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No Pay, No Gain? The Plus Side of Unpaid Internships

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NO PAY, NO GAIN? THE PLUS SIDE OF UNPAID INTERNSHIPS

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ABSTRACT

Recent cases out of the Southern District of New York have shined a spotlight on the phenomenon that is the unpaid internship with for-profit companies. These rulings, awaiting scrutiny by the Second Circuit, have opened the floodgates for countless interns to challenge their "employers" for the minimum wage they may be owed under the Fair Labor Standards Act (FLSA). This article examines the evolution of testing for employment under the FLSA, which varies greatly among the circuits. It then argues for a limited exception to the FLSA inspired by the "small business exception" to the Affordable Care Act.

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I. INTRODUCTION

The days of being guaranteed work with just a college degree are long gone. Factors such as the increasing rates of young people obtaining degrees, outsourcing, improvements in technology, and older workers choosing to retire later in life,[1] all lead to increased competition for young people. Whereas the hunt for jobs used to begin at graduation, it now begins earlier in college for many students through the battle to obtain internships, many of which are unpaid.

Lately, unpaid internships have become a politicized issue, receiving much attention and criticism.[2] This is due in large part to the vast number of college students participating in unpaid internship experiences with for-profit companies. According to survey data from the National Association of Colleges and Employers (NACE), approximately forty-eight percent of students had done unpaid internships, with thirty-eight percent of those students interning at for-profit companies.[3] NACE defines an internship as:

> [A] form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting. Internships give students the opportunity to gain valuable applied experience and make connections in professional fields they are considering for career paths; and give employers the opportunity to guide and evaluate talent.[4]

Unpaid internships with for-profit companies present an interesting issue because they deal with an educated-and-informed group of workers—people not typically thought of as susceptible to exploitation by the market. Is it fair to force employers to pay minimum wage to college students with little-to-no experience but want an opportunity to gain some? Even if they are willing to work for free to gain that experience? Conversely, how could we allow

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[1] Jim Harter & Sangeeta Agrawal, *Many Baby Boomers Reluctant to Retire,* GALLUP (Jan. 20, 2014), http://www.gallup.com/poll/166952/baby-boomers-reluctant-retire.aspx.

[2] *See* Andrew Mark Bennett, *Unpaid Internships & The Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293 (2011); Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 3, 2010, at B1; Derek Thompson, *Unpaid Internships: Bad for Students, Bad for Workers, Bad for Society*, THE ATLANTIC (May 10, 2012, 11:39 AM), http://www.theatlantic.com/business/archive/2012/05/unpaid-internships-bad-for-students-bad-for-workers-bad-for-society/256958/.

[3] Susan Adams, *The Unpaid Internships is Not Dead Yet*, FORBES (June 20, 2013, 1:15 PM), http://www.forbes.com/sites/susanadams/2013/06/20/the-unpaid-internship-is-not-dead-yet/.

[4] *Position Statement: U.S. Internships,* NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS (July 2011), http://www.naceweb.org/advocacy/position-statements/united-states-internships.aspx.

conditions caused by a surplus of workers to enable employers to benefit from the labors of workers without having to pay them?

To assess whether an unpaid internship is within the bounds of the law, the threshold inquiry is whether the intern is an employee under the Fair Labor Standards Act (FLSA).[5] If an intern is in fact an employee under the FLSA, then the employer is required to pay the intern minimum wage and overtime. This matter is complicated by the lack of uniformity among the courts in interpreting the FLSA.[6] There is "no settled test for determining whether [an intern] is an employee for purposes of the FLSA."[7]

Part II of this article tracks the development of varying tests used by courts to determine if someone is an employee under the FLSA.[8] A caveat to this examination is none of these tests were originally developed with internships in mind, nor were they created in a vacuum. Each test that will be discussed was created by a court with a certain set of facts in front of it. While each court ultimately decided its test was the appropriate one, attention must be paid to the underlying situation. Part III will examine the treatment of unpaid internships in the courts today.[9] More specifically, it will examine two recent cases out of the Southern District of New York: *Xuedan Wang v. The Hearst Corp.*[10] and *Glatt v. Fox Searchlight Pictures, Inc.*[11] Finally, Part IV will discuss the effect of unpaid internships on both education and the labor market.[12] This article will then propose a narrow exception to the FLSA wherein small businesses may hire short-term unpaid interns.[13] This proposed exception was inspired by and is derived from the Affordable Care Act.

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[5] *See* McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989) (Wilkins, C.J., dissenting).

[6] *See* Jessica L. Curiale, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1546 (2010) ("Given the lack of uniform interpretation of the FLSA as applied to unpaid internships, compliance with the law is nearly impossible. While the Department of Labor has recently indicated that it believes many unpaid internships are illegal, businesses that genuinely want to follow the law may be at a loss as to how to do so." (citations omitted)).

[7] Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 521 (6th Cir. 2011) (analyzing whether students who worked in the kitchen and housekeeping departments at a sanitarium operated by the school were employees).

[8] *See infra* Part II and accompanying notes 15–113.

[9] *See infra* Part III 114–144.

[10] Xuedan Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013).

[11] Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y. 2013).

[12] *See infra* Part IV and accompanying notes 145–172.

[13] *See infra* Part V.

II. DEVELOPMENT OF TESTS FOR EMPLOYMENT UNDER THE FLSA

In 1938, Congress enacted the Fair Labor Standards Act.[14] Congress intended to "protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."[15] Federal legislation was needed to protect these segments of the population because of unequal bargaining power between employers and employees.[16] Without the protections of the FLSA, this unequal bargaining power would enable employers to exploit employees.[17]

Pursuant to the FLSA, "[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,"[18] the minimum wage prescribed by the statute. The FLSA defines "employee" as "any individual employed by an employer."[19] To "employ" includes "to suffer or permit to work."[20] Accordingly, the term "employee" has "been given the broadest definition that has ever been included in any one act."[21]

There are, however, exemptions from the minimum wage law.[22] For example, Section 203(m) of the FLSA creates an exemption for tipped employees—waiters.[23] Workers in seasonally operated amusement or recreational establishments are also excluded from the minimum wage and overtime requirements of the FLSA.[24] But exemptions are to be narrowly construed, and employers bear the burden of proving the exemption.[25]

Because the proliferation of internships is a relatively recent phenomenon,[26] the courts seek guidance from case law relating to trainees to

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[14] 29 U.S.C. §§ 201–19 (2012).

[15] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945).

[16] *Id.*

[17] Davis Bros. v. Donovan, 700 F.2d 1368, 1370 (11th Cir. 1983).

[18] 29 U.S.C. § 206(a) (2012).

[19] *Id.* § 203(e)(1).

[20] *Id.* § 203(g).

[21] United States v. Rosenwasser, 323 U.S. 360, n.3 (1945) (internal quotation marks omitted).

[22] *See, e.g.*, Victor M. Veralde, *On the Construction of Section 203(O) of the FLSA: Exclusion Without Exemption*, 21 U. MIAMI BUS. L. REV. 253 (2013) (discussing the exclusion from hours worked of time taken to put on and take off personal protective equipment).

[23] *See* Roberts v. Apple Sauce, Inc., 945 F. Supp. 2d 995, 999 (N.D. Ind. 2013); § 203(m).

[24] *See* Adams v. Detroit Tigers, Inc., 961 F. Supp. 176, 178–79 (E.D. Mich. 1997); § 213(a)(3).

[25] *See* Foster v. Nationwide Mut. Ins. Co., 710 F.3d 640, 642 (6th Cir. 2013).

[26] J. Isaac Spradlin, *The Evolution of Interns*, FORBES (Apr. 27, 2009, 4:00 PM), http://www.forbes.com/2009/04/27/intern-history-apprenticeship-leadership-careers-jobs.html.

determine employee status. *Walling v. Portland Terminal Co.*[27] is the starting point for any such analysis. In *Portland Terminal*, a railroad operated a training course for prospective brakemen.[28] This training course was "a necessary requisite" to employment, and "[a]n applicant for such jobs [was] never accepted until he [had] had this preliminary training, the average length of which [was] seven or eight days."[29] Over the course of the unpaid training, the applicants would first learn by observation and then "gradually [be] permitted to do actual work under close scrutiny."[30] The applicants' work did "not displace any of the regular employees . . ." and "[did] not expedite the company business, but may . . . actually [have] impede[d] and retard[ed] it."[31] If the trainees completed the training course and were certified as competent, their names would be added to a list from which the railroad could draw from as needed.[32]

The Court noted "[t]he definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[33] Additionally, "such a construction would sweep under the [FLSA] each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit."[34]

Despite the broad definitions of the FLSA, the Court made clear "they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."[35] The FLSA "was not intended to penalize [companies] for providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner which would most greatly benefit the trainees."[36] The Court held "the railroads receive[d] no 'immediate advantage' from any work done by the trainees" and, therefore, the trainees were not employees within the FLSA's meaning.[37]

There are currently four major tests utilized to determine whether unpaid individuals qualify as employees under the FLSA: the Six Factors Test, the

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[27] Walling v. Portland Terminal Co., 330 U.S. 148 (1947).
[28] *Id.* at 149.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 150.
[32] *Id.*
[33] *Id.* at 152.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 153.
[37] *Id.*

Economic Realities Test, the Primary Beneficiary Test, and the Balancing Test.

A. The Six Factors

In 2010, the United States Department of Labor issued Fact Sheet #71 "to help determine whether interns must be paid the minimum wage and overtime under the [FLSA] for the services that they provide to 'for-profit' private sector employers."[38] Fact Sheet #71 contains a list of six criteria to apply when making this determination:

> 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
>
> 2. The internship experience is for the benefit of the intern;
>
> 3. The intern does not displace regular employees, but works under close supervision of existing staff;
>
> 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
>
> 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
>
> 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[39]

Before the six factors in Fact Sheet #71 were adapted for internships, they were used for matters involving trainees. The Tenth Circuit applied the six factors to determine whether four firefighter trainees were employees in *Reich v.*

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[38] U.S. Dep't of Labor, Wage & Hour Division, *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/regs/compliance/whdfs71.pdf (last visited Nov. 19, 2014).

[39] *Id.* Many courts consider the factors to be derived from *Portland Terminal*, 330 U.S. 148. *See* Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) ("To give content to this very broad statutory language, using factors first articulated in the Supreme Court's landmark decision in [*Portland Terminal*], the Department of Labor's Wage and Hour Division has developed a test listing six criteria for determining whether trainees are employees within the meaning of FLSA.") (citations omitted); McLaughlin v. Ensley, 877 F.2d 1207, 1211 (4th Cir. 1989) (Wilkins, C.J., dissenting) ("Following *Portland Terminal* the Wage and Hour Division of the Department of Labor promulgated a six-part test to guide its determination of whether trainees are in fact employees."). *Contra* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) ("[T]he test is inconsistent with *Portland Terminal* itself, which . . . suggests that the ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed.").

Parker Fire Protection District.[40] In its analysis, the court addressed the application of the six factors, and indicated "no one . . . factor[] in isolation is dispositive; rather, the test is based upon a totality of the circumstances."[41] In its determination of employment status, the court found the six factors to be only relevant but not conclusive.[42]

For the first four factors, the *Reich* court found the training experience to meet the necessary conditions.[43] For the final two factors, however, the court noted, "the documentary evidence establishes that the trainees fully expected to be hired upon successful completion of their training, but also fully understood that they would not be paid until that time."[44] Despite an issue of material fact—the expectation of employment upon completion of the training—the court affirmed the granting of summary judgment, because "that single factor cannot carry the entire weight of an inquiry into the totality of the circumstances."[45]

B. Economic Realities

Instead of a complicated factor-by-factor analysis, some courts have applied much more basic "economic realities" tests. The Court in *Tony & Susan Alamo Foundation v. Secretary of Labor* applied this test to a group of "volunteers" at a nonprofit religious organization.[46] Instead of soliciting contributions from the public, the Foundation derived its income largely from the operation of commercial businesses, which were operated by the Foundation's "associates."[47] These "associates" were mostly former drug addicts, derelicts, and criminals, who were converted and rehabilitated by the Foundation.[48] They "receive[d] no cash salaries, but the Foundation provide[d] them with food, clothing, shelter, and other benefits."[49]

Complications arose when numerous associates vehemently protested wages, claiming they "expected no compensation for their labors," and "considered [their] work in the Foundation's businesses as part of [their] ministry."[50] One associate went so far as to testify, "the thought [of accepting

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[40] *Reich*, 992 F.2d at 1026.
[41] *Id.* at 1027 (quoting Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989)).
[42] *Id.*
[43] *Id.* at 1028–29.
[44] *Id.* at 1029.
[45] *Id.*
[46] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 300–01 (1985).
[47] *Id.* at 292.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 300.

compensation] is totally vexing to [her] soul."[51]

These protestations, though persuasive, did not end the inquiry into the employer-employee relationship.[52] The Court pointed out, "[i]f an exception to the [FLSA] were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the [FLSA]."[53] This is a valid point, but bargaining power is dependent on the worker wanting or needing something from the employer in exchange for his or her labors. Accordingly, the Court stated "[t]he test of employment under the [FLSA] is one of 'economic reality.'"[54] Because the associates entirely depended on the Foundation for necessities like food and shelter for long periods, they were employees under the FLSA.[55] The benefits they received were merely wages in a different form.[56]

What makes the economic realities test viable is it is not limited by an enumerated list of factors. Even when a list of factors is only supposed to serve as a framework for analysis, it acts as an anchoring point, and the design of the factors intrinsically guides the analysis in a certain direction.[57] On the other hand, such a simple test leaves the judge wide discretion to base his decision on as many or as few factors as he or she sees fit. With increased flexibility comes added unpredictability.

C. Primary Beneficiary

In a far different direction than the six factors and the economic realities tests, some courts believe *Portland Terminal* calls for a primary beneficiary test. Hailing from the Fourth Circuit, *McLaughlin v. Ensley*[58] resolved whether delivery driver trainees were employees under the FLSA.[59] There, before hiring

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[51] *Id.* at 301.

[52] *Id.*

[53] *Id.* at 302.

[54] *Id.* at 301.

[55] *Id.*

[56] *Id.*

[57] AMERICAN PSYCHOLOGICAL ASSOCIATION, APA DICTIONARY OF PSYCHOLOGY 51 (2007) ("**anchor** *n.* a reference point used when making a series of subjective judgments. . . . **anchoring** *n.* 1. In ADAPTATION LEVEL theory, the assignment of set points (ANCHORS) for judgment scales. According to this theory, all judgments are relative to an implicit scale of comparison . . . . **anchoring bias** the tendency, in forming perceptions or making quantitative judgments of some entity under conditions of uncertainty, to give excessive weight to the initial starting value (or ANCHOR), based on the first received information or one's initial judgment, and not to modify this anchor sufficiently in light of later information.").

[58] McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

[59] *Id.*

any person to drive a delivery route, applicants had to participate in an unpaid, five-day training course, which included approximately fifty to sixty hours of labor.[60] During this period, the applicants, along with the experienced delivery driver they were following, loaded and unloaded the delivery truck, restocked stores with Ensley's product, were given instructions on how to drive the trucks, were introduced to retailers, were taught basic vending machine maintenance, and occasionally helped in preparing orders of goods.[61] There was conflicting evidence as to whether the company benefited from the new workers' activities, but there was evidence no person who had completed the training was not subsequently hired.[62]

Borrowing from *Portland Terminal*, the court noted, "when the employer received no immediate advantage from the trainees' services, that is, when the principal purpose of the seemingly employment relationship was to benefit the person in the employee status, the worker could not be brought" under the FLSA.[63] It added that the "general test used to determine if an employee is entitled to the protections of the [FLSA] is whether the employee or the employer is the primary beneficiary of the trainees' labor."[64] After finding the instruction the trainees received did not rise to the level of a "vocational course in outside salesmanship," and the trainees were only taught simple specific job functions related to the company's own business, the court decided these trainees were indeed employees and owed a minimum wage.[65]

Notwithstanding the authority on which the majority spoke, the dissent argued strongly against a primary beneficiary test.[66] It argued the primary beneficiary analysis was a diversion from the "true legal issue, [which was] whether the trainees were 'employees' within the definition" of the FLSA.[67] The dissent believed both *Portland Terminal* and the six-factor test rely on not one single factor, but "consideration of all the circumstances."[68] Furthermore, the dissent argued determination of who is the primary beneficiary is but one factor to be considered.[69]

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[60] *Id.* at 1208.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1209 (quoting Isaacson v. Penn Cmty. Servs., 450 F.2d 1306, 1308 (4th Cir. 1971)) (internal quotation marks omitted); *see also* Wirtz v. Wardlaw, 339 F.2d 785, 788 (4th Cir. 1964) (finding it determinative the employer "benefited from their labors.").

[64] *Id.*

[65] *Id.* at 1210 (internal quotation marks omitted).

[66] *See Ensley*, 877 F.2d at 1210–14 (Wilkins, C.J., dissenting).

[67] *Id.* at 1210.

[68] *Id.* at 1211.

[69] *Id.* at 1212.

Although the dissent made excellent points on how the facts were analyzed, the dissent mistook using a test for not answering the true question. It is beyond doubt the FLSA definitions are vague. But, it is this vagueness that necessitated the creation of all the competing tests.

Applying the tests is still not as simple as plugging in facts, and the dissent believed the majority erred in doing so. It asserted "[t]he majority minimize[d] the importance of the skills taught during the training period, finding that the trainees learned to perform only 'basic' vending machine maintenance and 'simple kinds' of paperwork, and cite[d] the brevity of the five-day training period as support for its finding that no meaningful training occurred."[70] This is a major fault of both the six factors and the primary beneficiary test because they require assigning weight to each element, which is in the court's discretion.

The dissent concluded with a warning of the long-term effects of the majority's decision.[71] It believed the decision "will tend to *make it more difficult for young and/or unskilled persons* seeking employment opportunities beyond that of an unskilled laborer to find employment."[72] There is merit to this statement because it places a burden on companies with training programs to ensure the trainee is the primary beneficiary, otherwise the company will have to pay wages. This test is a disincentive for such training programs, and unskilled or uneducated workers will be hard pressed to find such opportunities.

In a recent case out of the Sixth Circuit, the court applied a primary beneficiary test to a non-profit corporation operating a religious boarding school.[73] In *Laurelbrook Sanitarium*, part of the school's instruction involved children working in the sanitarium's kitchen and housekeeping departments.[74] The sanitarium served as a training vehicle for the students, and Laurelbrook would not have operated it if not for the school.[75] Therefore, the students did not displace employees.[76] The students learned to use tools associated with specific trades, and the learning experience was similar to that received in vocational training courses.[77]

Being forthright in its analysis, the court began by announcing that "[t]here is no settled test for determining whether a student is an employee for

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[70] *Id.*
[71] *Id.* at 1213.
[72] *Id.* (emphasis added).
[73] Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011).
[74] *Id.* at 520.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 521.

purposes of the FLSA."[78] It then discussed several tests courts have used to determine employee status. First, the court looked at economic realities tests. It quickly dismissed the economic realities test with the assertion, to "state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA's definitions themselves. There must be some ultimate question to answer, factors to balance, or some combination of the two."[79] The court's desperation to have a clear-cut test or bright-line rule undercuts the value judges provide our legal system. To decide on economic realities is to look at *all* of the facts and conditions surrounding the situation. The same rationale would apply to a primary beneficiary approach. That test would still require the court to look at different factors and then assign a weight to those factors. If anything, a primary beneficiary test, particularly one assessing the education of a student or intern, is more subjective. Economic realities, such as dependency on the job and conditions of the labor market, are more objective.

Next, the court discussed the six factors.[80] It noted a disparity in how other courts treated this test. "Some courts have said that the test is entitled to substantial deference. Others have rejected it altogether. Still others strike a balance and consider the factors as relevant but not dispositive to the inquiry."[81] But, the court ultimately felt the six factors were too rigid and inconsistent with a totality of the circumstances approach, where no one factor controls.[82] The court's assessment of the rigidity of the six factors was appropriate, but this position is inconsistent with the court's own belief there should be a set of factors and an ultimate question to answer. A more consistent position would be that there should be a set of factors or questions to answer, but the six factors are the wrong factors to consider.

Continuing its analysis of the six factors, the court added that the six factors are inconsistent with *Portland Terminal* itself, which it believed suggests "the ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed."[83] It noted that in *Portland Terminal*, "after finding the training most greatly benefit[ted] the trainees and accepting the unchallenged findings . . . that the railroads receive[d] no immediate advantage from any work done by the trainees, the Court concluded

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[78] *Id.*
[79] *Id.* at 522.
[80] *Id.* at 524.
[81] *Id.* at 525 (citations omitted) (internal quotation marks omitted).
[82] *Id.*
[83] *Id.*

that the men were not employees for purposes of the FLSA."[84] The court believed it is error most courts read *Portland Terminal* as focusing on the relative benefits to the company of the work performed by the purported employees.[85] In its view, however, the decision in *Portland Terminal* "rested upon whether the trainees received the primary benefit of the work they performed."[86] Interpreting *Portland Terminal* to support a primary beneficiary test over the six factors, or any other test, is not in itself a problem. What is a problem is spending the bulk of a decision dissecting and condemning other tests, when many of those flaws are equally applicable to a primary beneficiary test. The primary beneficiary test is better than the six factors in that it is not skewed by its own rigidity, but it is still highly subjective.

D. Balancing Test

Coming from the Fifth Circuit, *Donovan v. American Airlines* presents a rather interesting situation in which potential airline employees entered a several week long, unpaid training program, completion of which was necessary to be eligible for employment.[87] American Airlines employs approximately 650 new flight attendants and 800 new reservation sales agents each year, and, to maintain a steady supply of new employees, it selects approximately 800 and 1,000 flight attendants and reservation sales agents annually for training, respectively.[88] Before beginning training, each candidate acknowledges, in writing, he or she is not an employee during training, and acceptance for training is not an offer of employment.[89]

Training at American's Learning Center in Dallas, Texas, is a requirement for employment.[90] Trainees must give up their jobs and other commitments to train full time in Dallas during this period.[91] Although not all trainees accept, American Airlines offers meals and housing in dormitories.[92] Nonetheless, American Airlines reserves the right not to hire any person who participates in the training.[93] Furthermore, even though American Airlines tries to match the

[84] *Id.* at 526 (quoting Walling v. Portland Terminal, 330 U.S. 148, 153 (1947)) (internal quotation marks omitted).
[85] *Id.*
[86] *Id.*
[87] Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982).
[88] *Id.* at 268.
[89] *Id.* at 269.
[90] *Id.* at 268.
[91] *Id.*
[92] *Id.* at 269.
[93] *Id.*

date of completion of the training program with when it will need new employees, at times it is unable to offer immediate employment to graduates.[94]

For flight attendant trainees, training is forty hours per week for four to five weeks.[95] The instruction is designed to teach employees to work for American, and not for other airlines.[96] Training includes learning the emergency and safety features of each aircraft, as the Federal Aviation Administration (FAA) requires, as well as learning American Airlines' internal procedures and practices.[97] Trainees do not assist on any commercial flights and displace no American Airlines employees.[98]

As for reservation sales agents, the training course is approximately two or three forty-hour weeks.[99] Approximately three fourths of the course includes training on computer consoles similar to that used by the rest of the airline industry.[100] The remainder covers sales techniques, airport designations, computation of airlines fares, and other subjects common to the airlines industry.[101]

After a brief discussion of *Portland Terminal*, the *American Airlines* court discussed a three-part test formulated in *Wardlaw*.[102] The test asked: "(1) whether the trainee displaces regular employees; (2) whether the trainee *works* solely for his or her own benefit; and (3) whether the company derives any *immediate* benefit from the trainee's work."[103] The court took issue with the second prong of the *Wardlaw* test.[104] If participation in the training course "were *solely* for the trainee's benefit, the company would not conduct the school except as a matter of altruism or public pro bono."[105] The *Hearst* court echoed this logic.[106] It is simply too stringent of a requirement to force a for-profit company to not benefit at all from a training or internship program. Such polarization is not reasonable and will only serve to reduce the number of

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94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.* at 270.
100 *Id.*
101 *Id.*
102 *See* Wirtz v. Wardlaw, 339 F.2d 785, 788 (4th Cir. 1964).
103 *American Airlines*, 686 F.2d at 271–72 (emphasis added) (citing *Wardlaw*, 339 F.2d 785 (4th Cir. 1964)).
104 *Id.* at 272.
105 *Id.* (emphasis added).
106 *See infra* Part III.

potential experience-gaining opportunities students have.[107]

Because of its loathing of absolutes, the court asserted a balancing analysis is most appropriate.[108] It then found the balance tipped heavily in favor of there not being employment status. "Although training benefits American by providing it with suitable personnel, the trainees attend school for their own benefit, to qualify for employment they could not otherwise obtain."[109] American Airlines did not receive any immediate benefit from the training program.[110]

On the other hand, the "[t]rainees [made] a sacrifice to attend school. *But so do all who seek to learn a trade of profession*."[111] This is merely an opportunity cost, and every freshman economics student knows, to do anything, you are giving up the opportunity to do something else—there is no free lunch. Unpaid internships are quite often censured because while interns are "working" without pay, they must pay for tuition, housing, food, transportation, and other expenses. But, this is not a perfect world, and that time spent working without pay may be a necessary sacrifice to learn and eventually enter the workforce.

The balancing test the court champions is a relatively strong test. Unlike the six factors, it is not rigid and constrained. Unlike the economic realities test, it considers more than just dependency. But, it is not perfect. Similar to a primary beneficiary test, there is much subjective analysis involved. "[T]he relative benefits flowing to trainee and company during the training period"[112] are likely to vary from case to case and would be difficult to predict. Just because in this one case the court found the test straightforward and easy to apply, does not mean this test will work so easily in other situations.

III. UNPAID INTERNSHIPS IN THE COURTS TODAY

To date, no court of appeals has ruled on whether for-profit companies that do not pay their interns violate the FLSA, but the Second Circuit is considering the issue with both *Glatt v. Fox Searchlight Pictures*[113] and *Xuedan*

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[107] By this logic, if the trainee works *at all* for the benefit of the employer, then it is not *solely* for the trainee's benefit and, therefore, would make the trainee an employee under the FLSA. *Cf.* STAR WARS EPISODE III: REVENGE OF THE SITH (Lucasfilm 2005) ("Anakin: If you're not with me, then you're my enemy. Obi-Wan: Only a Sith deals in absolutes.").

[108] *American Airlines*, 686 F.2d at 272.

[109] *Id.*

[110] *Id.*

[111] *Id.* (emphasis added)

[112] *Id.* at 271 (quoting Donovan v. American Airlines, Inc., 514 F. Supp. 526, 533 (N.D. Tex. 1981) (internal quotation marks omitted).

[113] Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y. 2013).

Wang v. Hearst Corp.[114] Both cases arise from the Southern District of New York and were filed mere months apart.[115]

When Judge William H. Pauley III certified *Glatt* for immediate appeal, he noted specific differences between the test for employment he used and of that in *Hearst*.[116] In *Glatt*, the court adopted the Department of Labor's six factor test,[117] whereas in *Hearst*, the court examined the totality of the circumstances but used the six factors as a guide for its analysis.[118] Additionally, the *Hearst* court looked into "who [was] the primary recipient of benefits from the relationship."[119]

There are inherent weaknesses to the tests used by both courts. Both tests fail to properly understand the competing tensions involved with unpaid internships. On the one hand, the FLSA exists to protect workers from exploitation by employers.[120] Because there is a surplus of workers available, competition for jobs has increased to the point where people are willing to work for free, with the hope the unpaid internship will lead to future paid employment; this also suppresses wages for those who found paying jobs. Yet, even if minimum wage requirements cause demand for workers to decrease, as long as the marginal output of each worker exceeds the minimum wage, the employee is profitable and the employer should be willing to pay the wage. If the marginal output of an intern is less than the minimum wage, then the employer will not hire an intern. On the other hand, people should be free to enter into non-coercive relationships that they perceive to be beneficial. The sacrifice a student makes in undertaking an unpaid internship may pay off if it enhances the student's career prospects.

The six factors address this tension very well. By providing that the internship must be similar to training in an educational environment, the intern must not displace any employees, and the employer receives no immediate advantage from the intern, the six factors test hinders exploitation. The problem is the six factors test prevents exploitation so well it places too heavy a burden on any employer who wishes to create such a position, thereby reducing educational opportunities available to students.

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[114] Xuedan Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013).

[115] *See* Class Action Complaint, Xuedan Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013) (No. 12 CV 793 (HB)), 2012 WL 300002; Class Action Complaint, Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y 2013) (No. 11 Civ. 6784 (WHP)), 2011 WL 4479356.

[116] Glatt v. Fox Searchlight Pictures, Inc., No. 11 Civ. 6784 (WHP), 2013 WL 5405696, at 1 (S.D.N.Y. 2013).

[117] *Glatt*, 293 F.R.D. at 531–34.

[118] *Hearst*, 293 F.R.D. at 492–94.

[119] *Id.* at 493 (quoting Velez v. Sanchez, 693 F.3d 308, 330 (2d Cir. 2012)).

[120] *See supra* Part II.

The primary beneficiary test, though appreciating how much the intern learns, loses sight of the purpose of the FLSA. That an intern learned a great deal and built many professional relationships cannot justify exploiting the intern's labor. Furthermore, such a test can only be applied after the fact, which is harmful to both parties. Likewise, a totality of the circumstances test needs to be applied on a case-by-case basis, and gives the court discretion in weighing certain factors against the FLSA.

In *Hearst*, the named plaintiff, Xuedan Wang, interned for Hearst, one of the world's largest publishers of monthly magazines.[121] Over the past six years, Hearst has had over 3,000 interns.[122] Wang "worked as an intern five days a week, sometimes from 9 a.m. to 8 p.m. . . . Wang's duties included serving as a contact between editors and public relations representatives, doing online research, cataloguing samples, maintaining the accessories closet, and doing story boards."[123] All plaintiffs understood, prior to their internship, the position was unpaid, and Hearst made it clear there was little likelihood, and no guarantee, of a job at the conclusion of the internship.[124]

The *Hearst* court concluded the "Supreme Court in [*Portland Terminal*] looked to the totality of the circumstances,"[125] and, even though the Court held the trainees were not employees because the railroad received no immediate advantage, "it [did] not logically follow that the reverse [was] true, i.e. that the presence of an immediate advantage alone create[d] an employment relationship under the FLSA."[126] Additionally, the court noted a key element of the analysis should be determining who is the primary beneficiary of the relationship.[127] But, despite using a totality of the circumstances test, the court decided, "the six factors in Fact Sheet #71 ought not be disregarded."[128] Instead, the factors suggest a framework for the foregoing analysis.

As for *Glatt*, plaintiffs Eric Glatt[129] and Alexander Footman[130] were

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[121] *Id.* at 490.

[122] *Id.* at 491.

[123] *Id.*

[124] *Id.* at 492.

[125] *Id.* at 493.

[126] *Id.* (internal quotation marks omitted).

[127] *Id.*

[128] *Id.* at 493–94

[129] *See* Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 6, 2012, at A1. Far from the ordinary intern, Glatt interned with Fox Searchlight at age forty and had already obtained an M.B.A. and a master's in international management. *Id.* He previously worked for the American International Group (AIG), overseeing the company's training programs. *Id.* Even though he "knew that this was going to be a normal job and [was not] going to be paid . . . it started kicking around in [his] mind how unjust [the unpaid internship] was." *Id.* Glatt filed suit alleging minimum wage violations. *Id.* Glatt is currently a student at Georgetown University Law Center.

unpaid interns who worked on the set of the film *Black Swan*.[131] Afterwards, Glatt took a second unpaid internship relating to the film's post-production.[132] The court decided that there was little support for a primary beneficiary test in *Portland Terminal*.[133] It noted in *Portland Terminal*, the Court did not weigh the benefits of the trainees and the railroad but decided the program served *only* the trainees.[134] Unlike the *Hearst* court, the *Glatt* court found a primary beneficiary test to be "subjective and unpredictable. . . . The very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot."[135] Thus, employment status could only be determined after the internship has commenced. Businesses cannot operate with such uncertainty.

Because the six factors were promulgated by the Department of Labor, the agency that administers the FLSA, the court gave the factors deference.[136] In its analysis of the factors, the court vividly illustrated the subjectivity of the test. While assessing whether the interns' training was similar to an educational environment, the court asserted, "internships must provide something beyond on-the-job training that employees receive,"[137] and should include "skills that are fungible within the industry."[138] The fact that Footman learned the function of a production office through experience was not enough.[139]

Next, the court determined the internship was not for the benefit of the intern.[140] Even though the interns received benefits such as "resume listings, job references, and an understanding of how a production office works,"[141] such benefits were incidental to working in the office. The benefits should have been

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Id.

[130] Both Glatt and Footman are graduates of Wesleyan University, class of 1991 and 2009, respectively. *Unpaid Interns Win Lawsuit Against Fox*, WESLEYING (June 14, 2013, 12:29 AM), http://wesleying.org/2013/06/14/unpaid-interns-win-lawsuit-against-fox/. Footman, now living in Afghanistan, is "being paid to work on two documentaries—one about the country's first heavy metal band and another about the Afghan soccer league." Rebecca Greenfield, *The Aftermath of an Unpaid Intern Who Sues His Old Boss*, THE WIRE (June 14, 2013 8:54 AM), http://www.thewire.com/national/2013/06/afterlife-unpaid-intern-who-sues-his-old-boss/66219/.

[131] Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 522 (S.D.N.Y. 2013).

[132] *Id.* at 522.

[133] *Id.* at 531.

[134] *Id.*

[135] *Id.* at 532.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* at 533.

[141] *Id.*

the result of a training program designed for their benefit.[142] Ultimately, the court held:

> Considering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are "employees" covered by the FLSA and NYLL. They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received—such as knowledge of how a production or accounting office functions or references for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer. They received nothing approximating the education they would receive in an academic setting or vocational school. This is a far cry from [*Portland Terminal*], where trainees impeded the regular business of the employer, worked only in their own interest, and provided no advantage to the employer.[143]

Certainly, the court set a very demanding standard, which begs the question, what for-profit employer will ever want to give a student a chance?

IV. SUGGESTED TWO-PRONG TEST

Despite the goal of the FLSA, to protect workers from being exploited, there should be a narrow exception to the rule, as discussed in Part IV.C. The proper test should effectuate the goals of the Department of Labor's six factors without placing such heavy burdens on employers to prove an internship meets the test's standards, particularly because several factors are difficult to predict and apply. Before discussing what the test should be, this article will examine the benefits of unpaid internships.

A. Trends in Education

Record numbers of young people are choosing to attend college. It is estimated 21.0 million students attended American colleges and universities in the fall of 2014, an increase of approximately 5.7 million students since the fall of 2000.[144] These numbers are not attributed to mere increases in population. Even though, between 2000 and 2012, the population of 18–24 year olds grew from approximately 27.3 million to approximately 31.4 million, the *percentage*

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[142] *See id.*

[143] *Id.* at 534.

[144] *Fast Facts: Back to School Statistics*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=372 (last visited Jan. 27, 2015).

of this demographic enrolled in college increased from 35.5% in 2000 to 41.0% in 2012.[145]

As for those who complete their education, the numbers are equally impressive. "During the 2014–15 school year, colleges and universities are expected to award 1 million associate's degrees; 1.8 million bachelor's degrees; 821,000 master's degrees; and 177,500 doctor's degrees."[146]

There has always been a question of how college degrees, or in the instant case, internships, benefit students. Do students benefit because the knowledge they gain is so valuable? Or, do students benefit because attending and doing well in college, or obtaining an internship, shows the student's inherent value? Two competing theories help to answer this question: signaling theory and human capital theory.[147]

Human capital theory "argues intuitively that education endows an individual with productivity-enhancing capital, and that this increased productivity results in increased earnings in the market. Competitive market theory does, after all, require that laborers receive a wage equal to their marginal product."[148] In terms of internships, a human capital theorist would argue the skills, training, and experience the intern receives make the intern more valuable. This would then lead to better employment prospects, and higher salaries.

On the other hand, signaling theory argues educational and internship experiences "only reflect[] inherent human capital. This inherent human capital, not education itself, is what increases productivity and leads to higher wages" and better employment prospects.[149] Signaling theory is supported by the vast majority of students who end up working in fields unrelated to their majors.[150] Showing a student can obtain and handle an internship gives him or her a strong advantage in the labor market. Accordingly, limiting internship possibilities disserves students by limiting the ways in which they can differentiate themselves from their ever-increasing competition.

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[145] *Id.*

[146] *Id.*

[147] Jim Kjelland, *Economic Returns to Higher Education: Signaling v. Human Capital Theory, An Analysis of Competing Theories*, 16 PARK PLACE ECONOMIST 70, 70 (2008).

[148] *Id.*

[149] *Id.*

[150] Brad Plumer, *Only 27 Percent of College Grads Have a Job Related to Their Major*, WASH. POST (May 20, 2013, 2:54 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/20/only-27-percent-of-college-grads-have-a-job-related-to-their-major/.

B. Labor Market

"It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[151]

Principles of economics are not to be disregarded. If an employer will be penalized for benefiting from an internship program, even if it is not an inquiry-ending penalty, the employer is disincentivized from offering such a program. Opponents of unpaid internships treat this as a one-variable issue: wages. But, it is not. It is much more complicated than that. If wages increase, the population of intern candidates is not necessarily better off. Due to economic scarcity, demand for the internship will increase. A weaker candidate who was once able to obtain some experience through an unpaid internship may be beaten out in the market. Likewise, supply will decrease, again creating more competition. Smaller companies that do not have the income to add another employee to the payroll may simply choose to forgo their internship program. Furthermore, proponents of unpaid internships "[assert] that the particular nature of unpaid internships benefits low-income students without connections because employers, with nothing to lose, are more willing to take a risk on . . . potentially promising students [they had] never heard of."[152]

Another common argument against unpaid internships is that the intern has living expenses, so working without a wage harms the intern. This argument rests on the assumption the opportunity cost is necessarily worth more than the internship experience. An opportunity cost is the benefits that could have been received by taking an alternative action.[153] For example, if a student could work forty hours per week for ten weeks during the summer, earning $10 an hour, he or she would earn $4,000 that summer, before taxes. By working an unpaid internship for the same amount of time, the intern loses the opportunity to earn $4,000 but gains professional experience, knowledge, contacts, and a more impressive resume. The same could be said about the opportunity cost of attending college versus heading straight to the workforce. Whether the trade-off is beneficial should be up to the student to decide.

Because of the increasing levels of competition in our labor market, the trade-offs involved with unpaid internships are becoming more and more worthwhile. The increasing rates of students entering college and earning degrees, as previously discussed, are only relevant if inconsistent with trends in the labor market. According to recent market data, "[t]he number of new jobs

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[151] ADAM SMITH, THE WEALTH OF NATIONS I.2.2 (1776).

[152] Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1378 (2012).

[153] *Definition of 'Opportunity Cost'*, INVESTOPEDIA, http://www.investopedia.com/terms/o/opportunitycost.asp (last visited Nov. 10, 2014).

created remains insufficient to redeem the jobs lost during the recession and additional jobs needed to keep up with growth in the labor force."[154] Additionally, "[d]ue to the increasing size of the labor force, job creation has not been sufficient to reduce unemployment."[155] This takes us right back to supply and demand. If our supply of workers is growing faster than the demand for workers, it creates a fierce battle for jobs. Unfortunately, jobs do not go to the people who need them the most; jobs go to the seemingly most qualified candidates.

Particularly with young people, obtaining employment is difficult in today's market conditions. While overall unemployment in June 2013 was 7.6%, the unemployment rate for the 20–24 demographic was 13.2%.[156] Even with college degrees, young people are struggling, and for one reason—"[b]ecause experience trumps brilliance."[157]

To gain experience, many recent college graduates are turning to unpaid internships, after failing to secure their desired employment.[158] The reasoning for this is simple: The market is highly competitive, and an experienced candidate with professional contacts is more likely to find employment than an inexperienced outsider. Therein lies the unappreciated beauty of the unpaid internship. By spending time in a professional setting, interns are given the opportunity to "amass a network of connections" to tap later on.[159] It does not provide an immediate, direct advantage, but it leads to other opportunities for employment. An unpaid internship is a stepping-stone—it is the early phase of a long-term strategy to develop a career.

Another undervalued benefit of unpaid internships is they help students decide on an ultimate career path.[160] As has been previously established, allowing for unpaid internships increases the availability of internship programs. This not only benefits students trying to gain experience in a particular field, but it also gives students the opportunity to see what a certain career is like. Coursework can only take a student so far. In contrast, getting the chance to spend a few months in the field allows the student to decide based on actual, not merely theoretical, experience whether this is a path worth pursuing. According

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[154] International Labour Organization, *Recent US Labor Market Data*, ILO.ORG (June 2013), http://www.ilo.org/washington/ilo-and-the-united-states/spot-light-on-the-us-labor-market/recent-us-labor-market-data/lang--en/index.htm.

[155] *Id.*

[156] *Id.*

[157] Thomas Sowell, *Experience Trumps Brilliance*, WND (July 27, 2010, 12:00 AM), http://www.wnd.com/2010/07/184157/.

[158] Greenhouse, *supra* note 3.

[159] Tucci, *supra* note 153, at 1377.

[160] *Id.*

to a 2010 National Association of Colleges and Employers student survey, "[forty-two] percent of graduates with internships who applied for a job received an offer compared with only [thirty] percent of students who had no internship experience."[161]

The differences also extended to starting salaries. Graduates with internship experience had a median starting salary of $41,580, while their inexperienced counterparts only had a median starting salary of $34,601.[162] Although these numbers only speak to correlation, and not causation, they shed some light on the importance of experience.

While this discussion of the labor market shows the conditions are prime for worker exploitation, the intangible benefits interns receive must be emphasized. The education one receives in a classroom or from reading a book is vastly different than that of working in a professional setting. The difference is between theory and practice. If there were no difference between theory and practice, the scientist working in his laboratory would rest with his hypothesis and never conduct the experiment. Nevertheless, for an unpaid internship to be within the bounds of the law, controls must be put in place that prevent, or at least greatly limit, worker exploitation.

C. Two-Prong Test

There are clearly flaws with the prevailing test for assessing whether unpaid interns are employees under the FLSA. To be workable, the proper test must recognize what an internship actually is, and why students seek them.

Each test discussed has strengths and weaknesses. While some are too rigid, others give the court too much discretion and are unpredictable. At times, having a framework for analysis is beneficial but not when the design of that framework inevitably leads the inquiry in a certain direction. To meet the needs of students, and effectuate the goals of the FLSA, there should be a narrowly tailored small business exception. This exception would best be created by the legislature, where it could be applied in its entirety, but courts could adopt parts of the test by applying the ideas through one of the pre-existing tests. The first prong of the test—the small business exception—is modeled after the Affordable Care Act (ACA).[163]

Small businesses have long been glorified as the backbone of the

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[161] *2010 Student Survey*, NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS, http://files.eric.ed.gov/fulltext/ED526915.pdf (last visited Nov. 24, 2014).

[162] *Id.*

[163] Patient Protection and Affordable Care Act of 2010, PL 111–148, 124 Stat. 119 (codified as amended in scattered sections of 26 U.S.C.).

American economy—"cornerstones of our communities".[164] Clichés aside, this sentiment exists because small businesses have a more personal identity that large corporations lack, while large corporations are viewed as ruthless capitalists. By narrowly tailoring this exception to the FLSA to small businesses and temporary internships, the risk of exploitation is greatly reduced. The interns would not be dealing with powerful capitalists who control the market, but rather local businesses. Because of the requirement that the position be temporary, combined with the costs of training an intern while having limited personnel, the return on investment for hiring the intern will be limited. Unlike a large corporation with high turnover and greater hiring needs, a small business may actually be burdened by short-term internships.

1. Affordable Care Act

In 2010, Congress enacted the ACA to increase the number of Americans covered by health insurance and to decrease health care costs.[165] The ACA is composed of ten titles and spans over nine hundred pages.[166] For the purposes of this article, we will focus on 29 U.S.C. § 4980H,[167] the shared responsibility for employers regarding health coverage.

Section 4980H(a) requires large employers to provide health care coverage for full-time employees or otherwise pay a tax.[168] According to the statute's definitions, an applicable large employer is an employer "who employed an average of at least [fifty] full-time employees on business days during the preceding calendar year."[169]

There is, however, an exemption for seasonal workers. That is, an employer is not considered to employ more than fifty full-time employees if the employer's workforce exceeds fifty full-time employees for 120 days or fewer, and the employees in excess of fifty employed during that period were seasonal workers.[170] The threshold inquiry with the ACA is whether a business is an applicable large employer.[171] The same inquiry should be applied to the FLSA for unpaid internships.

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[164] *But see Sorry Class Warriors, Small Businesses Are Not The Backbone Of The U.S. Economy*, FORBES (Oct. 06, 2013, 9:00 AM), http://www.forbes.com/sites/johntamny/2013/10/06/sorry-class-warriors-small-businesses-are-not-the-backbone-of-the-u-s-economy/.

[165] Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

[166] *Id.*

[167] 29 U.S.C. § 4980H (2012).

[168] *Id.* § 4980H(a).

[169] *Id.* § 4980H(c)(2)(A).

[170] *Id.* § 4980H(c)(2)(B).

[171] *See id.* § 4980H(a).

2. Small Business Internship Exception to the FLSA

The proposed test is broken down into two prongs: First, the internship must qualify pursuant to the applicable statutory language; and second, the economic realities of the intern must be that the intern is not dependent on the employer.

For the first prong, the employer must not be an "applicable large employer," as defined by § 4980H. Because an internship is meant to educate, the intern must be enrolled in a degree-earning program at the commencement of the internship. Internships will also be limited to ninety days. The 120-day seasonal worker exception in the ACA serves a different purpose and is excessive for an internship.

If, during the course of an internship, an employer's full-time employees exceed fifty—including interns—for the purposes of the FLSA, an unpaid internship should be prohibited. This is an instance where a line in the sand must be drawn, and payment to the intern must be favored. Wages will be required for all times when the business exceeds fifty full-time employees. Additionally, if the internship exceeds ninety days per calendar year, wages must be paid retroactively for all time worked in the given calendar year.

For the second prong, economic realities will govern. In addition to determining whether the intern is economically dependent on the employer, courts would determine: (1) whether the intern is necessarily entitled to a job at the conclusion of the internship, and (2) whether the employer and intern understand the intern is not entitled to wages for the time spent in the internship.

While the first prong creates a narrow exception in which the threat of exploitation is reduced, the second prong focuses on the psychological relationship between intern and employer. If, at some point during the internship, the employer offers the intern future employment, to satisfy part (1) of the second prong the intern must be paid beginning at the point of acceptance. For example, if a student is working an unpaid internship over the summer, and, near the end of the summer, the employer offers the intern a full-time paid position for the following year, the employer would have to begin paying the intern at the time of acceptance of the offer. Such a situation involving expected future wages would leave an intern susceptible to manipulation and exploitation under an at-will internship, wherein the employer could terminate the intern or create conditions so the intern quits before realizing any wages. Likewise, expectation of employment is a strong motivator and tips the balance of power in favor of the employer. Accordingly, if there is an entitlement to or expectation of employment at the conclusion of the internship, there must be a finding of employment under the FLSA.

The employer and intern must also understand the intern is not entitled to

wages during the internship. If the student is working under the pretense he will receive remuneration for his labors, be it through wages or a stipend, there must be a finding of employment. This will be, however, a fertile area for dispute between the intern and the employer. Therefore, a safe practice would be to execute a written agreement clarifying the terms of the internship. Additionally, the employer and the intern should strive to make the terms of the internship as clear as possible. The parties should specify the beginning and end dates, that the internship will be unpaid, and that there is no guarantee of future employment arising out of the internship.

By placing these limitations on the small-business exception, the practical effect is to meet the goals of Fact Sheet #71 without placing an onerous burden on employers to prove elements, such as the benefit of the internship being for the intern and that the intern learned something. The costs of hiring and training an intern, together with the limited time for the employer to recoup its investment, work to ensure the internship is for the benefit of the intern. Similarly, because of the short ninety-day internship, it would be very difficult for the employer to use interns to displace regular employees. The employer may receive an immediate advantage, but, if the employer's hiring and training costs exceed the productivity of the intern, the business' operations may actually be impeded.

V. CONCLUSION

As young people continue to pour into the already saturated labor market, the need for protecting people from exploitation remains imperative. There is an upside to unpaid internships, as can be seen by the Department of Labor contemplating these programs in Fact Sheet #71; namely, they are outlets to gain experience. But, the stringent requirements imposed by Fact Sheet #71 lead to onerous litigation and discourage employers from offering students opportunities to learn in a practical setting.

A carve out of the FLSA that allows students and small-businesses to enter into relationships in which the student will work for the employer temporarily and without pay is necessary to efficiently meet the needs of individuals and firms. Despite the appearance of an exploitative relationship, the short duration of the employment gives the employer little time to recoup recruitment and selection costs, and other costs associated with new employees, thereby curbing any ill-intent on the part of the employer.

Students who are affected by structural barriers, such as students who are the first in their family to attend college, will particularly benefit from this exception. Whereas some students may benefit from nepotism and familial connections, students without these privileges must gain experience elsewhere to

stay competitive. Having more outlets to gain experience helps students; reducing the risk of "hiring" a student helps employers. If an exception to the FLSA can be made that is beneficial to both individuals and employers without turning a blind eye to the purpose of the FLSA, then that exception should be made law. A small business exception to the FLSA will ultimately benefit young workers—the people the FLSA is intended to protect.