



## UNPAID INTERNSHIPS: A TALE OF LEGAL DISSONANCE

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## I. INTRODUCTION

“Should everyone be paid something, or are unpaid internships simply a part of getting your foot in the door?”<sup>1</sup> That quote typifies the ultimate question about unpaid internships and the law. As of 2013, the American economy is still slowly recovering from its 2008 collapse.<sup>2</sup> In April 2012, 13.2% of 20–24 year olds were unemployed, which reflected the weak recovery among America’s young workers.<sup>3</sup> The fact that unpaid internships have proliferated into more industries in recent years has added to the stagnant employment numbers among college students and recent graduates.<sup>4</sup> Unpaid internships present a complicated problem because they provide an important experiential opportunity for college students and a recruiting opportunity for employers. However, employers also have the opportunity to use unpaid internships to violate the minimum wage and overtime requirements of the Fair Labor Standards Act (“FLSA”), which requires employers to pay employees a minimum wage and an overtime wage.<sup>5</sup>

One issue that has emerged in the context of unpaid internships is the proper legal analysis that courts should use to determine when an unpaid internship violates the FLSA. While the Supreme Court dealt with a similar issue in *Walling v. Portland Terminal Co.*, the Department of Labor (“DOL”), through its regulatory arm called the Wage and Hour Division

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<sup>1</sup> Lauren Sherman, *Will Prohibiting Unpaid Internships Kill the Fashion Industry?*, FASHIONISTA (Apr. 8, 2010, 2:43 PM), <http://fashionista.com/2010/04/will-prohibiting-unpaid-internships-kill-the-fashion-industry/>.

<sup>2</sup> Robert J. Samuelson, *Recovery That Never Started Might Now Be Underway*, INVESTORS.COM (Mar. 22, 2013, 6:06 PM), <http://news.investors.com/print/ibd-editorials-on-the-left/032213-649053-strong-gains-in-jobs-and-output-feed-recovery.aspx>.

<sup>3</sup> Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 6, 2012, at A1, available at <http://www.nytimes.com/2012/05/06/business/unpaid-internships-dont-always-deliver.html?pagewanted=all>.

<sup>4</sup> *Id.*

<sup>5</sup> 29 U.S.C. §§ 206–207 (2010).

(“WHD”), has since disagreed with various United States Circuit Courts over the proper test used to determine if a volunteer, such as an unpaid intern, qualifies as an employee under the FLSA.<sup>6</sup>

This note will examine the application of the FLSA to unpaid internship programs and the circuit split that has caused legal confusion. Part II provides an overview of unpaid internships and the various interests involved in the context of determining the legality of unpaid internships. Part III discusses the FLSA, the Supreme Court case of *Walling v. Portland Terminal Co.*, and the WHD’s Factsheet #71, which created confusion for both employers and interns. Part IV examines the circuit split over the proper test to apply to determine whether a volunteer, and thus an unpaid intern, is an employee under the FLSA. Part V recommends that a Supreme Court standard is necessary to clear up the legal confusion surrounding unpaid interns and that a WHD standard would not solve the problem. Part VI provides a brief summation of the note.

## II. UNPAID INTERNSHIPS: THE NEW REALITY OR A BIG PROBLEM?

As the calendar flipped from the twentieth to the twenty-first century, the decision to continue education beyond high school became the rule for most Americans, not the exception. Just shy of 70% of high school graduates immediately enroll in some sort of secondary educational program.<sup>7</sup>

In particular, college has become the premier avenue for those who pursue secondary education. As of 2012, 33% of

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<sup>6</sup> See *infra* Part IV (discussing the split in the circuits over the proper test to determine if an employment relationship exists).

<sup>7</sup> Nancy K. Cauthen, *Preface* of KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, *ECON. POL’Y INST., PAVING THE WAY THROUGH PAID INTERNSHIPS: A PROPOSAL TO EXPAND EDUCATIONAL AND ECONOMIC OPPORTUNITIES FOR LOW-INCOME COLLEGE STUDENTS* 1, 1 (2010), available at [http://www.demos.org/sites/default/files/publications/PavingWay\\_PaidInternships\\_Demos.pdf](http://www.demos.org/sites/default/files/publications/PavingWay_PaidInternships_Demos.pdf).

Americans ages 25–29 had a college degree.<sup>8</sup> Concurrent with the increase in the number of college attendees and graduates is the number of college students who participate in internships. In 2006, 84% of students at four-year institutions finished at least one internship program prior to graduating from college.<sup>9</sup>

The substantial number of college attendees who participate in internships illustrates the importance of experiential programs to a student’s marketability after graduation. Internships “provide a crucial bridge from being a college graduate to transitioning into the labor market.”<sup>10</sup> Further, the internship allows the student to gain actual experience in the field he wants to pursue professionally, to learn new skills, to network with professionals established in the field, and to “get a foot in the door for future employment in a particular field.”<sup>11</sup> The National Association of Colleges and Employers (“NACE”) found that 76.3% of surveyed employers reported that relevant work experience was the primary factor when considering applicants.<sup>12</sup> Further, only 14% of graduates from the class of 2009 who did not have an internship experience had a job, compared to the 23% of graduates that held one or more internships.<sup>13</sup>

Despite the many benefits, one major problem is that most internship programs are unpaid. As of 2012, one-third to one-

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<sup>8</sup> Tamar Lewin, *Record Number Complete High School and College*, N.Y. TIMES, Nov. 6, 2012, at A17, available at [http://www.nytimes.com/2012/11/06/education/record-numbers-of-young-americans-earn-bachelors-degree.html?\\_r=0](http://www.nytimes.com/2012/11/06/education/record-numbers-of-young-americans-earn-bachelors-degree.html?_r=0).

<sup>9</sup> KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, ECON. POL’Y INST., *PAVING THE WAY THROUGH PAID INTERNSHIPS: A PROPOSAL TO EXPAND EDUCATIONAL AND ECONOMIC OPPORTUNITIES FOR LOW-INCOME COLLEGE STUDENTS 2* (2010).

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

half of the 1.5 million internships were unpaid.<sup>14</sup> Not surprisingly, unpaid internships have a substantial negative socioeconomic effect on college students from less affluent families. For example, for student *X*, a member of a family with a combined income of over \$200,000 per year, the potential negative consequences of an unpaid internship are minimal. Financially, *X* has the resources necessary to survive while participating in the unpaid internship. However, student *Y*, a member of a family with a combined income of \$75,000, must work in a paid job, even if it is menial work, in order to pay bills. The economic necessity of working a paid job severely limits student *Y*'s ability to participate in an unpaid internship.<sup>15</sup> This has a negative impact on *Y*'s potential economic opportunities, both to make money in the present and to gain valuable professional experience for a future job.

Because of the integral role that internships play in obtaining a job after graduation, many low-income students are forced to either take a paid job—often outside of that student's field of study—or take out additional loans to finance the internship.<sup>16</sup> In the long-term, both options are poor because the student will

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<sup>14</sup> 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/>.

<sup>15</sup> Although it is beyond the scope of this note, a study from the Economic Policy Institute provided an excellent overview of the concentrated negative impact that unpaid internships have on low and middle-income college students. The study's authors advocate for a government program to provide the necessary funding for students with fewer internship options because of their precarious financial situation. EDWARDS & HERTEL-FERNANDEZ, *supra* note 9, at 4.

<sup>16</sup> *Id.* at 5. Edwards and Hertel-Fernandez note that the financial aid system also has a negative impact on low-to-moderate income students. *Id.* at 4–5. First tier graduates, meaning students from high-income families, “can afford to forgo wages each summer to pursue unpaid work experiences” as compared to the second tier, low-to-moderate income graduates who are “highly dependent on financial aid and employment, and therefore often cannot afford unpaid internships . . .” *Id.* at 5. That illustrates a major problem that occurs when too many employers are allowed to abuse unpaid internships to avoid paying students. It has either a negative financial impact on the life of the intern or a negative career impact on the student who must forgo the unpaid internship to work.

either have limited marketability or deep debt.<sup>17</sup> This problem will not help the high unemployment rate among 20–24 year olds, which was at 13.2% as of April 2012.<sup>18</sup> Another potential problem is that a lack of job opportunities forces graduates, desperate for a resume-building job, to turn to unpaid internships as a means to strengthen their credentials.<sup>19</sup> Although post-graduate unpaid internships were previously limited to a few industries, such as film, unpaid internships are the norm for most industries in the modern economy.<sup>20</sup>

The cost–benefit debate over unpaid internships has played out among institutional actors. In 2010, thirteen college presidents signed a letter urging then-Secretary of Labor, Hilda Solis, to implement a cautious approach to cracking down on unpaid internships.<sup>21</sup> Written by Joseph E. Aoun, President of Northeastern University, the letter stated that “[t]he Department’s . . . public statements could significantly erode employers’ willingness to provide valuable and sought-after opportunities for American college students.”<sup>22</sup> Moreover, the thirteen presidents urged “great caution in changing an approach to learning that is viewed as a huge success by educators, employers, and students alike . . . .”<sup>23</sup> President Aoun’s letter reflects the view that unpaid internships are largely beneficial for all parties involved.

However, the Economic Policy Institute responded to Aoun’s letter with its own barrage of criticism of the argument opposing the regulation of unpaid internships. Ross Eisenbrey, Vice

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<sup>17</sup> *Id.*

<sup>18</sup> Greenhouse, *supra* note 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Letter from Joseph E. Aoun, Pres., Northeastern Univ., et al., to Hilda Solis, Sec’y of Labor, Dep’t of Labor (Apr. 28, 2010), *available at* [http://www.epi.org/page/-/pdf/20100428\\_univ\\_presidents\\_letter\\_to\\_USDOL.pdf](http://www.epi.org/page/-/pdf/20100428_univ_presidents_letter_to_USDOL.pdf). The letter was written in response to Factsheet #71, a directive to for-profit employers to ensure that their unpaid internship programs complied with the relevant law. *See infra* Part III.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

President of the Economic Policy Institute, authored a letter to Secretary Solis in response to President Aoun's letter.<sup>24</sup> Eisenbrey assailed Aoun's letter as "astonishing" because "what the universities are asking is that the Department of Labor look the other way and condone violations of the law . . . ."<sup>25</sup> Eisenbrey pointed out that "the Department of Labor has regulated internships as long as they have existed, insofar as internships are, in fact, employment."<sup>26</sup> The letter framed WHD's Factsheet #71 as a reiteration of the application of the FLSA to unpaid internships, rather than a shift towards the regulation of internships.<sup>27</sup> Significantly, WHD's test protects unpaid interns from predatory internship programs that use interns to benefit the employer, such as packing boxes, running errands, and answering phones, without any equivalent experiential benefit to the intern.<sup>28</sup>

Beyond the debate among institutional actors, the proliferation of unpaid internships has recently resulted in litigation against employers that hosted unpaid internship programs. Two law firms, Outten & Golden LLP in New York City and Schneider and Rubin, LLC in New Jersey, have marketed the firms as focused on unpaid internship litigation. One online news outlet has described Schneider and Rubin's firm as "the first law firm in the United States exclusively focused on the issue of internship law."<sup>29</sup> Outten & Golden operates a website separate from its official law firm website

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<sup>24</sup> Letter from Ross Eisenbrey, Vice Pres., Econ. Pol'y Inst., to Hilda Solis, Sec'y of Labor, Dep't of Labor (May 5, 2010), *available at* [http://www.epi.org/publication/epi\\_responds\\_to\\_university\\_presidents\\_on\\_internship\\_regulations/](http://www.epi.org/publication/epi_responds_to_university_presidents_on_internship_regulations/).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* As a brief introduction, in 2010 the Wage and Hour Division issued Factsheet #71 as guiding authority to help employers determine if their internship violates the FLSA. *See infra* note 69.

<sup>28</sup> *Id.*

<sup>29</sup> *Schneider & Rubin, LLC, Opens First U.S. Law Firm Exclusively Dedicated to Unpaid Internship Law*, ONLINE PR MEDIA (Feb. 2, 2012), <http://www.onlineprnews.com/news/202675-1328061976-schneider-rubin-llc-opens-first-us-law-firm-exclusively-dedicated-to-unpaid-internship-law.html>.

that solely handles unpaid internship queries.<sup>30</sup> Highlighting the increase in litigation, Outten & Golden currently has two lawsuits open, one against Fox Searchlight and the other against Hearst Corporation.<sup>31</sup>

The above discussion set the factual context of the current problem with unpaid internships. Both sides in the ongoing battle over unpaid internships have persuasive arguments, which this note will consider in Part V. First, it is first important to note that the unpaid internship issue arose for two main reasons: 1) uncertainty about the application of the FLSA to unpaid interns, and 2) the differing interpretations of the United States Circuit Courts of Appeals over the proper test to use to determine if someone is an “employee” under the FLSA. Each topic is covered in turn in Part III and Part IV.

### III. CURRENT LAW: THE FLSA, WALLING, AND THE DOL

The process that led to federal minimum wage for employees developed slowly. The United States Supreme Court struck down a 1918 District of Columbia ordinance that mandated a minimum wage for all women and children who worked within its boundaries.<sup>32</sup> Fifteen years later, though, the Supreme Court in *West Coast Hotel Co. v. Parrish* upheld a Washington minimum wage law that expressly overruled the holding in *Adkins*.<sup>33</sup> Further, in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, the Supreme Court upheld the power of the federal government

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<sup>30</sup> Outten & Golden LLP, *Should You Have Been Paid for Your Unpaid Internship?*, UNPAID INTERNS LAWSUITS (Mar. 20, 2013), <http://unpaidinternslawsuit.com/>.

<sup>31</sup> *Id.*

<sup>32</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525, 562 (1923). Though the majority based its decision on the freedom of contract found in the Due Process Clause of the Fifth Amendment, the Supreme Court had previously used the freedom of contract doctrine to reject governmental regulation of the employment realm during the early twentieth century. *Id.* at 545.

<sup>33</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

to enact regulations to protect the right of workers to unionize.<sup>34</sup> That decision opened the door for expanded federal regulation in the employment realm without concern that the Supreme Court would overturn the legislation.

The legislative history provides an important backdrop to understanding the FLSA. President Franklin Roosevelt, encouraged by the Supreme Court's decision in *Jones & Laughlin Steel Corp.*, signaled his support for a statutory scheme to protect workers with minimum wage and maximum hour laws.<sup>35</sup> President Roosevelt cited the commerce clause in Article One of the U.S. Constitution as the legal authority to enact the FLSA.<sup>36</sup>

Congress promulgated the federal minimum wage protection for workers in the Fair Labor Standards Act of 1938.<sup>37</sup> Section 202 of the FLSA sets forth Congress's declared policy to provide a minimum standard of living for employees of "industries engaged in commerce."<sup>38</sup> Congress created the WHD, under the direction of the Administrator, as the entity authorized to oversee wage and hour issues.<sup>39</sup>

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<sup>34</sup> N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). The Supreme Court found that Congress's power to regulate interstate commerce extended to acts by an employer that "burden or obstruct interstate or foreign commerce." *Id.* at 31.

<sup>35</sup> BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 396–99 (Robert F. Koretz ed. 1970), reprinted in MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 390–91 (7th ed. 2011). President Roosevelt wrote a message that stated: "To conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor." *Id.*

<sup>36</sup> *Id.* The decision by President Roosevelt to cite the Commerce Clause proved to be significant because the Supreme Court ultimately upheld the FLSA based on the commerce clause in *U.S. v. Darby*, 312 U.S. 100, 121–22 (1941).

<sup>37</sup> 29 U.S.C. § 206 (2012).

<sup>38</sup> *Id.* § 202(a). The impetus for the FLSA, as described in Section 202, was employer practices that had negatively affected interstate commerce. *Id.* Although the detrimental effect on the health, efficiency, and general well-being of workers was important, the conditions also cited "burdens [on] commerce and the free flow of goods in commerce." *Id.*

<sup>39</sup> *Id.* § 204(a). The President appoints the Administrator with the advice and consent of the Senate. *Id.*

Section 206 is the provision that pertains to the minimum wage requirement in the FLSA.<sup>40</sup> The relevant text reads: “[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, wages” at rates specified by Congress.<sup>41</sup> The FLSA defines “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency,” but excluded labor organizations, unless one acts as an employer.<sup>42</sup> For the purposes of this note, the definition of employee provides the base from which I approach the unpaid internship problem.

Section 203(e)(1) ever so helpfully defines an employee as “any individual employed by an employer.”<sup>43</sup> That same sub-provision qualifies the definition of employee in paragraphs (e)(2–4) of the subdivision. It is important to understand the qualifications because certain exemptions found in the FLSA will automatically exclude some unpaid interns from potential “employee” status. First, individuals employed by a public agency, such as the federal government, the judiciary, the Library of Congress, the United States Postal Service, or a state or a political subdivision of a state, do not fall under the category of “employee.”<sup>44</sup> Next, Section 203(e)(3) exempts from “employee” status “any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer’s immediate family.”<sup>45</sup> Finally, Section 203(e)(4) exempts from “employee” status any

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<sup>40</sup> *Id.* § 206(a).

<sup>41</sup> *Id.* The rest of sub-division (a) articulates the minimum wage requirement at the current level of \$7.25. *Id.*

<sup>42</sup> 29 U.S.C. § 203(d). Although the definition of employer is not a significant portion of this note, Section 203(r)(1) provides an extensive definition of the word “enterprise” that is a component of the employer definition. 29 U.S.C. § 203(r)(1).

<sup>43</sup> 29 U.S.C. § 203(e)(1).

<sup>44</sup> 29 U.S.C. § 203(e)(2).

<sup>45</sup> § 203(e)(3).

individual who volunteers for “a public agency which is a State, a political subdivision of a State, or an interstate governmental agency . . . .”<sup>46</sup> The definition of “employ”, found in the same section, states, “[e]mploy’ includes to suffer or permit to work.”<sup>47</sup>

Section 214 provides potential guidance for the unpaid intern problem. The “[l]earners, apprentices, and messengers” sub-provision states that “the Secretary [of Labor] . . . shall by regulations or by orders provide for the employment of learners, of apprentices . . . under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage . . . under section 206[.]”<sup>48</sup> Although it does not provide an explicit answer, Section 214 illustrates that Congress contemplated the need for flexibility in circumstances where the employer should rightfully be exempt from the minimum wage requirement of Section 206. A Supreme Court case in 1947 provided guidance on the interpretation of the FLSA in the context of “trainees”, which can be analogized to unpaid interns.

In *Walling v. Portland Terminal Co.*, the employer was a railroad company that provided applicants with “practical training” prior to actual employment as yard brakemen in a train yard.<sup>49</sup> During the training period, the applicant, or trainee, observed how to perform the job, followed by a period in which the applicant performed the work under close supervision of the yard crew.<sup>50</sup> The trainee did not displace any employee and did not provide the railroad with a benefit because the efforts “[did] not expedite the company business.”<sup>51</sup> After successfully completing the course, the trainee was put on a list for the railroad to use when needed.<sup>52</sup> However, the trainee was not paid for the training period, and thus the

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<sup>46</sup> § 203(e)(4).

<sup>47</sup> § 203(g).

<sup>48</sup> 29 U.S.C. § 214(a) (2012).

<sup>49</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149 (1947).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 149–50.

<sup>52</sup> *Id.* at 150.

plaintiff brought suit against the employer for violating Section 215(a)(2) of the FLSA.<sup>53</sup>

First, the Court engaged in a textual and purposivist analysis of the FLSA. It found that the FLSA covered the trainees “without doubt” because the FLSA granted the Administrator the power, in Section 214(a), to grant a certificate to employers to pay the learner-apprentice at less than minimum wage.<sup>54</sup> The Court found that the purpose of Section 214(a) was to allow employers to pay trainees at lower than minimum wage because the person had inadequate skills to justify paying them in full. The sub-provision was not intended to provide employers with an exemption from the minimum wage requirement.<sup>55</sup> However, the employer who has not actually employed the trainee has not violated the minimum wage law and does not automatically have to get a permit from the Administrator.<sup>56</sup>

The Court then analyzed congressional intent in defining “employ” and “employee.”<sup>57</sup> The Court found that the definition of “employ”—to suffer or permit to work—was “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.”<sup>58</sup> Further, such a broad interpretation of the FLSA would cover even those people who did not have a promise or expectation to make money; the congressional purpose and scope was a good deal narrower than that.<sup>59</sup>

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<sup>53</sup> *Id.* Section 215(a)(2) provides that “it shall be unlawful for any person . . . to violate any of the provisions of section 206.” 29 U.S.C. § 215(a)(2) (2012).

<sup>54</sup> *Walling*, 330 U.S. at 151.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 152.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* If that were the case, the Court reasoned, even students at a college would be employees of the school that they attended, thus entitling them to minimum wage. *Id.* For the actual definition of “employ,” see 29 U.S.C. § 203(g).

<sup>59</sup> *Id.*

The Court distinguished between employees who expected to be paid and those who worked only in self-interest. Congressional purpose for Section 206 was to guarantee that every person who “contemplated compensation” could not and should not be forced to work for less than minimum wage.<sup>60</sup> In contrast, the broad definitions of “employ” and “employee” were not intended to cover, as an employee, a person whose “work serves only his own interest.”<sup>61</sup> Further, the Court found that neither the purpose nor text of the FLSA was intended to penalize an employer for providing free training to a learner, which primarily benefited the learner, not the employer.<sup>62</sup>

The Court held that the plaintiff was not an employee under the FLSA because the railroad did not receive “immediate advantage” from the work.<sup>63</sup> The Court cautioned that its holding could potentially provide an evasion of the FLSA minimum wage requirement,<sup>64</sup> but that the facts of this case did not support the contention that the railroad violated either the text or purpose of the FLSA.<sup>65</sup> The Court closed the opinion with a statement appropriate to this note: “We therefore have no case before us in which an employer has evasively accepted the services of beginners at pay less than [sic] the minimum wage . . . . It will be time enough to pass upon such evasions when it is contended that they have occurred.”<sup>66</sup> As stated in Part V below, that time is rapidly approaching.

Although the *Walling* decision provided a satisfactory discussion of the judicial interpretation of the FLSA in the

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<sup>60</sup> *Walling*, 330 U.S. at 152.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 153.

<sup>64</sup> *Id.* The Court wrote “[w]e have not ignored the argument that such a holding may open up a way for evasion of the law.” *Id.* The Court’s contemplation of a potential evasion of minimum wage requirements foreshadowed the problem that has emerged sixty-five years later in the context of unpaid internships.

<sup>65</sup> *Id.*

<sup>66</sup> *Walling*, 330 U.S. at 153.

context of trainees, it did not deal with the precise issue of unpaid internships. Although internships were not prevalent outside the field of medicine at the time of *Walling*, they have increased markedly since the 1970s and 1980s.<sup>67</sup> In the aftermath of the recession in 2008, it is estimated that a third to a half of internships are unpaid.<sup>68</sup> To deal with that problem, the WHD, per its authority under the FLSA, issued guidance to employers to stem the growing problem of unpaid internships.

The WHD issued Fact Sheet #71 to provide guidance to employers about the legality of unpaid internships.<sup>69</sup> It provides general information to help determine “whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to ‘for-profit’ private sector employers.”<sup>70</sup> The “Background” portion of the fact sheet states that internships in the for-profit private sector will generally be considered to meet the definition of “employ”, thus falling within the scope of “employee” under FLSA.<sup>71</sup>

The WHD outlined a six-factor test for employers to determine if they must compensate the interns in their office at minimum wage. The *Walling* decision provided the base for the

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<sup>67</sup> Sanburn, *supra* note 14. The author found unpaid internships increased for two main reasons. First, the labor force endured a “casualization” that shifted from full-time, lifetime employees to temporary workers because temporary workers were easier to lay off, easier to keep from unionizing, and could be paid less in benefits. *Id.* Second, employers developed Human Resources departments to oversee new hires and recruitment, often through the internship programs developed by those departments. *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> WAGE AND HOUR DIV., DEPT. OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) (“FACT SHEET #71”).

<sup>70</sup> *Id.* The Fact Sheet makes clear that only interns in the “for-profit” private sector will be viewed as “employees” under the FLSA. *Id.* The FLSA recognizes an exception for people who volunteer for religious, charitable, civic, or humanitarian non-profit organizations. *Id.* It further provides that unpaid internships in the “public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.” *Id.*

<sup>71</sup> *Id.* The “Background” section also stated that the employer was required to pay the intern minimum wage, as well as any applicable overtime. FACT SHEET #71, *supra* note 69.

test.<sup>72</sup> After acknowledging that an unpaid intern's effort often benefits only himself, the WHD stated that the employer must evaluate six factors to determine an intern's status:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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.<sup>73</sup>

The WHD further stated that the exclusion is "necessarily quite narrow" because the FLSA is broadly defined, so the FLSA will not apply if all six factors are met.<sup>74</sup> Under the first element, the WHD provides that the closer the program resembles an academic experience, not the employer's actual

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<sup>72</sup> *Id.* Although the Fact Sheet did not mention the *Walling* decision by name, it pulled quotes from the decision. For instance, it states that "suffer or permit to work" should not be interpreted so broadly as to make someone whose efforts "serves only his . . . interest an employee of another who provides aid or instruction." *Id.*

<sup>73</sup> *Id.* The test is a totality test that "depends upon all of the facts and circumstances of each such program." *Id.*

<sup>74</sup> *Id.*

operations, the more likely it will qualify as a legal unpaid internship.<sup>75</sup> For instance, colleges offer educational credit to ensure that the experience “is similar to the education environment.”<sup>76</sup> The internship also must be designed such that the unpaid intern is the primary beneficiary, which is best provided by allowing the intern to gain a multitude of skills in areas beyond the employer’s business. The third element, known as displacement, prohibits an employer from using unpaid interns as replacement employees to avoid hiring additional employees or to avoid allowing current employees to work additional hours.<sup>77</sup> The more the employer supervises the unpaid intern, especially above and beyond normal employees, the more likely the experience is “educational.”<sup>78</sup> To meet the fifth element, the employer and the unpaid intern must not engage in a “trial period” that precedes hiring the unpaid intern in a permanent role with the for-profit enterprise.<sup>79</sup> The final element provides the straightforward requirement that the employer make clear, and that the unpaid intern agrees that, the position will be unpaid.<sup>80</sup>

The WHD’s Fact Sheet #71 provided relevant guidance on the issue of unpaid interns. It worked off of the *Walling* decision’s holding that trainees do not qualify as “employees” under the FLSA.<sup>81</sup> However, despite the seemingly clear-cut guidance, the WHD’s Fact Sheet is just one interpretation that

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<sup>75</sup> FACT SHEET #71, *supra* note 69. The WHD puts a premium on employers providing the intern with skills that could be used in various employment settings, as opposed to only the employer’s area of business. If the intern is involved in “productive work”, such as filing or assisting customers, they will likely fall under the FLSA minimum wage requirement. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* The more supervision the unpaid intern receives, the more he or she resembles a trainee. *Id.*

<sup>79</sup> *Id.* The WHD recommends that the employer establish a “fixed-duration” before the internship begins in order to avoid the appearance that the unpaid intern will receive a full-time job at the conclusion of the internship. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Walling*, 330 U.S. at 152.

can potentially apply to unpaid interns. Various U.S. Circuit Courts use different tests to analyze the dividing line between “employee” and “trainee” under the FLSA.<sup>82</sup> In Part IV, I will discuss the circuit court split over the interpretation of trainee programs in the context of the FLSA.

#### IV. THE CIRCUIT SPLIT

Since *Walling*, the U.S. Supreme Court has not issued a definitive rule to use to determine when an unpaid intern becomes an employee. However, a number of circuits have dealt with the issue of trainee programs and the FLSA. The Second, Fourth, Fifth, Sixth, and Tenth Circuits each use a different analysis to determine whether a trainee is an employee for the purposes of the FLSA. I will discuss each circuit analysis in turn.

##### A. THE FIFTH CIRCUIT

The Fifth Circuit first dealt with the issue of whether a trainee is an employee per the FLSA in *Donovan v. American Airlines, Inc.*<sup>83</sup> In *Donovan*, the Secretary of Labor brought an action against American Airlines, arguing that fulltime students in its airline learning center were employees under the FLSA and thus entitled to minimum wage and overtime.<sup>84</sup> American used a specialized training program for flight attendants that required forty hours a week for four-to-five weeks, all of which were unpaid.<sup>85</sup> The trainees did not supplant any full time employees, and they learned about American’s aircraft, safety procedures, equipment, internal procedures, food preparation, customer service, and grooming requirements.<sup>86</sup> Reservation

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<sup>82</sup> See *infra* Part IV.

<sup>83</sup> *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir.1982). One year later, the Fifth Circuit again addressed the issue of trainees under the FLSA in the case of *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983).

<sup>84</sup> *Donovan*, 686 F.2d at 268.

<sup>85</sup> *Id.* at 268–69.

<sup>86</sup> *Id.* at 269–70.

sales agents trained in classrooms for two-to-three weeks, forty hours per week, wherein the trainee learned American's sales techniques, airport designations, fares, and other information that was specialized to American Airlines.<sup>87</sup>

The Fifth Circuit adopted the WHD test, but also used a balance of the benefits approach.<sup>88</sup> The court found that the trainees in the case did not meet any of the WHD criteria.<sup>89</sup> The court enunciated that the facts in *Donovan* analogized neatly with *Walling*: “Indeed, if we return to the *Portland Terminal* opinion and change the word ‘railroad’ to the word ‘airline,’ the decision fits this case.”<sup>90</sup>

Moreover, the court employed a balancing analysis that weighed the benefits that the trainees received compared to American Airlines. The benefits tipped in favor of the trainee because no regular employees were displaced, the training was very expensive, and American received no immediate benefit from the trainees' presence.<sup>91</sup> Although American Airline's training program operated for its own profit, the training produced a labor pool available to be hired if American needed them for work.<sup>92</sup> The trainees did not actually become “productive for American” until after they completed training, which was one of several steps necessary to prepare the trainees to work for American Airlines.<sup>93</sup>

## B. THE FOURTH CIRCUIT

In 1989, the Fourth Circuit dealt with the same question of whether trainees were employees under the FLSA's minimum

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<sup>87</sup> *Id.* at 270.

<sup>88</sup> *Id.* at 271–73.

<sup>89</sup> *Donovan*, 686 F.2d at 273. Although the court accepted the WHD test, it did not apply the factors to the facts of the case; rather, it simply noted that the trainee did not meet any of the factors. *Id.*

<sup>90</sup> *Id.* at 272.

<sup>91</sup> *Id.* at 271.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 272.

wage and overtime provisions, but analyzed the scenario with a different framework than the Fifth Circuit.<sup>94</sup> The trainees in this case were being hired to work particular routes as snack food vendors.<sup>95</sup> The trainees worked fifty-to-sixty hour weeks with experienced routemen who taught the trainees how to load and unload the trucks, restock stores with products, maintain vending machines, and prepare orders.<sup>96</sup>

The district court used the WHD test derived from *Walling* to evaluate the claim by the DOL.<sup>97</sup> After applying the test, the court determined that the training was similar to vocational school instruction provided for outside salesmen, the trainees did not displace any workers, the training benefitted the trainee, and the employer received no immediate benefit.<sup>98</sup>

However, the Fourth Circuit Court concluded that the proper test to determine if the trainee was an employee was “whether the employee or the employer is the primary beneficiary of the trainees’ labor.”<sup>99</sup> The court cited case law from within its circuit that required it to apply the primary beneficiary test as opposed to the WHD test.<sup>100</sup> To analyze the degrees of benefit for each party, the court examined the facts underlying the job requirements of the trainees during the training period in dispute.<sup>101</sup> In this case, the truck driving, unloading the products, and stocking shelves and vending machines were

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<sup>94</sup> *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989).

<sup>95</sup> *Id.* at 1208.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1209.

<sup>99</sup> *Id.*

<sup>100</sup> *McLaughlin*, 877 F.2d at 1209. The two cases cited by the majority were *Wirtz v. Wardlaw*, 339 F.2d 785 (4th Cir. 1964) and *Isaacson v. Penn Community Services, Inc.*, 450 F.2d 1306 (4th Cir. 1971). *See id.* In *Wardlaw*, the court found that the FLSA entitled a group of women to minimum wage and overtime pay because the women benefitted the employer by selling insurance. *Id.* In *Isaacson*, the court held the employer did not receive a benefit and the trainee did, and therefore, the trainee was not covered by the FLSA. *Id.*

<sup>101</sup> *Id.* at 1210.

“only simple specific job functions” that directly related to the business of the employer.<sup>102</sup> The court reasoned that the benefits to the employer far outweighed the “very little” that the trainees received in from the training.<sup>103</sup> Ultimately, the court held that the trainees who participated in the training period were entitled to minimum wage and overtime for their efforts because the employer principally benefitted from the labor.<sup>104</sup> Despite the prevailing view of the majority, Judge Wilkins submitted a vigorous dissent to the majority’s opinion.<sup>105</sup>

### C. THE TENTH CIRCUIT

The Tenth Circuit addressed the trainee-employee distinction in the case of *Reich v. Parker Fire Protection District*.<sup>106</sup> In *Reich*, the Secretary of Labor brought suit against the defendant, a fire department, for wages owed to firefighters who trained at its academy prior to becoming employed as firefighters.<sup>107</sup>

In *Reich*, the parties agreed that the proper test to apply to determine whether trainees were employees within the meaning of the FLSA was the WHD test; however, the parties disagreed

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* The court listed the benefits that broke in favor of the employer: the employer received fully trained employees who could perform the job when they started to receive pay, the employer received a free opportunity to evaluate the trainees’ performances, and the regular workers received help performing their usual duties. *Id.* In contrast, the trainees learned skills that were specific to this particular job or “so general to be of practically no transferable usefulness.” *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *McLaughlin*, 877 F.2d at 1210 (Wilkins, J., dissenting). The dissent argued that the majority applied the wrong test. *Id.* Without addressing the Fourth Circuit case law cited by the majority opinion as controlling, the dissent followed the *Walling* holding and the WHD test to find that each element was met. *Id.* at 1212. Further, the dissent found that the conclusion of the majority served to “contravene[] the policies underlying the trainee exclusion from the minimum wage law” by increasing the difficulty for young people and unskilled workers to find job opportunities beyond low-skill employment opportunities. *Id.* at 1213.

<sup>106</sup> *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993).

<sup>107</sup> *Id.* at 1024–25.

whether all six factors were necessary to meet the test.<sup>108</sup> The Secretary of Labor argued that the test strictly required that all six elements be met for the employees to be considered trainees and, thus, not be owed minimum wage under the FLSA.<sup>109</sup> On the other hand, the fire department urged that the test was a “totality of the circumstances” test that did not automatically fail where one factor was not met.<sup>110</sup>

The majority began by addressing the proper deference due to the DOL’s interpretation under the WHD test. The court acknowledged that the WHD had applied the six-part test consistently since 1967, but found that the WHD’s interpretation of the test—which strictly required all six factors—was not to be given the heightened level of deference accorded to agency regulations.<sup>111</sup> Rather, the court applied the less deferential *Skidmore* standard to the WHD’s interpretation, which allowed the court to take into account the “rulings, interpretations and opinions of the Administrator under this act,” but did not require the court to follow it as controlling.<sup>112</sup>

The majority analogized the trainee-employee distinction to the employee-independent contractor distinction.<sup>113</sup> Under the independent contractor-employee distinction, no single factor was dispositive; rather, the ultimate outcome was based upon the totality of the circumstances and the economic realities of the relationship.<sup>114</sup> Due to the similarity of the situations, the

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<sup>108</sup> *Id.* at 1025–26.

<sup>109</sup> *Id.* at 1026.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The majority compared the deference afforded by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as controlling over agency regulations, in contrast to the decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which controlled non-regulatory guidelines. *Id.*

<sup>112</sup> *Reich*, 992 F.2d at 1026 (citing *Skidmore*, 323 U.S. at 144). This distinction is particularly relevant for my note because I advocate for a Supreme Court decision to enunciate the proper test, rather than a reformulated WHD test.

<sup>113</sup> *Id.* at 1027.

<sup>114</sup> *Id.*

majority found that the independent contractor-employee reasoning was “informative” to the determination of the trainee-employee distinction.<sup>115</sup>

Using the totality of the circumstances approach, the court found that the trainees met five of the six factors; therefore, the test was easily met.<sup>116</sup> The court found that the trainees fully expected to be hired at the end of their training, but that they also understood at the outset of their training that they were not to be paid until they completed the training.<sup>117</sup> There was also no displacement of current firefighters by the trainees because the fire department was expanding to replace volunteer firefighters, not to replace veteran firefighters.<sup>118</sup>

The court found that the training program was similar to a vocational school and thus met the first element.<sup>119</sup> Comparing the training academy to the America Airlines Learning Center in *American Airlines*, the court found that the trainees received experience and training that overlapped with degree programs in community colleges and at other fire academies.<sup>120</sup> Although the training program in this particular case emphasized some policies specific to the defendant fire department, the program taught skills that were “fungible within the industry”, making the training sufficiently similar to vocational school training.<sup>121</sup>

The court also found that the trainees’ efforts did not benefit the employer; the training primarily benefitted the trainees.<sup>122</sup> Although the trainees did provide some equipment maintenance and support for a non-fire emergency situation, the benefit to

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1029.

<sup>117</sup> *Id.*

<sup>118</sup> *Reich*, 992 F.2d at 1029.

<sup>119</sup> *Id.* at 1028.

<sup>120</sup> *Id.* at 1027.

<sup>121</sup> *Id.* at 1028. The majority also took into account the fact that the training was significantly more substantive than the training in *McLaughlin*, which was a one-week program and simply required the trainee to follow the regular employee’s routework. *Id.*

<sup>122</sup> *Id.*

the employer was *de minimis* because they did not actually perform the job of firefighters during their training.<sup>123</sup> In holding that the trainees primarily benefitted during the training period, the court focused on the transferability of the particular skill set that the trainees received while at the fire academy.<sup>124</sup> In finding that the trainees primarily benefitted from the training at the expense of the employer, the court found five of the six elements met, which easily satisfied the totality of the circumstances analysis.<sup>125</sup>

#### D. THE SIXTH CIRCUIT

Recently, in *Solis v. Laurelbrook Sanitarium & School, Inc.*, the Sixth Circuit adopted the primary beneficiary test as the appropriate approach for determining whether an employment relationship exists in a training situation.<sup>126</sup> In *Solis*, the DOL brought an action against a boarding school that it investigated for child labor violations of the FLSA.<sup>127</sup> Laurelbrook was a nonprofit corporation that both operated as a boarding school to teach children academically and provided practical skills.<sup>128</sup> The activity in question revolved around the assistance that students provided to patients in the sanitarium, ranging from kitchen and housekeeping jobs, to medical assistance for patients.<sup>129</sup>

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<sup>123</sup> *Id.* at 1028–29.

<sup>124</sup> *Id.*

<sup>125</sup> *Reich*, 992 F.2d at 1028.

<sup>126</sup> *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011).

<sup>127</sup> *Id.* at 519. Although the case dealt with child labor provisions of the FLSA, as opposed to minimum wage or overtime, the court needed to determine if the students were employees under the FLSA before a violation could exist. *Id.*

<sup>128</sup> *Id.* at 520. The school offered a number of vocational courses, including the sanitarium care at issue. *Id.*

<sup>129</sup> *Id.* The students who provided medical assistance were required to pass a test and be over sixteen years old. *Id.*

First, the Sixth Circuit refused to defer to the WHD test in the case.<sup>130</sup> The court rejected the *Skidmore* deference argument as inapplicable in this case because it found the test to be a “poor method for determining employee status” and its “all-or-nothing approach inconsistent with prior WHD interpretations and opinions endorsing a flexible approach . . . .”<sup>131</sup> Finally, the Sixth Circuit found the six-part test inconsistent with *Walling* because the dispositive inquiry was “whether the employee is the primary beneficiary of the work performed.”<sup>132</sup>

The Sixth Circuit concluded that the test for determining whether an employment relationship exists is “to ascertain which party derives the primary benefit from the relationship.”<sup>133</sup> The Sixth Circuit began its reasoning by noting that it viewed *Walling* as enunciating the primary beneficiary test, not the six-factor test, and that its own intra-circuit

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<sup>130</sup> *Id.* at 525 n.1. In Footnote One, the court noted, “[t]he Secretary does not contend that the six-factor test is entitled to deference under *Chevron*.” *Id.* at 532 (citation omitted). The decision of the Secretary to not argue *Chevron* deference was significant because it meant that the WHD’s test would not receive deferential authority. Thus, the best that advocates of a reformulated WHD test could hope for was that the court would treat it as informative authority.

<sup>131</sup> *Id.* at 525. The Sixth Circuit did not provide the WHD test with *Skidmore*’s “measure of respect” deference after weighing “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* (quoting *Skidmore*, 323 U.S. at 140).

<sup>132</sup> *Solis*, 642 F.3d at 525. The Sixth Circuit took the view that *Walling* hinged on the question of which party benefitted most from the work done by the trainees. *Id.* Further, the court found that the *Walling* majority merely considered the various factors that eventually became the six-part test as informing the ultimate question of primary beneficiary. *Id.* The Sixth Circuit wrote in Footnote Two of the decision that “[t]he Secretary inaccurately characterizes [*Walling*] as creating a six-factor test for trainee status . . . the Court gave no indication that such facts must be present in future cases to foreclose an employment relationship.” *Id.* at 526 n.2.

<sup>133</sup> *Id.* at 529.

precedent supported the primary beneficiary test.<sup>134</sup> Further, court decisions from other circuits supported the use of the primary beneficiary test.<sup>135</sup> Finally, it found that the primary beneficiary test was better suited for training scenarios because “focusing on the benefits flowing to each party, the test readily captures the distinction the FLSA attempts to make between trainees and employees.”<sup>136</sup>

Applying the primary beneficiary test, the Sixth Circuit found that the students were the primary beneficiaries of the sanitarium training; therefore they were not employees covered under the FLSA.<sup>137</sup> First, the court acknowledged that the defendant did receive some benefits from efforts provided by the students.<sup>138</sup> However, it went on to reason that the benefits to the employer were offset by a number of factors.<sup>139</sup>

The training program provided the students with a number of benefits: practical skills, competitiveness with graduates from other vocational school programs, experience operating tools,

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<sup>134</sup> *Id.* The case, *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465, 477 (M.D. Tenn. 1979), held that X-ray technician students who performed the same work as paid employees were therefore “employees” covered under the FLSA. *Solis*, 642 F.3d. at 526–27. The deficiency of the training program—students were sometimes staffed only with other students, not employees—undercut the educational benefit, while the employer received the benefit of the students’ free labor. *Id.* at 527. Further, the students’ free labor also displaced paid radiologic technicians. *Id.*

<sup>135</sup> *Id.* at 528. For instance, the court cited the Fourth Circuit’s decision in *McLaughlin* as explicit application of the primary beneficiary test. *Id.*

<sup>136</sup> *Id.* at 529. The court also applauded the test’s malleability, such that it could take into consideration the “unique nature” of the training situation. *Id.*

<sup>137</sup> *Id.* at 532.

<sup>138</sup> *Solis*, 642 F.3d at 530. In particular, the employer received Medicare money for the services it provided to patients, including services provided by students at no cost to the employer. *Id.* The court also noted the students in other vocational programs engaged in activities that financially benefitted the employer. *Id.*

<sup>139</sup> *Id.* at 530–31. The court listed a number of factors that parallel the WHD test: instructors spent extra time supervising students at the expense of performing productive work, the students did not displace regular staff, and the staff members could provide equivalent services in the absence of the students. *Id.*

and an opportunity to in a state accredited course.<sup>140</sup> The Sixth Circuit concluded that under the primary beneficiary test, the majority of the benefits from the training program flowed to the students, rather than to the employer-school.<sup>141</sup>

#### E. THE SECOND CIRCUIT-SOUTHERN DISTRICT OF NEW YORK

Although the Second Circuit Court of Appeals has not yet issued an opinion on the trainee-employee distinction, the United States District Court for the Southern District of New York established a unique test, as compared to each of the circuit courts discussed in the foregoing text. In *Archie v. Grand Central Partnership, Inc.*, the district court used a test that is a combination of the WHD six-part test and a two-part economic realities test.<sup>142</sup>

The plaintiffs in this case, a group of formerly homeless and jobless individuals, brought suit against the Grand Central Partnership and co-defendant Grand Central Partnership Social Services Corporation (“SSC”), which operated a Pathways to Employment (“PTE”) program.<sup>143</sup> Homeless people who visited the SSC were called clients and could opt to join the PTE, wherein the client would be assigned to a particular area of the PTE that contributed to running the SSC.<sup>144</sup> The PTE program required that the individual work in the program for forty hours

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<sup>140</sup> *Id.* at 531. The court also found that a number of intangible benefits flowed to the students because the training taught them about “responsibility and the dignity of manual labor.” *Id.*

<sup>141</sup> *Id.* at 532.

<sup>142</sup> *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504, 531–33 (S.D.N.Y. 1998). The district court judge who decided this case is current United States Supreme Court Justice Sotomayor. *Id.* at 507. This case could potentially provide an important window into the interpretive view of a Justice, who will likely vote in any decision that comes before the Supreme Court in the near future to decide an employee-trainee test.

<sup>143</sup> *Id.* at 508. SSC was a non-profit organization that ran a service center for the homeless, which New York City funded under a contract. *Id.*

<sup>144</sup> *Id.* at 509. The five areas of work were recycling, outreach, food service, administration, and maintenance. *Id.*

per week, with a target length of 700 hours, and no single person made more than sixty dollars per week.<sup>145</sup> The plaintiffs contended that they were employees covered under the FLSA, and thus were owed minimum wage and overtime.<sup>146</sup>

Justice Sotomayor, then United States District Judge Sotomayor, began by noting that the WHD test and the *Walling* test had identical requirements that mandated consideration of the total circumstances.<sup>147</sup> Based on the similarity, Justice Sotomayor found that the WHD test was a “reasonable application” of the FLSA and the *Walling* decision; thus it was entitled to a *Chevron* level of deference.<sup>148</sup>

Justice Sotomayor found the WHD test easily flowed in favor of the plaintiffs. First, using an expert report, Justice Sotomayor found that the PTE program areas did not provide training similar to that of a vocational school and that it was possible that some participants had displaced regular employees.<sup>149</sup> A second expert found that the participants did not enjoy close supervision in a way that made the program analogous to vocational training rather than work.<sup>150</sup> Justice Sotomayor did acknowledge that the PTE program provided the participants with opportunities to work and gain skills that they would otherwise have been unlikely to get.<sup>151</sup> However, Justice

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<sup>145</sup> *Id.* at 509. The workers were paid between \$1 to \$1.50 per hour for the work they performed in each department. *Id.* at 513.

<sup>146</sup> *Id.* at 507.

<sup>147</sup> *Id.* at 532. Justice Sotomayor also reasoned that the “factors are not exhaustive,” which became readily apparent later in the opinion when she added the economic realities portion of her analysis. *Id.* at 532–33.

<sup>148</sup> *Archie*, 997 F. Supp. at 532. Justice Sotomayor’s decision to grant the WHD test *Chevron* deference is interesting for a couple of reasons. One, it differs markedly from other decisions examined in this note. Two, it shows that Justice Sotomayor may grant the WHD test greater deference than the circuits, and thus make it more likely that Court would adopt the WHD test.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* Many of the participants were left alone entirely. *Id.*

<sup>151</sup> *Id.* at 533. The PTE instructors also taught the homeless participants to avoid absenteeism, arrive on time to work, work an eight-hour day, and “clock-in” when working. *Id.* They also helped the participants find housing and employment outside of the program. *Id.*

Sotomayor found that the WHD test was not met because the defendants did not provide training that remotely approached the level of vocational training required; the participants often displaced regular employees; and often the work was not under supervision.<sup>152</sup> Perhaps most important, the defendants gained a substantial benefit because they paid the participants well below the minimum wage and could offer services below market rates.<sup>153</sup> Thus, Justice Sotomayor applied the WHD, finding that the defendants had failed to show that the participants were trainees and not employees; however, that did not end the inquiry.<sup>154</sup>

Justice Sotomayor also applied two elements to analyze the economic reality of the employment situation: (1) if the trainee expected compensation and (2) if the employer received an immediate benefit from the work done by the trainees.<sup>155</sup> The record clearly showed that PTE participants expected compensation for the work and that the plaintiffs participated because they thought it was a job.<sup>156</sup> Further, the periods of work were called “shifts,” the plaintiffs recorded their hours, and any additional time worked over forty hours a week was “overtime.”<sup>157</sup> The court rejected the defendant’s argument that each participant signed a “Letter Agreement” acknowledging that he or she was not an employee as unpersuasive because plaintiffs stated they were coerced into signing the Letter Agreement, and the date was not evident on the agreements.<sup>158</sup>

The court found that the second element of the economic realities analysis was met because the defendant gained an

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Archie*, 997 F. Supp. at 533.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 534.

<sup>158</sup> *Id.* The court acknowledged that the letter agreement included factors that matched the WHD test, but the wording was added only once the defendants became aware that a lawsuit was forming. *Id.*

immediate benefit from the work of the plaintiffs.<sup>159</sup> Although the plaintiffs did receive a benefit from the experience and “ability to create an employment history,” the defendants would not have been able to meet the requirements of the contract with New York City in the absence of the PTE participants.<sup>160</sup>

Justice Sotomayor used the WHD test and the economic realities elements to find that “the economic reality is that the PTE participants benefitted from the defendants’ efforts, but the defendants benefitted more.”<sup>161</sup> Under these facts, the plaintiffs were employees covered by the FLSA.<sup>162</sup>

## V. THE SOLUTION

The deep divide between the circuits and the DOL has created what can be described as a “legal void.”<sup>163</sup> The most troubling fact is that, since unpaid interns are not considered employees, they will not receive statutory protections that apply to employees, such as Title VII.<sup>164</sup> However, more to the point of this note, the differing interpretations across the circuits create different levels of protection for student interns, depending upon the circuit that they file suit in. In this section, I will propose that a Supreme Court ruling is the necessary

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<sup>159</sup> *Id.* at 535.

<sup>160</sup> *Archie*, 997 F. Supp. at 535. Some days were so busy with required work that even if all of the PTE participants worked overtime the defendants did not have enough workers to cover all of the locations. *Id.*

<sup>161</sup> *Id.* Interestingly, Justice Sotomayor listed the “the Wage and Hour Test, expectation of compensation, and immediate advantage to the employer” prior to writing that the primary benefits flowed to the employer. *Id.* Although she did not call the test the primary beneficiary test, it appears that is exactly what the ultimate outcome depended upon.

<sup>162</sup> *Id.*

<sup>163</sup> See David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 217 (2002) (discussing the legal implications of students not falling under the category of “employees” for purposes of legal protections).

<sup>164</sup> See *O’Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1048 (1998). See generally Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998).

mechanism to settle the ongoing uncertainty surrounding the proper interpretive analysis to determine who is an “employee.” In line with a number of the circuit courts, I believe that a primary beneficiary test will not only properly balance the interest of student interns in gaining valuable experience, but also protect them from predatory internships that provide little or no experiential value.

#### A. ADMINISTRATIVE RULE AS AN INEFFECTIVE SOLUTION

Rather than a Supreme Court standard, some have argued in favor of an updated WHD standard that properly reflects the importance of unpaid internships in the modern economy and the need to crack down on predatory internships that provide little educational benefit.<sup>165</sup> However, I argue that an updated WHD standard will not solve the problems associated with the circuit split.

At most, courts will treat the WHD test as deferential authority. The leading case supporting judicial deference is *Chevron, U.S.A., v. Natural Resource Defense Council*.<sup>166</sup> In *Chevron*, Justice Stevens, writing for the majority, enunciated the analytical framework for courts to use when confronted with a problem regarding an official agency interpretation:

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<sup>165</sup> See Sarah Braun, Comment, *The Obama “Crackdown:” Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281, 286 (2012); Jessica L. Curiale, Note, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1549 (2010). In particular, the Curiale note argues in favor of a WHD rule as the best solution because “[t]he WHD is in a better position than both the courts and Congress to address the unpaid internship problem.” *Id.* at 1549. The author goes on to note that the WHD is the entity to which Congress expressly delegated rulemaking authority over the wage and hour realm, the WHD is more politically accountable such that a matter of policy is more properly decided by it, the agency has expertise with the FLSA, and a WHD rule will “promote geographic uniformity.” *Id.* at 1549–51. Although I agree that the WHD has substantial expertise with labor matters, I disagree with the other stated reasons and will explain my reasoning later in this section.

<sup>166</sup> WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 324 (2d ed. 2006).

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>167</sup>

Under *Chevron* deference, only two cases have been interpreted as unreasonable under the second step of the analysis.<sup>168</sup> However, if the agency interpretation is informal, as in the case of Factsheet #71 and other WHD opinion letters, the Supreme Court has held that:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later

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<sup>167</sup> *Chevron*, 467 U.S. at 842–43. The *Chevron* decision resulted in a two-step analysis: Does the statute clearly answer the interpretive question? If yes, apply the statute according to the text. If no, the second step is that the court should defer to the agency unless the interpretation is unreasonable. ESKRIDGE, *supra* note 166, at 328.

<sup>168</sup> ESKRIDGE, *supra* note 166, at 328–29.

pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>169</sup>

In *Solis*, the Sixth Circuit analyzed the WHD test under the *Skidmore* standard, as opposed to the *Chevron* analysis. The court noted in Footnote One that Secretary of Labor Solis did not contend that the six-factor test was entitled to deference under a *Chevron* standard.<sup>170</sup> Although the Sixth Circuit did not speculate as to the reason for Secretary Solis's decision not to argue *Chevron* deference, the *Reich* decision from the Tenth Circuit provides analytical insight.

In *Reich*, the Tenth Circuit rejected then Secretary of Labor Reich's contention that the WHD test deserved *Chevron* deference.<sup>171</sup> The court quickly dispensed with the *Chevron* argument because the WHD test was based upon "nonregulatory guidelines," which put it under the *Skidmore* analytical framework.<sup>172</sup> Yet, even under the *Skidmore* framework, the court still found "little support for as strict an application of this test as the Secretary urges . . . ."<sup>173</sup> Similarly, the Sixth Circuit and Fourth Circuit both declined to apply the *Skidmore* deference.<sup>174</sup> The only circuit to give the WHD test any level of deference was the Fifth Circuit. In *Atkins*, a case concerning General Motors' trainees, the Fifth Circuit held that "the Administrator's interpretation is entitled to substantial deference by this court."<sup>175</sup> However, in *Archie*, current

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<sup>169</sup> *Skidmore*, 323 U.S. at 140.

<sup>170</sup> *Solis*, 642 F.3d at 525 n.1.

<sup>171</sup> *Reich*, 992 F.2d at 1026.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Solis*, 642 F.3d at 525; *McLaughlin*, 877 F.2d at 1209 n.2. The Sixth Circuit in *Solis* supported its decision to reject the WHD test for three reasons: it was rigid, *Reich* diminished the persuasive force of the WHD test by rejecting the all-or-nothing approach as inconsistent with prior WHD interpretations, and *Walling* turned on the question of whether the employee was the primary beneficiary of the work, not the six-factor WHD test. *Solis*, 642 F.3d at 525.

<sup>175</sup> *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983).

Supreme Court Justice Sotomayor provided the WHD test with *Chevron* deference.<sup>176</sup>

As explained above, the WHD test has left a trail of confusion and contradictory statements among those courts with occasion to issue opinions on whether a person is an employee for purposes of the FLSA. At best, a reformulated WHD test will maintain the status quo: confused court interpretations that vary from circuit-to-circuit. In contrast, a Supreme Court opinion can provide the authority that is necessary to unite the circuits and clear up the decades of confusion over the level of deference, not to mention the proper analysis, to apply.

## B. COMPETING INTERESTS AND FLSA POLICY

The concerns raised by supporters of unpaid internships are important to consider in formulating the proper test. Student internships are a “crucial bridge” that allow the student to gain important professional experience and connections.<sup>177</sup> Statistics further illustrate the importance of internship experience in obtaining a job after college.<sup>178</sup> As President Aoun stated in his letter to Secretary Solis, a too-stringent standard could have a significant adverse effect on the availability of internships for college students.<sup>179</sup> Yet, it is important to address the problem of predatory internships where student interns fetch coffee, pack boxes, answer phones, take notes, etc.<sup>180</sup> In this instance, the use of unpaid labor is little more than an avenue for the employer to violate the FLSA. But, beyond the interests for and

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<sup>176</sup> *Archie*, 997 F. Supp. at 532.

<sup>177</sup> EDWARDS & HERTEL-FERNANDEZ, *supra* note 9, at 3.

<sup>178</sup> *Id.* at 5.

<sup>179</sup> Letter from Joseph E. Aoun to Hilda Solis, *supra* note 21.

<sup>180</sup> Letter from Ross Eisenbrey, *supra* note 24. Perhaps the most significant problem is one that will not be addressed in this note: the concentrated negative impact of unpaid internships on low and middle-income students. Although my analysis does not take the socio-economic argument into account when evaluating whether an unpaid intern is an employee, an excellent policy analysis and proposal to address precisely this socio-economic problem can be found in the Edwards and Hertel-Fernandez proposal. See generally EDWARDS & HERTEL-FERNANDEZ, *supra* note 9.

against unpaid internships, it is important to once again consider the policy of the FLSA.

Section 202 of the FLSA declared that it was the policy of the statute to provide a minimum standard of living for employees of industries “engaged in commerce.”<sup>181</sup> One of the motivating factors for the FLSA was that employers that chose not to pay workers had a negative impact on the national economy because it “burdens commerce and the free flow of goods in commerce.”<sup>182</sup>

Applying those basic provisions to unpaid internships, it appears that unpaid internships violate both the text and policy of the FLSA. The decision to not pay college students does indeed “burden commerce” because it keeps money out of the hands of the student intern doing the work, which prohibits the intern from putting that money back into the economy.

However, as the Supreme Court stated in *Walling*, to suffer or permit to work does not mean “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.”<sup>183</sup> That statement supports the proposition that unpaid interns, with no agreed upon compensation, participate in the internship program to obtain the necessary skill set to pursue a career in that particular field, such that they “work for their own advantage.”<sup>184</sup> Despite the seemingly contradictory nature of the policy and the interpretation of the FLSA, the Court in *Walling* honed in on the question that is the first step in the ultimate test to determine when an unpaid internship violates the FLSA: whether the employer receives an “immediate advantage from any work done by the trainees . . . .”<sup>185</sup>

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<sup>181</sup> 29 U.S.C. § 202 (2012).

<sup>182</sup> *Id.*

<sup>183</sup> *Walling*, 330 U.S. at 152.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 153.

### C. RECOMMENDATION: A SUPREME COURT STANDARD

The competing interests involved in the context of unpaid internships and the policy of the FLSA will make any solution imperfect. Either interns will not be paid when they should be or employers will be forced to pay, which could lead to a drop-off in the availability of unpaid internships. However, a solution that addresses both the worst examples of employer abuse of unpaid internships and the need for unpaid internships as necessary professional experience is possible. I recommend that the Supreme Court adopt an analysis that applies a totality of the circumstances approach rather than a strict application of the WHD factors. I also recommend that the ultimate inquiry to determine if an unpaid intern is an employee should be whether the unpaid intern is the primary beneficiary of the work that he performs while working in the program.

First, it is important to note that the WHD test is not the proper test to use. Although courts have cited *Walling* as enunciating the strict WHD test, the majority held that the trainees were not employees because “the railroads receive no ‘immediate advantage’ from any work done by the trainees . . . .”<sup>186</sup> The Court did use the factors as a guide to its analysis but held that those factors informed the ultimate inquiry: which party was the primary beneficiary of the work done by the trainees?<sup>187</sup> It appears that the analysis and ultimate holding was based upon an evaluation of all of the factors, as opposed to the rigid application required by the WHD test.

The Tenth and Sixth Circuit Courts support the argument in favor of a totality approach. The majority in *Reich*, the Tenth Circuit case, stated that “we find little support for as strict an application of this test as the Secretary urges before us. . . . [T]here is nothing in *Portland Terminal* to support an ‘all or nothing’ approach.”<sup>188</sup> In *Solis*, the majority of the Sixth Circuit stated that “[w]e find the WHD’s test to be a poor method for determining employee status in a training or educational setting

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 152–53.

<sup>188</sup> *Reich*, 992 F.2d at 1026.

. . . it is overly rigid and inconsistent with a totality-of-the-circumstances approach . . . ”<sup>189</sup>

The totality approach is the better approach to determine if an unpaid intern is an employee and thus under the protection of the FLSA. First, the strict WHD test puts an onerous burden on employers to meet all six factors. The first factor, that the training is similar to that given in an educational environment, undercuts the purpose of an internship: to provide practical experience as a supplement to educational experience. To put the burden on employers to operate internships as if the intern is still in a classroom is counterproductive. Moreover, the second factor, that the internship is for the benefit of the intern, is also counter-intuitive. Of course the primary goal is to benefit the intern, but the employer should not be punished if it benefits from the intern’s efforts. If the employer benefits because the intern did a good job, it is more likely that the employer will hire the unpaid intern than if her efforts provided absolutely no benefit to the employer. It strains logic to advocate that an employer who hosts an internship program must make sure that it does not benefit from the program. Employers would ultimately have no incentive to provide internships that have become a crucial stepping-stone for college students.

However, a number of the factors from the WHD test are helpful to evaluate when an unpaid intern should be considered an employee. First, the third factor, that an unpaid intern does not displace regular employees, is important to uphold the policy of the FLSA to provide minimum wage to employees who perform work for the employer. This factor addresses the scenario where an employer uses the unpaid intern to primarily perform menial tasks, such as fetching coffee, filing, packing boxes, and running errands. When employers choose to use the internship to obtain free labor, rather than pay an administrative assistant or a secretary, the employer acts with a purpose to evade the protection of the FLSA. Moreover, the sixth factor is helpful to ensure that the intern and the employer both “understand that the intern is not entitled to wages for the time spent in the internship.”<sup>190</sup> Although not a crucial factor, it

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<sup>189</sup> *Solis*, 642 F.3d at 525.

<sup>190</sup> FACT SHEET #71, *supra* note 69.

is important to get both parties to understand the parameters of the internship prior to the intern starting the program.

Beyond the totality of the circumstances approach, I also advocate that the dispositive inquiry to determine if the unpaid intern is an employee should be whether the unpaid intern or the employer is the primary beneficiary of the unpaid intern's work. The approach that I advocate for the Supreme Court to apply is substantially similar to that applied by the Sixth Circuit in *Solis*:

[W]e hold that the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship. Factors such as whether the relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations that can guide the inquiry. Additional factors that bear on the inquiry should also be considered insofar as they shed light on which party primarily benefits from the relationship.<sup>191</sup>

The primary beneficiary approach provides the flexibility necessary for the court to determine if the unpaid intern is an employee under the FLSA. As in *Solis*, where the court found that both the employer and the students benefited from the program, the primary beneficiary approach does not mechanically apply a general beneficiary approach.<sup>192</sup> It allows the court to weigh the benefits that each party received before making the ultimate determination as to the party who principally benefitted from the experience. Moreover, the factors used in the WHD test are still applied to the facts, though each will provide relevant considerations that guide the inquiry rather than robotically determine the outcome.

No matter what test the Supreme Court ultimately applies, it will not please all interested parties. The primary beneficiary

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<sup>191</sup> *Solis*, 642 F.3d at 529.

<sup>192</sup> *Id.* at 530–31.

test allows employers to use unpaid interns where the WHD test might have found that the employer violated the FLSA. Further, the primary beneficiary test will provide the analytical framework that allows courts to consider the relevant facts in each case. If a court finds that the employer used the unpaid intern to complete menial tasks that benefitted the employer and not the intern, then the primary beneficiary test will find that the employer violated the FLSA.

The primary beneficiary framework applies the concept stated by the Supreme Court in *Walling*, that every person who works with an employer is not automatically an employee, specifically when that person does work that “serves only his own interest” at the “aid and instruction” of the employer.<sup>193</sup> By adopting the primary beneficiary test, the United States Supreme Court will retain the factors laid out in *Walling*, while also acknowledging that the ultimate inquiry will turn on whether the employer attempted to circumvent the FLSA by acting as the principal beneficiary of the work of the unpaid intern.

## VI. CONCLUSION

The FLSA was enacted in 1938 to mandate employers pay a minimum wage and overtime to workers who qualified as employees under the statute. Although most cases are straightforward, in the case of a volunteer—in modern America, an “unpaid intern”—courts apply inconsistent tests to determine if the person is more like a trainee or an employee. The Supreme Court dealt with precisely this issue in *Walling*, but courts and the DOL have veered off in different interpretive directions since the 1947 case.

Although the DOL, through the WHD, attempted to clearly enunciate the proper analysis to determine if an unpaid intern is an employee under the FLSA, multiple circuits applied their own tests both before and after Factsheet #71 was issued in 2010. As a result of the circuit split, both unpaid interns and employers are left to ponder the proper standard by which each must order their actions. Employers are uncertain about whether or not to host unpaid interns because doing so might violate the FLSA.

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<sup>193</sup> *Walling*, 330 U.S. at 152.

On the other hand, the unpaid intern does not know if he should receive minimum wage or what to expect from the employer that hosts his unpaid internship. This uncertainty only adds to the already negative employment outlook that surrounds college students and recent college graduates.

The most effective way to solve the problem is for a Supreme Court standard to clear up the murky waters surrounding the legality of unpaid internships. The test that best honors the policy of the FLSA, while balancing the interests of employers and unpaid interns, is the primary beneficiary test, with an analytical assistance from the WHD six-factor test, applied as a totality of the circumstances approach. The primary beneficiary test will allow the courts to properly sift through the facts to determine if the employer's actions are an attempt to circumvent the FLSA or if the unpaid intern is gaining important experience that does not qualify her as an employee under the FLSA. Most importantly, this test will clear up decades of jurisdictional disunity that confuses employers and college students alike.