships are "a rite of passage . . . that most students in these fields are familiar with and accepting of").

196. *See* Levin-Epstein, *supra* note 14 ("If your industry is failing or you're just not that into your job anymore, an internship can grease the wheels of change."); Ross Perlin, Opinion, *Today's Internships Are a Racket, Not an Opportunity*, N.Y. TIMES, http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/todays-internships-are-a-racket-not-an-opportunity (last updated Feb. 6, 2012, 12:04 PM) ("Youth unemployment hovers above 18 percent . . . . The entry-level job is fast becoming an endangered species. . . . Meanwhile, the labor of unpaid interns has quietly replaced or displaced untold thousands of workers.").

197. *See* PERLIN, *supra* note 22, at 69 (detailing the experience of a recent graduate who was unable to gain employment and "jumped on the chance" to work in a small start-up company where the employer strung the interns along with claims of future pay).

198. *See* Schuster & Fleming, *supra* note 190.

199. *Id.*

200. *Id.*

201. A "mood board" is a tool used in creative industries that incorporates inspirational elements to help a designer develop their ideas for a project. *Why Mood Boards Matter*, WEB DESIGNER DEPOT (Dec. 30, 2008), http://www.webdesignerdepot.com/2008/12/why-mood-boards-matter.

202. Schuster & Fleming, *supra* note 190.

203. *Id.*

204. *See* PERLIN, *supra* note 22, at 79 ("In the eyes of the law, unpaid interns are neither

Further, many industries have come to value internships on a resume as a sign of prior training in the field.[205] Requiring companies to adhere to educational training standards not only takes away from the training level these employers are expecting of their future hires, but also the training level interns expect to receive from the internship.[206] In recent years, while the job market has been down, unpaid internships have gained new traction, becoming a stepping-stone towards new careers, job openings, and training for higher levels.[207]

B. Lack of Enforcement by the Wage and Hour Division

Under the WHD, violations of the FLSA in internship programs are extremely underenforced,[208] which is a major source of the problems detailed above.[209] Under the FLSA, Congress gave the DOL "broad powers to enforce and interpret" the Act, which it has not used.[210] Operating on a "'worst-first' basis," the WHD looks to the seriousness and extent of the violation in complaints to determine order of response.[211] However, it is not uncommon for intern abuse to go unreported, as many unpaid interns do not want to do anything that

students nor employees; they are invisible.").

205. *See* Bennett, *supra* note 30, at 296 ("Internships also make students more marketable to other employers."); *see also* Jacquelyn Smith, *Internships May Be the Easiest Way to a Job in 2013*, FORBES (Dec. 6, 2012, 2:10 PM), http://www.forbes.com/sites/jacquelynsmith/2012/12/06/internships-may-be-the-easiest-way-to-a-job-in-2013 (citing an Internships.com survey that found sixty-six percent of employers believe relevant work experience is one of the most important factors to consider when making hiring decisions, much more so than strong academic performance).

206. *See* Smith, *supra* note 205 (noting that interns get to "test-drive a career" before committing, while employers get the benefit of "find[ing] talent they need to help grow their business without relying solely on just a short interview").

207. *See* Malik, *supra* note 149, at 1187 ("High unemployment rates for recent college graduates have led to a hyper-competitive job market, causing internships to become a highly coveted way of getting one's foot in the door."); *see also* Daniel Schwartz, *Black Swans and Trojan Horses: Why That Internship Program May Not Be Legal*, CONN. EMP. L. BLOG (June 18, 2013), http://www.ctemploymentlawblog.com/2013/06/articles/black-swans-and-trojan-horses-why-that-internship-program-may-not-be-legal (quoting Suzanne Lucas in a discussion of the impact the original *Glatt* holding would have for student interns, and how it would hurt college students to require they receive only an educational benefit from their internship for it to not be illegal).

208. PERLIN, *supra* note 22, at 71-72.

209. *See id.* at 71 ("[T]he most important factor by far in the rise of illegal internships is the failure of the Wage and Hour Division to enforce the law.").

210. *See* Bennett, *supra* note 30, at 308; *see also* PERLIN, *supra* note 22, at 72 ("[E]nforcement by the Wage and Hour Division has sunk to dangerously low levels.").

211. Bennett, *supra* note 30, at 309.

might affect their potential for future employment.[212] Thus, many companies are not afraid to skirt around the laws.[213]

Interns should be able to rely on the WHD to enforce the FLSA without having to worry about potentially jeopardizing their careers.[214] The DOL has the capacity and the authority to act against illegal internships by "target[ing] high-violation industries and . . . protect[ing] the more vulnerable workers who may not come forward."[215] The WHD has claimed to be increasing its enforcement since the rise in litigation, but that remains to be seen.[216]

But, is enforcement by the WHD what unpaid interns actually want? Many illegal internships offer workers actual office experience, which interns would not receive if companies were forced to adhere to DOL standards.[217] Thus, not filing complaints may represent the interns of the world acquiescing to the current unpaid standard for a potential opportunity to further their careers.[218]

IV. THE NECESSITY FOR FEDERAL REGULATION PROTECTING UNPAID INTERNS FROM WAGE AND HOUR ABUSE

Entertainment industry interns today are seen as the free-labor "entry level assistant."[219] Employers trying to skirt federal and state

212. *See id.* at 311 ("Unpaid interns do not want to ruffle feathers in their industry just as they are getting started. . . . An intern's reluctance to complain when worrying about finding a permanent job after graduation is only natural."); *see also* Kara Brandeisky & Jeremy B. Merrill, *How the Labor Department Has Let Companies Off the Hook for Unpaid Internships*, PROPUBLICA (Apr. 9, 2014, 1:59 PM), http://www.propublica.org/article/how-the-labor-department-let-companies-off-hook-for-unpaid-internships ("Instead of proactively investigating employers that advertise illegal internships, the department has decided to rely on complaints—even though the agency admits unpaid interns are hesitant to complain, for fear of endangering their future career prospects.").

213. *See* Bennett, *supra* note 30, at 311-12 ("[E]mployers do not have any incentive not to continue their unpaid intern programs.").

214. *See* PERLIN, *supra* note 22, at 73 (stating that, according to a National Employment Law Project report, "[t]he WHD cannot rely on worker complaints to drive its enforcement programs").

215. *Id.*

216. *See id.* at 72-73 ("The stagnation and decline of the Wage and Hour Division has been stark—from 1975 to 2004, a period when the number of workplaces in its purview increased by 112 percent, the number of staff investigators fell by 14 percent . . . . The trend has been reversed under the Obama administration, with 250 new investigators being hired for Wage and Hour alone and promises of a return to vigorous enforcement. But the results remain to be seen."); *see also* Brandeisky & Merrill, *supra* note 212 ("Two years after the U.S. Department of Labor announced its intent to crack down on unpaid internships . . . the Labor Department dropped the case . . . .").

217. Laura Fortman of the WHD has said, "[W]e have heard that many individuals view unpaid internships as a way to get their foot in the door and that may lead to a reluctance to file a complaint." Brandeisky & Merrill, *supra* note 212.

218. *See id.*

219. *See* Dominic Patten, *NBCU Slapped with Latest Intern Lawsuit*, DEADLINE (July 3, 2013, 11:26 AM), http://deadline.com/2013/07/nbcuniversal-slapped-with-latest-intern-lawsuit-535062.

wage and hour laws readily take advantage of young workers eager to break into the magical world of Hollywood,[220] knowing that if one intern complains there are plenty more candidates waiting to snatch away his or her position.[221] But, that does not justify the horrendous way interns are treated.[222] It is important for the entertainment industry, as well as all other industries, to begin recognizing interns as valuable players at their companies and not just someone they can force to run menial tasks.[223] College students and post-graduates alike expect a learning experience from their internships and, because of recent litigation, are receiving more of a classroom-type training session.[224] While this is not fair, neither is the treatment they readily accept just to get an "in" at the company they dream of actually working at one day.[225] The issues outlined above stem from one major problem: no federal regulation governing unpaid internships.[226] Therefore, this Note proposes the DOL issue a federal regulation addressing "intern specific overtime" pursuant to the FLSA.

A few states have started the trend of extending employee-employer discrimination laws to interns, and hopefully that will continue to grow.[227] However, the one protection interns in this country do not receive is that from wage and hour abuse.[228] Hopefully, the recent

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"A key part of NBCUniversal's success are the hundreds of unpaid or underpaid interns who work for it as production assistants, researchers, and delivery people, but receive no or very little compensation for their work," states the twenty-three-page complaint filed by Jesse Moore and Monet Eliastam, on behalf of a class, against NBCUniversal. *Id.* (quoting Class Action Complaint at 2, Moore v. NBCUniversal, Inc., No. 13 CV 4634 (S.D.N.Y. July 3, 2013)); *see also* Sanburn, *supra* note 168 ("[T]asked with the responsibilities of production assistants, bookkeepers, secretaries and janitors without wages. . . . These were entry-level positions that were being filled by unpaid hands."); Katy Waldman, *Get Your Own Damn Coffee!*, SLATE (Feb. 13, 2012, 6:10 PM) http://www.slate.com/articles/business/moneybox/2012/02/intern_xuedan_wang_sues_harper_s_bazaar_why_don_t_more_unpaid_interns_protest_.html ("The lawsuit claims, 'Unpaid interns are becoming the modern-day equivalent of entry-level employees,' except when it comes to compensation.").

220. *See* Madden, *supra* note 152.

221. Kaminer, *supra* note 166 ("You have no standing to make demands . . . . A thousand eager aspirants are waiting for the chance to take your position. Start issuing ultimatums, and one of those lucky suckers will get her wish.").

222. *See* Kaavya Asoka, *Interns Aren't Just Cheap Labor to Abuse: They're Workers—And They Deserve Pay*, GUARDIAN (May 7, 2014, 7:45 EDT), http://www.theguardian.com/commentisfree/2014/may/07/unpaid-internships-unfair-cheap-labor-abuse ("[U]nderpaid and ignored almost by definition, interns have also been sexually harassed and even worked to death.").

223. *See supra* note 152 and accompanying text.

224. *See supra* text accompanying notes 123-24.

225. Asoka, *supra* note 222 ("Driven by fear of a bad economy and the fantasy of 'getting a foot in the door', hordes of young graduates put up with a lot . . . .").

226. *See supra* Part III.

227. *See supra* Part II.B.

228. *See supra* note 79 and accompanying text.

growth in legislation protecting unpaid interns from workplace harassment and discrimination can be viewed as a first step towards total reform of internship programs.[229] The next step would then be the proposed regulation, in Subpart B, which would require companies that wish to continue hiring unpaid interns to cap the number of hours the interns work per week at twenty.[230] After twenty hours, the employer would be required to pay the intern a specified "overtime" wage. Under this proposed regulation, companies can continue to run their internship programs without having to adhere to the strict "educational training" guidelines of the DOL, and interns will enjoy the benefit of not being overworked, being compensated for their consensually agreed upon overtime, and receiving specified training for their future career.[231] Subpart A details the introduction of recent litigation to the Senate that exemplifies the necessity for a federal regulation.[232]

A. A Call for Protection for Unpaid Interns

On January 11, 2016, the House of Representatives passed a bill, the Unpaid Intern Protection Act,[233] extending protection from workplace discrimination to unpaid federal interns.[234] Part of a trio introduced by the Democrats,[235] one of the other two bills would specifically apply to unpaid interns working in the private sector.[236] Despite unanimous House-passage of the bill (arguably indicating a strong showing of support in Congress for protection of all unpaid interns),[237] Republicans may be reluctant to pass a bill aimed at private businesses, as they have been reluctant in the past to impose any new

229. *See* Samantha Cooney, *Congress Might Grant More Protection to Unpaid Interns—But There's a Catch*, MASHABLE (Jan. 15, 2016), http://mashable.com/2016/01/15/congress-might-grant-more-protection-to-unpaid-interns-but-theres-a-catch/#yPtZPnyep5q5 (noting that questions regarding legal status of interns have only begun to arise in the last few years, and such questions will not simply go away despite the recent introduction of legislation on the matter).

230. *See infra* Part IV.B.

231. *See supra* text accompanying notes 193-94.

232. *See infra* Part IV.A.

233. H.R. 3232, 114th Cong. (2015).

234. Dave Jamieson, *House Passes Bill to Protect Unpaid Interns from Discrimination*, HUFFINGTON POST (Jan. 11, 2016, 8:39 PM), http://www.huffingtonpost.com/entry/house-interns-discrimination_us_56944702e4b09dbb4bac5dbd.

235. *See* Moses Frenck, *Discrimination Laws Do Not Extend to 'Unpaid' Interns*, DIVERSITYINC (July 31, 2015), http://www.diversityinc.com/news/discrimination-laws-do-not-extend-to-unpaid-interns.

236. H.R. 3231, 114th Cong. (2015); *see also* Jamieson, *supra* note 234.

237. *See* Cristina Marcos, *House Votes to Establish Protections for Unpaid Federal Interns*, HILL (Jan. 11, 2016, 7:10 PM), http://thehill.com/blogs/floor-action/house/265494-house-votes-to-to-protect-unpaid-federal-interns ("[The bill] [p]assed easily by a vote of 414-0 . . . .").

legislation that can lead to lawsuits from workers.[238] Further, under the bill, the definition of "intern" would be clarified to mean "someone who performs uncompensated voluntary service in an agency to earn credit awarded by an educational institution *or to learn a trade or occupation*," thus expanding the reach of who qualifies as an intern and eliminating the need to qualify as an "employee" to receive protection under the FLSA.[239]

Yet, despite multiple states (and now the federal government) enacting and amending legislation to afford discrimination protection to unpaid interns, there still remains no protection from wage and hour abuse.[240] What has not yet been discussed in this Note is an existing test, law, or regulation that fixes this overarching problem.[241] As stated above, the federal intern bill is likely to pass through the Senate as it did the House, however the business sector-aimed portion is unlikely to prove as successful.[242] Thus, this Note proposes a federal regulation be implemented by the DOL, pursuant to their authority under the FLSA to enforce the Act. This solution both addresses the abuse of overworked and un(der)paid interns, as well as encourages companies to keep their internship programs alive.[243] The DOL, as a government agency, is awarded deference in its rulemaking authority, and as such, a regulation would be easier to pass than a bill proposed to Congress.[244]

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238. Jamieson, *supra* note 234. The bill, which was supported by the Democrats, was passed by a Republican-controlled House, but still needs to pass through a Republican-controlled Senate. Zachary J. Liszka, *Current Laws Allow Employers to Discriminate, Harass and Retaliate Against Unpaid Interns*, LISZKA L. FIRM (Jan. 13, 2016), http://www.liszkalaw.com/unpaid-interns-may-gain-right-to-sue-for-workplace-discrimination.

239. Frenck, *supra* note 235 (emphasis added).

240. *See* PERLIN, *supra* note 22, at 64 ("[I]t's not just about minimum wage. A host of other, related rights are at stake with illegal internships . . . ."); *see also* Randi W. Kochman & Jason R. Finkelstein, *There Is Still No Such Thing as a Free Lunch: The Rise of Collective Action Claims for Wages by Unpaid Interns and Related Legislation*, N.J. LAW., Dec. 2014, at 22, 24.

241. Note, the DOL is close to passing a proposed rule that would expand overtime pay beyond the list of employees that currently qualify. *See* Aaron Vehling, *Employment Legislation and Regulation to Watch in 2016*, LAW 360 (Dec. 24, 2015, 8:38 PM), https://0-www.law360.com.libweb.hofstra.edu/articles/739486/employment-legislation-and-regulation-to-watch-in-2016.

242. Cooney, *supra* note 229.

243. *See infra* Part IV.B.

244. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 550-51 (1978) (referencing 42 U.S.C. § 2201(p) (2012), under which the Natural Resources Defense Council has general authority to "make, promulgate, issue, rescind and amend such rules and regulations as may be necessary"); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944). Although *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is currently the governing law on agency deference, it is important to note that in January 2017, the House passed a bill aimed at repealing the *Chevron* deference standard. *See* H.R. 5, 115th Cong. (2017).

B. Proposed Regulation Strictly Applying to Unpaid Internship Programs Pursuant to the Fair Labor Standards Act

It is beneficial to both companies and workers that internship programs continue to grow and remain a part of the U.S. job economy.[245] Without internships, students and other young workers would not have the opportunity to gain vital experience and working skills, and companies would not have the opportunity to save money and scout talent for potential employees.[246] In an effort to repair this social balance, a federal regulation capping the number of hours worked per week by interns at twenty hours should be implemented by the DOL.[247] Coupled with that should be an "intern specific overtime" wage, which will come in to play when unpaid interns agree to work over the capped hours, as they consensually see fit.[248] Thus, companies would be able to maintain the same type of internship programs they previously had without facing the possibility of liability, while young workers gain the benefit of not being overworked, as well as being rewarded with overtime pay for the extra hours they put in.[249]

Admittedly, this proposal is not a perfect fix.[250] However, neither is the current DOL test, nor the proposed federal intern bill.[251] Each of these only aims to fix one specific issue interns face.[252] The DOL test focuses on determining intern versus employee status when examining legality of an internship program.[253] However, as shown above, the "educational benefits" required by this test are not the type of benefits interns in the U.S. job market are looking for when accepting an internship.[254] They want experience, contacts, and potential for future

245. *See* Smith, *supra* note 205 ("The [Internships.com survey] results show that internships truly have become the 'new interview' in the job search process for students and employers alike.").

246. *Id.* (quoting Stuart Lander, from the Chief Marketing Office of Internships.com, who stated, "Not only can job-seeking students and college graduates land full-time jobs through internships—but they also get a chance to test-drive a career before committing. 'Meanwhile, employers get the opportunity to find the talent they need to help grow their business without relying on just a short interview'").

247. *See* Waldman, *supra* note 219 (summarizing the experience of Xeudan Wang, who sued *Harper's Bazaar* for failing to pay to her minimum wage and overtime pay during her unpaid internship, at which she usually worked around fifty-five hours per week).

248. *See id.*

249. *See* Hoey, *supra* note 156 ("[N]ow young people who truly crave the experience of an internship are not looking at a future where companies who cannot afford to pay simply throw up their hands and decide that they will not bother to sponsor such programs.").

250. *See, e.g.*, *supra* Part II.C.2.

251. *See supra* Parts II.A.2, IV.A.

252. *See supra* Part III.

253. WAGE & HOUR DIV., *supra* note 5.

254. *See supra* Part III.A.1.

employment.[255] As a government agency, the DOL has rulemaking authority that allows it to implement regulations pursuant to the FLSA, provided it follows the necessary procedures.[256] Reshaping the FLSA through the DOL's rulemaking process would arguably be a much easier route to success than passage of the proposed federal bill, as Congress has no vote when an agency makes amendments to its own rules.[257] That is why regulation regarding interns needs to be reexamined to better benefit both the intern and employee, thus focusing on the actual problem with current internship programs: wage and hour abuse.[258]

Moreover, newly enacted state legislation and the proposed federal bill are steps in the right direction for intern regulation reform.[259] Providing interns with the same types of protection from harassment and discrimination as awarded to employees is a positive acknowledgement of their misclassification.[260] Thus, this proposed regulation to include unpaid intern protection from wage and hour abuse under the FLSA, is the logical next step.[261] Under the proposed regulation, companies would be able to maintain the same type of internship programs they previously had without facing the possibility of liability—while young workers would gain the benefit of not being overworked—as well as being rewarded with overtime pay for the extra hours they willingly agree to work.[262]

Implementing this regulation under the FLSA would provide uniformity and fairness across the courts when determining liability in unpaid intern cases.[263] The implementation of a federal regulation will

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255. *See 8 Career Benefits of an Internship*, SIMPLYHIRED BLOG (July 16, 2013), http://www.simplyhired.com/blog/jobsearch/job-search-tips/8-career-benefits-internship.

256. *See* 5 U.S.C. § 553 (2012) (outlining the informal rulemaking procedures for agencies, which include: notice of proposed rulemaking to the public, followed by a notice and comment period, and a statement of basis and purpose justifying the reasoning for the proposed rule); *see also supra* note 244 and accompanying text.

257. *See* 5 U.S.C. § 553; *see also* Cooney, *supra* note 229 (noting that the "forecast for the companion bill [to the bill protecting federal interns] that would grant the same rights to interns working in private business . . . isn't so rosy—because the Republican-controlled Congress is reluctant to place more restrictions and controls on businesses").

258. *See supra* note 79 and accompanying text.

259. *See* Jamieson, *supra* note 234; *supra* Part II.B.

260. *See supra* notes 77-78 and accompanying text (explicating New York City's re-classification of interns to extend to them certain protections previously only provided to employees).

261. *See* Jamieson, *supra* note 234.

262. *See* Hoey, *supra* note 156 ("[N]ow young people who truly crave the experience of an internship are not looking at a future where companies who cannot afford to pay simply throw up their hands and decide that they will not bother to sponsor such programs.").

263. Because the DOL fact sheet does not hold the force of law such that it can be federally enforced, courts across the country use varying tests premised upon the six-factor test. WAGE & HOUR DIV., *supra* note 5; *see supra* note 46 and accompanying text.

also increase WHD enforcement by requiring the DOL to proactively seek out illegal internship programs, thus not relying on vulnerable interns to lodge a complaint before looking into the matter.[264] This is important because, as they currently exist, unpaid internships are illegal, and yet many companies and workers are willingly participating in them.[265] Under the proposed regulation, there will be guidelines that allow companies that are currently running illegal internship programs to continue to offer real-life work experience to willing participants, while setting boundaries to protect the unpaid interns from being overworked.[266] This may also encourage companies, such as Condé Nast, to bring back their internship programs that greatly benefited so many in the past.[267] Leveling the social balance will result in better working conditions for interns and reduce liability for companies who utilize voluntary free labor.[268]

V. CONCLUSION

In recent years, since the surge of litigation on this topic, multiple scholarly works have suggested ways to reform unpaid internships.[269] One piece suggests a test that focuses on "the objective benefits available to the intern and the subjective expectations of the employer," which would enable courts to "easily weed out exploitative, illegal internships."[270] Another work, aimed specifically at student interns, suggests the Supreme Court-approved "totality-of-the-economic-

264. *See* Gardner, *supra* note 1 (quoting assistant director of University of California, Los Angeles Producers Program, Ben Harris, who stated that intern programs need to be vigilantly policed); *see also* Gilbertson, *supra* note 149 (stating that businesses get away with not paying interns because the law is not aggressively enforced).

265. *See supra* notes 219-21 and accompanying text.

266. *See* Hoey, *supra* note 156 (noting the benefit of "giv[ing] employers some real practical guidance as to how they can design an internship program, without a fear that the intern today will become the plaintiff of tomorrow").

267. *See supra* note 131 and accompanying text.

268. *See* Madden, *supra* note 152 ("The practice of classifying employees as 'interns' to avoid paying wages runs afoul of federal and state wage and hour laws . . . [and] denie[s] them important rights that the wage and hour laws protect . . . .").

269. *See, e.g.*, Gregory S. Bergman, Note, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 585-88 (2014); Ashley G. Chrysler, Comment, *All Work, No Pay: The Crucial Need for the Supreme Court to Review Unpaid Internship Classifications Under the Fair Labor Standards Act*, 2014 MICH. ST. L. REV. 1561, 1599-1606 (2014); Zachary Edelman, Comment, Glatt v. Fox Searchlight Pictures Inc., 59 N.Y.L. SCH. L. REV. 591, 601 (2015); *see also infra* note 274 and accompanying text.

270. *See* Tripp, *supra* note 46, at 367 (suggesting that such a test would send a message to employers that their programs must comply with the FLSA, as well as create predictability that would allow employers "to maintain legitimate, beneficial internship programs without the fear of liability under the FLSA").

circumstances" test.[271] This test looks to the extent the worker is independent of his or her supervisor and whether the worker is receiving academic credit or other tangible benefits from the internship—dependency on a supervisor and the receipt of credit imply an internship, as opposed to employee, relationship.[272] Another piece even proposes that the Supreme Court review the current DOL guidelines and combine them with the primary beneficiary test to produce a federal regulation.[273]

As proven from the above referenced, and many other, proposed solutions to this hot-button issue, reform of unpaid internship programs is critical.[274] Further, personal horror stories from countless former interns also detail reasons why federally enforced protection must be implemented.[275] For example, Shahista Lalani recently filed suit against former employer Dualstar Entertainment Group, owned by Mary-Kate and Ashley Olsen.[276] Ms. Lalani recalls her work at the Olsen's high-end fashion line, The Row, as "very demanding," stating that she was in constant contact with her boss throughout the day and that around 10:00 p.m. she would send Ms. Lalani emails of tasks for the next day.[277] Ms. Lalani's internship required her to complete tasks such as data input, organizing materials, sewing, cutting patterns, and running personal errands; she worked fifty hours a week doing a job that should have been done by a paid employee.[278] Not only did Ms. Lalani not receive any wages, she did not receive college credit either.[279]

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271. *See* Malik, *supra* note 149, at 1211-14.

272. *Id.* at 1213.

273. *See* Chrysler, *supra* note 269, at 1599-1606.

274. *See* Robert J. Tepper & Matthew P. Holt, *Unpaid Internships: Free Labor or Valuable Learning Experience?*, 2015 BYU EDUC. & L.J. 323, 348-51 (2015) (arguing all legal unpaid internships should be structured around a college course, rather than the workplace); Paul Budd, Comment, *All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 KAN. L. REV. 451, 482-85 (2015) (proposing an amended version of the DOL six-factor test); Craig Durrant, Comment, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 186-88 (2013) (suggesting judges borrow from contract law and look to consideration in determining whether an intern or employee relationship exists).

275. *See* Feintzeig & Korn, *supra* note 132 (quoting former Lions Gate intern and New York University student, Christina Isnardi, who stated that "[t]here are hundreds of students who are sick of this, . . . [w]e just feel as though our dreams are holding us hostage to this unfair, unethical labor practice").

276. Aly Weisman, *The Olsen Twins Are Being Sued by an Intern Accusing Their Company of Overworking Interns Without Pay*, BUS. INSIDER (Aug. 11, 2015, 11:44 AM), http://www.businessinsider.com/olsen-twins-being-sued-by-intern-2015-8.

277. *Id.*

278. *See id.*

279. *Id.*

Ms. Lalani's story is a perfect example of why federal regulation of internship programs is necessary. Her experience, akin to many others in highly sought-after internships in the entertainment industry (and many full-time jobs in the space), required interns to be available to their employers practically 24/7. Nothing was paid to her in exchange.[280] It is only through the implementation of federal regulation that the abuse can be stopped.[281] Specifically, the above-proposed amendment would fix the abuse Ms. Lalani faced.[282] By capping her working hours at twenty and enforcing specific overtime, it would be illegal for her employer to be as demanding of her time without compensating her for the work she did.[283]

Throughout this Note, the lack of protection for unpaid interns has been thoroughly detailed.[284] It has been explained how interns who do not meet the six-factor DOL test legally qualify as employees under the FLSA and must be paid wages.[285] It has been noted that illegally unpaid internships have existed for too long due to a lack of enforcement by the WHD, coupled with young workers' fear of speaking out.[286] The downfalls of the existing DOL guidelines have been picked through.[287] The problems facing future internship programs in the industry have been discussed.[288]

It could be argued that awarding academic credit is the best answer, providing educational and beneficial learning experiences to each intern.[289] However, that only appeals to one class of interns—students.[290] It could also be argued that the courts should uniformly adopt one of the existing tests.[291] But that will never happen without the enforcing hand of the federal government.[292] Thus, implementation by the DOL of a

280. *See supra* note 152 and accompanying text.

281. *See supra* Part IV.

282. *See supra* Part IV.B.

283. *See supra* Part IV.B.

284. *See supra* Parts II–III.

285. PERLIN, *supra* note 22, at 66 ("[I]f even one of the six criteria is not met, the internship is legally considered a job, bringing the benefits of the minimum wage, overtime pay, and associated rights."); *supra* Part II.A.

286. PERLIN, *supra* note 22, at 72 (quoting Catherine Ruckelshaus, who stated that what is needed is "to get agencies engaged and beef up retaliation protections so workers aren't afraid to complain"); *supra* Part III.B.

287. *See supra* Part II.A.2.

288. *See supra* Part II.C.4.

289. *See supra* text accompanying notes 123-24.

290. *See supra* note 186 and accompanying text.

291. Existing tests include, inter alia, the primary beneficiary test, the current DOL six-factor test, the immediate advantage test, the balancing of the benefits test, and the totality-of-the-economic-circumstances test. *See supra* notes 5, 100, 117-18, 271 and accompanying text.

292. *See* text accompanying notes 215-16.

federal regulation pursuant to the FLSA, which would provide federally enforceable regulation of internships, is necessary and vital to continue growing our country's economy—one eager young worker at a time.

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