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One of These Interns Is Not like the Others: How the Eleventh Circuit Misapplied the “Tweaked Primary Beneficiary” Test to Required Clinical Internships

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One of These Interns Is Not like the Others: How the Eleventh Circuit Misapplied the “Tweaked Primary Beneficiary” Test to Required Clinical Internships

SAMUEL C. GOODMAN*

Today’s ever-changing business environment continues to challenge the traditional educational model, further blurring the line between learning and labor. This has resulted in great uncertainty as to the proper legal treatment of the student intern, specifically the unpaid student intern.

*This Note is intended to introduce a new perspective to the unpaid internship debate and highlight the need for courts to focus on the specific type of internship at issue before formulating an approach to best assess whether the intern should be classified as an employee entitled to wages. Part I of the Article will discuss the Fair Labor Standards Act (“FLSA”) and the development of the “trainee” exception formulated by *Walling v. Portland Terminal Co.* The key question in any unpaid internship scenario is whether the intern should be deemed an employee under the FLSA and thus entitled to wages and overtime.*

Part II explores the varying and inconsistent tests put forth by the Department of Labor (“DOL”) and/or used by courts to determine whether a person should be deemed an employee under the FLSA and therefore entitled to wages. Part III then addresses the most recent test formulated by the Second Circuit and adopted by the Eleventh Circuit and suggests that neither court considered key differences between

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internship scenarios in deciding upon the proper test. Part IV expands on this suggestion by identifying several reasons why the test adopted by the Eleventh Circuit is not appropriate to address the narrow, but prevalent clinical internship scenario in which the internship is both a required component of the academic program and mandated for professional certification and licensure. Part V ultimately concludes that the clinical intern is a student engaged in required experiential learning as a component of an overall academic curriculum and professional certification. Because a student is not a worker, the courts should find that the clinical intern does not qualify as an employee under the FLSA and is not entitled to wages.

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INTRODUCTION

Examine the following two internship scenarios:

Internship A: John Doe leaves his stable desk job at an insurance company to pursue his dream of becoming a film editor.¹ In his fervor to excel in his newly chosen career path, John enrolls in a non-degree graduate film program at a local university.² He also applies for, and is accepted to work on, the set of a movie production as an intern.³ Among other assignments, John is tasked with copying and filing documents, drafting cover letters, tracking purchase orders, and running errands.⁴ At one point, John walks more than a mile to purchase a hypo-allergenic pillow for the filmmaker.⁵ John does not receive any school credit for his work on the movie set and he is not paid for any of his work during the internship.⁶

¹ See Daniel Miller, *Hollywood intern case dealt setback by federal appeals court*, LOS ANGELES TIMES (July 2, 2015, 5:47 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-unpaid-hollywood-intern-legal-case-dealt-blow-by-u-s-appeals-court-20150702-story.html>.

² See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 532 (2d Cir. 2015).

³ See *id.*

⁴ See *id.*

⁵ *Id.* at 532; Miller, *supra* note 1.

⁶ See *Glatt*, 811 F.3d at 532–33.

Internship B: Jane Doe enrolls in a degree program at a Florida university to become a registered nurse.⁷ The nursing program lasts 4 semesters and, in addition to classroom learning, it includes clinical experience at community health clinics, agencies, hospitals, and homes.⁸ The clinical work Jane engages in is required for her nursing degree to be conferred, and it is also mandated by the Florida Board of Nursing and by Florida law, which requires that at least 40% of the nursing curriculum be clinical training.⁹ At all times during her clinical work, Jane is supervised by a faculty member or clinical preceptor.¹⁰ Jane receives school credit for her clinical work¹¹ and fulfills requirements under Florida law and the Florida Board of Nursing.¹² She is not paid.

In recent years, the unpaid internship has become a prevalent issue, fiercely debated amongst interns, employers, universities, and policy-makers alike.¹³ This is due in no small part to the pervasiveness of internships—both paid and unpaid—in the modern job market¹⁴. Although exhaustive data on internships does not exist, recent

⁷ See, e.g., UNIVERSITY OF FLORIDA NURSING ADMISSIONS, <http://admissions.nursing.ufl.edu/degrees/undergraduate/generic-bsn/program-description/> (last visited Dec. 16, 2015).

⁸ *Id.*

⁹ See *Practical and Registered Nurse Education Program*, FLORIDA BOARD OF NURSING, <http://floridasnursing.gov/licensing/practical-and-registered-nurse-education-program/> (last visited Aug. 12, 2015); FLA. STAT. § 464.019 (2015).

¹⁰ See FLA. STAT. § 464.019.

¹¹ See UNIVERSITY OF FLORIDA NURSING ADMISSIONS, *supra* note 7.

¹² Section 464.019 of the Florida Statutes; *Practical and Registered Nurse Education Program*, *supra* note 9.

¹³ See, e.g., Nona Willis Aronowitz, 'No one should have to work for free': Is this the end of the unpaid internship?, NBC NEWS, (Sept. 2, 2013), <http://www.nbcnews.com/feature/in-plain-sight/no-one-should-have-work-free-end-unpaid-internship-v20262899>; Hu Wei, *Unpaid Internships: Good for Intern or Company?*, VOICE OF AMERICA (July 22, 2015, 5:58 PM), <http://www.voanews.com/content/unpaid-internships-who-benefits/2874306.html>; Vance Ginn & Carine Martinez-Gouhier, *Paid or Unpaid Internship? Let Individuals Decide*, FORBES, (June 26, 2014, 8:29 AM), <http://www.forbes.com/sites/realspin/2014/06/26/paid-or-unpaid-internship-let-individuals-decide/>.

¹⁴ See Andrew Soergel, *Paid Interns More Likely to Get Hired*, U.S. NEWS, (May 5, 2015, 5:30 PM), <http://www.usnews.com/news/articles/2015/05/05/study-suggests-college-graduates-benefit-more-from-paid-internships>.

studies estimate that more than half of graduating college seniors hold some type of internship during their time in school.¹⁵ According to a 2015 report by the National Association of Colleges and Employers, 39.2% of these internships were unpaid.¹⁶ A clear distinction arises between paid and unpaid internships in relation to the receipt of job offers: 72.2% of the class of 2015 who had completed a paid internship at a for-profit company received a job offer, while only 33.8–50% of students with unpaid internships received a job offer (compared to an offer rate of 36.5% for students with no internship experience at all).¹⁷ Disillusioned former unpaid interns point to a model that takes advantage of students and recent graduates with no bargaining power,¹⁸ while employers and universities point to the invaluable experiential learning and opportunities for employment that an internship provides as justification to keep the system intact.¹⁹

Notably absent from the unpaid internship debate, however, is any distinction between the *types* of internships at issue. Should courts use the same criteria for John—an unpaid intern on a movie set who receives no school credit, and Jane—a nursing student engaged in clinical training *required* for her degree and licensure, when evaluating their entitlement to wages?

The Second Circuit entertained facts analogous to John's situation in July 2015.²⁰ The court formulated a new test to be used to determine whether an intern should be classified as an employee entitled to wages.²¹

¹⁵ Blair Hickman, *6 Facts You Should Know If You've Ever Worked As An Unpaid Intern*, ALTERNET (July 30, 2014), <http://www.alternet.org/economy/6-facts-you-should-know-if-youve-ever-worked-unpaid-intern>.

¹⁶ *The Class of 2015 Executive Summary*, NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS, <http://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2015-student-survey-executive-summary.pdf>, (last visited April 18, 2017).

¹⁷ *Id.*

¹⁸ Matthew Tripp, Note, *In The Defense Of Unpaid Internships: Proposing A Workable Test For Eliminating Illegal Internships*, 63 DRAKE L. REV. 341, 343 (2015).

¹⁹ Robert J. Tepper & Matthew P. Holt, *Unpaid Internships: Free Labor or Valuable Learning Experience*, 2015 B.Y.U. EDUC. & L.J. 323, 326–27 (2015).

²⁰ *See generally* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2015).

²¹ *Id.* at 536. For a detailed discussion of the test see *infra* Part III.A.

In September 2015, the Eleventh Circuit faced facts similar to Jane's situation relating to graduate-level nurse anesthetists who completed mandatory clinical work as a component of their master's degree and professional certification and licensure.²² The court readily adopted the test formulated by the Second Circuit, but specifically for clinical interns working toward a degree and professional certification and licensure.²³ Should the court have entertained the critical differences between the types of internships at issue before adopting the Second Circuit's approach?

This Note is intended to introduce a new perspective to the unpaid internship debate and highlight the need for courts to focus on the specific type of internship at issue before formulating an approach to best assess whether the intern should be classified as an employee entitled to wages. Part I of the Article will discuss the Fair Labor Standards Act ("FLSA")²⁴ and the development of the "trainee" exception formulated by *Walling v. Portland Terminal Co.*²⁵ The key question in any unpaid internship scenario is whether the intern should be deemed an employee under the FLSA and thus entitled to wages and overtime.²⁶

Part II explores the varying and inconsistent tests²⁷ put forth by the Department of Labor ("DOL") and/or used by courts to determine whether a person should be deemed an employee under the

²² See generally *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015).

²³ *Id.* at 1211–12. For a detailed discussion of the test see *infra* Part III.B.

²⁴ 29 U.S.C. §§ 201–19 (2012).

²⁵ 330 U.S. 148 (1947).

²⁶ See, e.g., *Schumann*, 803 F.3d at 1207–08; *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (Wilkins, C.J., dissenting) ("the true legal issue is whether the trainees were "employees" within the definition of 29 U.S.C.A §§ 203(e)(1).").

²⁷ For further discussion on the different legal standards used by the DOL and the courts to determine employment status under the FLSA see, e.g., Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Unpaid Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183, 1189–1203 (2015); Stephanie A. Pisko, Comment, *Great Expectations, Grim Reality: Unpaid Interns And The Dubious Benefits Of The Dol Pro Bono Exception*, 45 SETON HALL L. REV. 613, 619–24 (2015); Paul Budd, Comment, *All Work And No Pay: Establishing The Standard For When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 U. KAN. L. REV. 451, 457–76 (2015).

FLSA and therefore entitled to wages. Part III then addresses the most recent test formulated by the Second Circuit and adopted by the Eleventh Circuit and suggests that neither court considered key differences between internship scenarios in deciding upon the proper test. Part IV expands on this suggestion by identifying several reasons why the test adopted by the Eleventh Circuit is not appropriate to address the narrow, but prevalent clinical internship scenario in which the internship is both a required component of the academic program and mandated for professional certification and licensure. Part V ultimately concludes that the clinical intern is a student engaged in required experiential learning as a component of an overall academic curriculum and professional certification. Because a student is not a worker, the courts should find that the clinical intern does not qualify as an employee under the FLSA and is not entitled to wages.

I. EARLY LEGAL FRAMEWORK

A. *The Fair Labor Standards Act*

In 1938, Congress enacted the FLSA²⁸ with the intention “to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”²⁹ Due to this unequal bargaining power between employers and certain segments of the working population, compulsory federal legislation was required to prevent private employment contracts that would endanger national health and efficiency.³⁰ The FLSA requires public and private employers to pay their employees a federal minimum wage.³¹

The minimum wage requirement is subject to a small number of statutory exceptions.³² For example, the FLSA creates exemptions

²⁸ 29 U.S.C. §§ 201–19.

²⁹ *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945).

³⁰ *Id.* at 706–07.

³¹ 29 U.S.C. § 206(a).

³² 29 U.S.C. §§ 213–14.

for tipped employees (such as waiters),³³ agricultural employees,³⁴ switchboard operators,³⁵ and full-time students working in retail or service.³⁶ As discussed in greater detail in Part I.B, the Supreme Court carved out an additional exception for “trainees” in *Portland Terminal*.³⁷

The uncertainty over internships arises because the FLSA does not exempt or define interns.³⁸ Similarly, the FLSA provides protections to all “employees,”³⁹ but it gives only a circular and unhelpful definition of the term: “any individual employed by an employer.”⁴⁰ The Act goes on to explain that the term “employ” means “to suffer or permit to work.”⁴¹ The threshold issue for any unpaid internship inquiry thus becomes whether the intern qualifies as an “employee” under the FLSA (therefore entitled to a minimum wage).⁴²

B. *Portland Terminal’s* “trainee” exception

The Supreme Court has yet to address the legality of unpaid internships, and so the courts often turn to *Portland Terminal*⁴³ as a

³³ 29 U.S.C. § 203(m).

³⁴ 29 U.S.C. § 213(a)(6).

³⁵ 29 U.S.C. § 213(a)(10).

³⁶ 29 U.S.C. § 214(b)(1)(A).

³⁷ 330 U.S. 148 (1947).

³⁸ 29 U.S.C. §§ 201–19; *see also* Phil Antis, *The Fate of the Unpaid Intern – The Saga Continues*, FEDERAL LAWYER, July, 2014, at 21, 21 (noting that the FLSA does not define the term intern or provide a statutory exception to the FLSA for interns); Lauren Fredericksen, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 250 (2013) (“[t]he FLSA does not provide a definition of ‘intern,’ nor does it give courts guidance on whether or not employers may even legally hire unpaid student interns.”).

³⁹ 29 U.S.C. § 206(a).

⁴⁰ 29 U.S.C. § 203(e)(1).

⁴¹ 29 U.S.C. § 203(g).

⁴² *See, e.g.,* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1207–08 (11th Cir. 2015); McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989) (Wilkins, C.J., dissenting) (“the true legal issue is whether the trainees were “employees” within the definition of 29 U.S.C.A §§ 203(e)(1)”; Chad A. Pasternack, *No Pay No Gain? The Plus Side of Unpaid Internships*, 8 J. BUS. ENTREPRENEURSHIP & L. 193, 195 (2014) (“[t]o 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).”)

⁴³ 330 U.S. 148 (1947).

starting point to determine a worker's employment status under the FLSA.⁴⁴ In *Portland Terminal*, the Administrator of the Wage and Hour Division of the United States Department of Labor brought a claim against a railroad company on behalf of prospective brakeman for unpaid wages.⁴⁵ The prospective brakemen participated in the railroad company's training program with the hopes of subsequent employment after the training period concluded.⁴⁶ The training lasted seven to eight days, and the trainees would first learn "routine activities by observation" and then were "gradually permitted to do actual work under close scrutiny."⁴⁷ The trainees did not displace any regular employees nor expedite the railroad's business, but at times they actually impeded it.⁴⁸ If the trainee successfully completed the program and received a certificate of competence, then he was either immediately offered work or placed on a list of qualified candidates from which the railroad could draw for its employment needs.⁴⁹

The Court began its statutory interpretation by noting that "without doubt, the . . . [FLSA] covers trainees, beginners, apprentices, or learners *if they are employed to work for an employer for compensation.*"⁵⁰ The Act's definition of employ "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. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages."⁵¹ The Court then explained that the broad definitions of "employ" and "employee" could not "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."⁵² Thus, the railroad trainees were not "employees" under the FLSA; the railroad company received no immediate advantage from any work done by the trainees, and the company

⁴⁴ Pasternack, *supra* note 42, at 196–197.

⁴⁵ 330 U.S. at 148.

⁴⁶ *See id.* at 149.

⁴⁷ *Id.*

⁴⁸ *Id.* at 149–50.

⁴⁹ *Id.* at 150.

⁵⁰ *Id.* at 151 (emphasis added).

⁵¹ *Id.* at 152.

⁵² *Id.*

should not be penalized “for providing, free of charge, the same kind of instruction [as a public or private vocational school] at a place and in a manner which would most greatly benefit the trainees.”⁵³ The holding effectively established the trainee exception to the FLSA’s minimum wage requirement.

II. POST-*PORTLAND TERMINAL* INTERPRETATIONS OF EMPLOYMENT STATUS UNDER THE FLSA

A. *Interpretations by the Department of Labor*

The Wage and Hour Division of the Department of Labor is responsible for enforcing the FLSA.⁵⁴ The DOL, and its Wage and Hour Division, have relied heavily on the opinion in *Portland Terminal* in formulating a test to determine whether certain classes of persons qualify as employees who are entitled to wages.⁵⁵ In 1933, the Wage and Hour Division issued a Field Operations Handbook, in which it listed six criteria used to determine whether a trainee or student qualifies as an employee.⁵⁶ The six criteria are the following: (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (2) the training is for the benefit of the trainees or students; (3) the trainees or students do not displace regular employees, but work under their close observation; (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students and on occasion his operations may actually be impeded; (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and (6) the employer and the trainees or students understand that the

⁵³ *Id.* at 153.

⁵⁴ 29 U.S.C. § 204 (2012).

⁵⁵ See David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 227–28 (2002); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015) (“it is equally plain from reviewing the six factors that the Handbook derived them by simply reducing the facts of *Portland Terminal* to a test.”).

⁵⁶ U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, CH. 10: FLSA COVERAGE-EMPLOYMENT RELATIONSHIP, STATUTORY EXCLUSIONS, GEOGRAPHICAL LIMITS, § 10b11 (1993), http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

trainees or students are not entitled to wages for the time spent in training.⁵⁷ According to the Field Operations Handbook, all six criteria must be met in order to find that “trainees or students are not employees within the meaning of the FLSA.”⁵⁸

The Department of Labor also released a Fact Sheet in April 2010 in response to nationwide criticism in the wake of the recession and increased scrutiny by state governments of unpaid internships.⁵⁹ The Fact Sheet 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.’”⁶⁰

The Fact Sheet begins with the presumption that private sector internships will “most often be viewed as employment,” but that circumstances exist in which individuals who participate in private sector internships or training programs may do so without requiring compensation; this occurs when a six-factor test is met.⁶¹ The Fact Sheet then effectively restates the six-factor trainee test promulgated by *Portland Terminal* and codified in the Field Operations Handbook and applies it to interns by substituting “intern” and related words for “trainee” and related words.⁶² The DOL has not justified its full-fledged virtual adoption of the Field Operation Handbook’s trainee guidelines nor has it explained why there should not be an individual test to assess unpaid interns under the FLSA.⁶³ Like the trainee test in the Field Operation Handbook, the Fact Sheet’s test

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Craig Durrant, Comment, *To Benefit or Not To Benefit: Mutually Induced Consideration As a Test For The Legality Of Unpaid Internships*, 162 U. PA. L. REV. 169, 175 (2013).

⁶⁰ U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), <https://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter FACT SHEET #71].

⁶¹ *Id.*

⁶² See *id.*

⁶³ See Jaelyn Gessner, Note, *How Railroad Brakemen Derailed Unpaid Interns: The Need For a Revised Framework To Determine FLSA Coverage For Unpaid Interns*, 48 IND. L. REV. 1053, 1060–63 (2015).

for internships requires all six prongs to be met in order for no employment relationship to exist under the FLSA (and for the minimum wage and overtime provisions not to apply to the intern).⁶⁴

In addition to the test, the Fact Sheet provides supplemental guidance on several of the six factors.⁶⁵ For example, the Fact Sheet provides that the more an internship is structured around the classroom or academic experience, the more likely it will be considered an extension of the intern's academic experience.⁶⁶ Similarly, if the internship provides job shadowing opportunities under close supervision, but the intern performs minimal or no work, the activity is more likely to be seen as an educational experience.⁶⁷ On the other hand, if the intern receives the same level of supervision as regular employees, this would suggest an employment relationship and the intern would be entitled to wages.⁶⁸

The Wage and Hour Division has also published a series of opinion letters applying the six-factor test from the Field Operations Handbook to a number of internship scenarios to determine whether a student intern is covered by the FLSA.⁶⁹ For example, the Division issued a March 13, 1995 opinion letter, responding to an inquiry as to whether or not certain college interns were employees under the FLSA.⁷⁰ The interns received college credit for their work and did not displace regular employees but they were not paid.⁷¹ The Division concluded that it could not make a definite determination on employee status, but it explained that if "this internship program is predominately for the benefit of the college students, . . . [the Wage and Hour Division] would not assert an employment relationship."⁷² The Division responded to a similar inquiry on May 8, 1996 about a different internship program for academic credit.⁷³ The Division noted:

⁶⁴ See FACT SHEET #71, *supra* note 60.

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Yamada, *supra* note 55, at 228–29.

⁷⁰ *Id.* at 229.

⁷¹ *See id.*

⁷² *Id.*

⁷³ *See id.*

In situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction.⁷⁴

Although the DOL's guidelines are, at best, afforded some level of deference in the courtroom⁷⁵ and its opinion letters are merely a source of persuasive authority, both reflect the Wage and Hour Division's perspective on student interns.⁷⁶ Taken together, these sources seem to suggest that the Division does not intend for interns participating in school-sponsored internship programs to be accorded employee status under the FLSA.⁷⁷

B. *Interpretations by the courts*

In the aftermath of *Portland Terminal* and the supplementary guidance provided by the Wage and Hour Division, the courts have split on how to approach various working relationships, such as unpaid internships, under the FLSA. Different jurisdictions have formulated and applied different tests based upon the level of deference given to the Wage and Hour Division's guidelines, the interpretation

⁷⁴ *Id.*

⁷⁵ *Compare* *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1209 (11th Cir. 2015) (“[t]his test is not a regulation, and it did not arise as a result of rule-making or an adversarial process. At most, it is entitled to *Skidmore* deference, meaning that the deference it is due is proportional to its power to persuade.”) (internal quotations omitted) *and* *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d. Cir. 2015) (“an agency has no special competence or role in interpreting a judicial decision.”) *with* *Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983) (holding that the Wage and Hour Division's 6-factor test for trainees is entitled to substantial deference).

⁷⁶ *See* *Yamada*, *supra* note 55, at 229–30.

⁷⁷ *See id.* at 230.

of *Portland Terminal*, and whether the test used should be applied wholesale in an “all or nothing” fashion.⁷⁸

1. TOTALITY OF THE CIRCUMSTANCES TEST

Some courts have taken a holistic approach to determining whether an intern or trainee is an employee under the FLSA and have therefore applied a totality of the circumstances test.⁷⁹ This test considers all of the facts surrounding the working relationship and the six factors identified by the Wage and Hour Division’s Field Operations Handbook, and it balances them to determine whether the intern or trainee qualifies as an employee.⁸⁰ The Tenth Circuit has been a major proponent of this test for some time and the lower courts in the Second Circuit have used this test in recent years to classify student interns.⁸¹

In *Reich v. Parker Fire Protection District*, the Tenth Circuit was tasked with determining whether prospective firefighter trainees attending a firefighter academy were employees under the FLSA.⁸² Permanent employment as a firefighter was conditioned upon satisfactory completion of a ten-week course, and trainees had a reasonable expectation of being hired upon completion.⁸³ Even

⁷⁸ See, e.g., *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1026 (10th Cir. 1993) (noting that some jurisdictions follow the Wage and Hour Division’s test while others use elements of the test and apply *Portland Terminal* directly); Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone To A Successful Career Or The Stumbling Block Of An Illegal Enterprise? Finding the Right Balance Between Worker Autonomy And Worker Protection*, 14 NEV. L.J. 184, 197–200 (2013); Chris J. Perniciaro, Comment, *An Emerging Liability: Managing FLSA Exposure From Internship Programs In The Private Sector*, 65 MERCER L. REV. 1131, 1148–57 (2014).

⁷⁹ See, e.g., *Reich*, 992 F.2d 1023; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 703 (1947) (“the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.”); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1327–28 (10th Cir. 1981) (applying the totality of the circumstances approach).

⁸⁰ See *Reich*, 992 F.2d 1023 (noting that the relevant inquiry is into the totality of the circumstances); Cody Elyse Brookhouser, Note, *Whaling on Walling: A Uniform Approach To Determining Whether Interns are “Employees” Under the Fair Labor Standards Act*, 100 IOWA L. REV. 751, 758 (2015).

⁸¹ See *Reich*, 992 F.2d 1023; *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 531–32 (S.D.N.Y. 2013).

⁸² See *Reich*, 992 F.2d at 1025.

⁸³ *Id.*

certified and experienced firefighters had to complete the academy in order to be eligible for hire, and the “curriculum included classroom lectures, tours of the district, demonstrations, physical training, and simulations.”⁸⁴

The court began by rejecting an all-or-nothing application of the six factors, explaining that “the six factors are meant as an assessment of the totality of the circumstances”⁸⁵ and that “the six criteria are relevant but not conclusive to the determination.”⁸⁶ After assessing the six factors, the court noted that all of the factors except one – the expectation of employment upon completion of the course – indicated that trainees were not employees, and it concluded that the trainees were not employees under the FLSA and not entitled to wages.⁸⁷ Importantly, the court recognized the parallels between the academy and a vocational school due to the transferrable skills taught.⁸⁸ Similarly, although the trainees maintained equipment and manned a truck near the end of their training, the court rejected the argument that the trainees provided productive work because the work was supervised and did not displace regular employees.⁸⁹

2. ECONOMIC REALITIES TEST

From 2013 until September 2015, the Eleventh Circuit used the economic realities test to determine if a student intern was an employee under the FLSA.⁹⁰ The Eleventh Circuit had previously used the economic realities test to assess employment status for other

⁸⁴ *Id.*

⁸⁵ *Id.* at 1026–27.

⁸⁶ *Id.* at 1027.

⁸⁷ *Id.* at 1027–29.

⁸⁸ *Id.* at 1028.

⁸⁹ *Id.* at 1028–29.

⁹⁰ *See Kaplan v. Code Blue Billing and Coding, Inc.*, 504 F. App’x 831, 834 (11th Cir. 2013) (applying the economic realities test). The Eleventh Circuit effectively replaced this test with its adoption of the Second Circuit’s “tweaked primary beneficiary” test in September 2015. *See Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1209–10 (11th Cir. 2015).

working relationships, such as retirement center patients who performed tasks for the retirement center⁹¹ as well as independent contractors.⁹² In *Kaplan v. Code Blue Billing and Coding, Inc.* it expanded the test to unpaid interns working for a coding and billing company who were required to complete an internship for academic credit in order to graduate.⁹³

In *Code Blue Billing*, the court explained that an assessment of employment status requires consideration of “the economic realities of the relationship, including whether a person’s work confers an economic benefit on the entity for whom they are working.”⁹⁴ In concluding that the student interns were not employees under the FLSA⁹⁵, the court reasoned that the interns received hands-on work experience and academic credit for their formal degree program while the company did not benefit because it was required to train and supervise the students and review their work, making the business run less efficiently.⁹⁶ The court also noted that the internship program satisfied all six factors of the Wage and Hour Division’s Field Operation Handbook: The training was similar to that which would have been given in school, it benefited the students because they received academic credit required for graduation, the interns did not displace regular employees, the company received no immediate advantage from the interns and was at times impeded by their

⁹¹ See *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982). The court here applied the economic realities test to a group of retirement home workers including kitchen help, maids, waitresses and other employees. *Id.* at 470–71. Some of these employees had recently been released from a mental hospital and performed a variety of tasks; they may have received room and board for their work, in addition to hourly wages ranging from \$0.17 to \$0.55. *Id.* at 470. The court determined that these workers qualified as employees under the FLSA and were entitled to wages because their work was of economic benefit to the retirement home. *Id.* at 470–71.

⁹² See *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311–12 (11th Cir. 2013) (applying the economic realities test to independent contractors who worked as cable and internet technicians and holding that the technicians qualified as employees under the FLSA).

⁹³ See *Code Blue Billing*, 504 F. App’x at 834–35.

⁹⁴ *Id.* at 834.

⁹⁵ *Id.*

⁹⁶ *Id.*

presence, and the interns understood that they were neither entitled to a job upon completion of the internship nor entitled to wages.⁹⁷

3. PRIMARY BENEFICIARY TEST

In contrast to the totality of circumstances and economic realities tests, the primary beneficiary test is used by other courts to determine employment status under the FLSA.⁹⁸ The thrust of the inquiry under the primary beneficiary test is the relative benefits flowing to each party to ultimately ascertain whether the worker or employer receives the primary benefit of the relationship.⁹⁹ As would be expected, if the worker receives the primary benefit, then the worker is not deemed an employee under the FLSA; if the employer receives the primary benefit, then the worker is an employee and is entitled to wages.¹⁰⁰ A critical component of the primary beneficiary test is the interpretation of a “benefit,” which courts have extended to include both tangible and intangible educational benefits.¹⁰¹

⁹⁷ *Id.* at 834–35.

⁹⁸ The Fourth, Fifth and Sixth Circuits have been the strongest supporters of the primary beneficiary test. *See, e.g.,* *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518 (6th Cir. 2011) (applying the primary beneficiary test to boarding school students whose learning consisted of a combination of classroom teaching and vocational training); *Atkins v. General Motor Corp.*, 701 F.2d 1124, 1127–29 (5th Cir. 1983) (implicitly applying the primary beneficiary to a group of machine attendant trainees); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (noting that the proper test to assess employment status for a group of snack food distribution trainees is whether the company or the workers “principally benefited from the weeklong orientation arrangement.”).

⁹⁹ *Laurelbrook*, 642 F.3d at 526; Ashley G. Chrysler, Comment, *All Work, No Pay: The Crucial Need For The Supreme Court To Review Unpaid Internship Classifications Under the Fair Labor Standards Act*, 2014 MICH. ST. L. REV. 1561, 1581 (2014) (“[t]he primary benefit test focuses on the benefits flowing to each party and ultimately examines whether the employer or the worker receives the primary benefit of the working relationship.”).

¹⁰⁰ *See Laurelbrook*, 642 F.3d at 526–29; Chrysler, *supra* note 99, at 1581.

¹⁰¹ *See Laurelbrook*, 642 F.3d at 530–32 (examining the intangible benefits afforded to the boarding school students through vocational training and noting that intangible benefits “are significant enough to tip the scale of primary benefit in the students’ favor even where the school receives tangible benefits from the students’ activities.”); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (finding that boarding school students’ chores were intended to instill a sense of responsibility, teamwork, accomplishment and pride and therefore primarily benefited the students).

In *Solis v. Laurelbrook Sanitarium & School, Inc.*, for example, the Sixth Circuit applied the primary beneficiary test to a group of boarding school students who spent half a day taking classes and the other half of the day learning practical skills.¹⁰² Classroom learning and practical training were integrated, and the practical training facility existed solely as a vehicle for student learning.¹⁰³ Students participated in vocational training in the kitchen and housekeeping departments, and older students were given the option to participate in the Certified Nursing Assistant Program.¹⁰⁴ The students were not paid.¹⁰⁵

The court began by acknowledging and rejecting the economic realities test, finding that it “is no more helpful than attempting to determine employment status by reference directly to the FLSA’s definitions themselves.”¹⁰⁶ The court dealt a similar blow to the DOL’s six-factor test outlined in the Field Operation Handbook, finding it to be “overly rigid” and “inconsistent with *Portland Terminal* itself, which, as outlined below, suggests that the ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed.”¹⁰⁷

The court then applied the primary beneficiary test, explaining that factors such as whether the relationship displaces paid employees, whether the relationship has an educational value, and whether other factors exist that shed light on which party primarily benefits are relevant considerations that can guide the inquiry.¹⁰⁸ It ultimately concluded that the students were not employees under the FLSA, conceding that the program received certain operational and pecuniary benefits, but pointing out that the tangible and intangible benefits that accrued to the students made the students the primary beneficiaries.¹⁰⁹ Notably, the court argued that intangible benefits of

¹⁰² 642 F.3d 518, 519–26 (6th Cir. 2011).

¹⁰³ *Id.* at 520.

¹⁰⁴ *Id.*

¹⁰⁵ Students were not entitled to a job upon graduation. *Id.* at 521. Unlike traditional public schools, Laurelbrook was responsible for its students at all times and was driven by its religious mission as a boarding school for Seventh-Day Adventists. *Id.* at 520.

¹⁰⁶ *Id.* at 522–23.

¹⁰⁷ *Id.* at 525.

¹⁰⁸ *Id.* at 526–29.

¹⁰⁹ *Id.* at 530–32.

vocational training, such as learning about responsibility and the dignity of manual labor, “are significant enough to tip the scale of primary benefit in the students’ favor even where the school receives tangible benefits from the students’ activities.”¹¹⁰

III. A NEW DIRECTION: THE “TWEAKED PRIMARY BENEFICIARY” TEST¹¹¹

Until July 2015, no court of appeals had decided whether for-profit companies with unpaid interns violated the FLSA. In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit Court of Appeals finally addressed the issue in response to a claim brought by a movie production intern working for neither wages nor school credit or professional licensure.¹¹² The court formulated a derivation of the primary beneficiary test to respond to the key features of the “modern internship.”¹¹³ Although the court touted its sensitivity to the internship relationship in modern society, it made no distinction between the various types of “modern internships” that the courts may encounter.¹¹⁴ Several months later, in September 2015, the Eleventh Circuit adopted the Second Circuit’s test wholesale for clinical interns engaged in experiential learning required for degree conferral and professional licensure.¹¹⁵

¹¹⁰ The court viewed these intangible benefits very broadly, and it seemingly did not require specific evidence of the intangible benefits received. Rather, parents, alumni and employers testified that their children learned about the importance of working hard, seeing a task to its completion, the need to respect the elderly, and the value of leadership skills. *Id.* at 531. This type of argument may be applicable across the gamut of experiential learning programs.

¹¹¹ Note that the test promulgated by the Second Circuit and adopted by the Eleventh Circuit was not expressly labeled the “tweaked primary beneficiary” test by the courts. It will be referred to by this name to distinguish it from other interpretations of the “primary beneficiary” test, which do not tweak the existing test by providing their own set of factors for analysis as the Second Circuit’s test does.

¹¹² 811 F.3d 528, 531–33 (2d Cir. 2015).

¹¹³ *Id.* at 537.

¹¹⁴ *Id.* (the test “is confined to internships and does not apply to training programs in other contexts.”).

¹¹⁵ *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1203 (11th Cir. 2015) (“we now adopt an application of *Portland Terminal’s* ‘primary beneficiary’ test specifically tailored to account for the unique qualities of the type of internship at issue in this case.”).

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

In *Glatt*, Plaintiffs Eric Glatt and Alexander Footman were unpaid interns working on the movie set of *Black Swan*.¹¹⁶ At the time, Glatt was enrolled in a non-degree graduate program, but he did not receive academic credit for his internship.¹¹⁷ Footman was not enrolled in a degree program at the time of his internship.¹¹⁸

Glatt interned in the accounting department from December 2009 through February 2010 and in the post-production department from March 2010 to August 2010.¹¹⁹ As an accounting intern, Glatt worked roughly 50 hours a week and his responsibilities included copying and filing documents, tracking purchase orders, transporting paperwork and maintaining personnel files.¹²⁰ As a post-production intern, Glatt worked roughly 15 hours a week, and his responsibilities included drafting cover letters, organizing paperwork, keeping the take-out menus up to date, and running errands.¹²¹

Similarly, Footman interned in the production department from September 2009 to February or March of 2010.¹²² Footman worked between 30 and 50 hours a week and his responsibilities included setting up office furniture, arranging lodging for cast and crew, taking out the trash, answering phone calls, photocopying, making coffee, compiling lists of local vendors, and other similar tasks and errands.¹²³

The court began its analysis by recognizing the benefits of properly-designed internship programs, as well as the potential for intern abuse, and suggested that circumstances exist in which unpaid interns both should and should not be classified as employees.¹²⁴ The court then summarily rejected an application of the DOL's Fact Sheet #71, agreeing with the defendants that the proper test is "whether the intern or the employer is the primary beneficiary of the

¹¹⁶ *Glatt*, 811 F.3d at 532.

¹¹⁷ *Id.* at 532.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 533–34.

relationship.”¹²⁵ Instead of applying a version of the primary beneficiary test formulated previously by another court, the Second Circuit put forth its own “tweaked primary beneficiary” test, providing a non-exhaustive list of seven factors used to determine whether an unpaid intern is an employee:

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

¹²⁵ *Id.* at 538.

without entitlement to a paid job at the conclusion of the internship.¹²⁶

No one factor is dispositive and courts may consider other factors beyond the seven factors listed in reaching a conclusion on an intern's employment status.¹²⁷ According to the court, the "tweaked primary beneficiary" test reflects the modern internship's "relationship between the internship and the intern's formal education . . . [t]he purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting."¹²⁸

B. *Schumann v. Collier Anesthesia, P.A.*

In striking contrast to the internship at issue in *Glatt*, the internship at issue before the Eleventh Circuit in *Schumann* involved students pursuing a master's degree and professional certification and licensure to become nurse anesthetists.¹²⁹ The program provided a 28-month curriculum in which the last 4 semesters consisted primarily of clinical experience.¹³⁰ Thus, unlike the internship scenario at issue in *Glatt*, the clinical experience was interwoven into the degree program and required for degree conferral; the clinical training was also required by Florida law and the accreditation agencies governing the field.¹³¹

The program and the accreditation standards required the students to participate in a minimum number of cases and master certain critical skills including completing preoperative forms, setting up and cleaning anesthesia equipment, monitoring patients, stocking anesthesia carts, and preparing rooms for use.¹³² Each clinical

¹²⁶ *Id.* at 537.

¹²⁷ *Id.*

¹²⁸ *Id.* This reasoning seems out of place considering that neither *Glatt*'s nor *Footman*'s internship was part of their formal education but rather was pursued independently. The court's explanation provides further evidence that it failed to consider the specific types of internships at issue before establishing the test.

¹²⁹ *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1202 (11th Cir. 2015).

¹³⁰ *Id.* at 1203. The first 3 semesters consisted primarily of classroom learning.

¹³¹ *Id.*

¹³² *Id.* at 1203–04.

course had an instructor and required daily evaluations to be completed by both the student and the supervising employee.¹³³ Students wore identifying clothing and were scheduled to work 8-hour shifts 365 days a year, but often worked for longer periods of time.¹³⁴

The court eased into its analysis by rejecting a strict application of the Field Operation Handbook's six-factor test, preferring "to take . . . [its] guidance on this issue directly from *Portland Terminal*."¹³⁵ Although it recognized the merits of evaluating the primary beneficiary of the internship relationship, the court differentiated between the type of required clinical training at issue in this case with the training at issue in *Portland Terminal*.¹³⁶ The court concluded that the best way to determine the primary beneficiary is "to focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is otherwise abusive toward the student."¹³⁷ The court then adopted the Second Circuit's non-exhaustive seven-factor test in whole,¹³⁸ finding that the factors "effectively tweak the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships like the type at issue here."¹³⁹

Critically, the court explained that a resolution of employment status does not need to be an all-or-nothing determination.¹⁴⁰ Thus, the test may be applied so that portions of a student's internship are deemed a *bona fide* internship that do not require remuneration, while other portions constitute abuse of the internship relationship and would require that the student be seen as an employee under the FLSA and entitled to wages.¹⁴¹

¹³³ *Id.* at 1204.

¹³⁴ *Id.* at 1204–05.

¹³⁵ *Id.* at 1209. For a discussion on the varying levels of deference accorded to the DOL's tests, see *supra* note 75.

¹³⁶ See Schumann, 803 F.3d at 1209–11.

¹³⁷ *Id.* at 1211.

¹³⁸ *Id.* at 1211–12.

¹³⁹ *Id.* at 1212. This is the basis for referring to the standard as the "tweaked primary beneficiary" test.

¹⁴⁰ *Id.* at 1214.

¹⁴¹ *Id.* at 1214–15.

IV. PRACTICAL CONSIDERATIONS: WHY THE “TWEAKED PRIMARY BENEFICIARY” TEST DOES NOT APPLY TO CLINICAL INTERNSHIPS REQUIRED FOR DEGREE CONFERRAL OR PROFESSIONAL CERTIFICATION AND LICENSURE

As a threshold matter, the Second Circuit formulated its “tweaked primary beneficiary” test in *Glatt* in reference to all unpaid internships at for-profit employers.¹⁴² The court failed to differentiate between the types of student internships a court may face, drawing no distinction between internships for academic credit and internships that are pursued independently of an academic program.¹⁴³ More importantly, of those internships pursued as a component of an academic program (i.e., an internship receiving academic credit), the court failed to differentiate between internships that are pursued by choice and internships that are required for degree conferral and/or professional certification and licensure, such as the internship at issue in *Schumann*.¹⁴⁴ On the contrary, all of these internships are lumped together into one group and referred to as “the modern internship,”¹⁴⁵ to be treated uniformly by the court’s revised test. Consequently—and despite its belief otherwise—the Eleventh Circuit adopted the “tweaked primary beneficiary” test and applied it to a group of interns engaged in clinical training required for both their degree and professional certification without discerning between the types of internships at issue and the applicability of the test to the interns in question.¹⁴⁶

¹⁴² *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 n.2 (2d Cir. 2015) (“we limit our discussion to internships at for-profit employers.”).

¹⁴³ In fact, the court justified its approach as a reflection on the “central feature of the modern internship—the relationship between the internship and the intern’s formal education. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting.” *See id.* at 537. However, neither *Glatt* nor *Footman* pursued the internship as a component of any academic program.

¹⁴⁴ *See id.* at 536 n.2.

¹⁴⁵ *See id.* at 537.

¹⁴⁶ The court made several references to the adoption of the entire test as a tailored response to the type of internship at issue but failed to explain how an adoption of the entire test was appropriate for the clinical internship before the court. *See, e.g., Schumann*, 803 F.3d at 1212 (“[t]he factors that the Second Circuit has identified effectively tweak the Supreme Court’s considerations in evaluating the training program in *Portland Terminal* to make them applicable to

In reference to unpaid internships as a whole, the “tweaked primary beneficiary” test seemingly favors the employer and will likely give employers considerable leeway to use unpaid interns without violating the FLSA as long as the work serves an educational purpose.¹⁴⁷ In the narrow context of clinical internships required for academic credit or professional certification, however, the test proves especially problematic for three reasons: (1) although the test is “non-exhaustive,” the mere identification of the seven listed factors will anchor the courts to those considerations and consistently ensure that clinical interns will not qualify as employees under the FLSA; (2) factors two through six will similarly continually indicate that a clinical intern is not an employee under the FLSA; and (3) the Eleventh Circuit’s parsing approach to evaluating individual activities for an entitlement to wages will be largely unworkable in the clinical intern setting and will likely open a floodgate of litigation.

modern-day internships like the type at issue here.”); *id.* at 1211 (“[t]his orientation allows for student internships to accomplish their important goals but still accounts for congressional concerns in enacting the FLSA.”).

¹⁴⁷ See Noam Scheiber, *Employers Have Greater Leeway on Unpaid Internships, Court Rules*, N.Y. TIMES, (July 2, 2015), http://www.nytimes.com/2015/07/03/business/unpaid-internships-allowed-if-they-serve-educational-purpose-court-rules.html?_r=0 (noting that the test hinges largely on the internship’s educational benefits and suggesting that Glatt and Footman are likely to prevail on remand since neither were enrolled in an educational institution during the internship); Susan Adams, *Why The Second Circuit Made A Flawed Decision In Upholding Unpaid Internships*, FORBES, (July 7, 2015), <http://www.forbes.com/sites/susanadams/2015/07/07/why-the-second-circuit-made-a-flawed-decision-in-upholding-unpaid-internships/> (suggesting that the “tweaked primary beneficiary” test may open the floodgates to internships that provide school credit and create a system in which employers make deals with educational institutions for school credit.); Eric Raphan & Rachel Tischler, *Second Circuit Court of Appeals Adopts “Primary Beneficiary Test” and Provides Guidance on the Unpaid Intern Question*, SHEPPARD MULLIN LABOR AND EMPLOYMENT LAW BLOG (July 27, 2015), <http://www.laboremploymentlawblog.com/2015/07/articles/unpaid-volunteers/second-circuit-court-of-appeals-adopts-primary-beneficiary-test-and-provides-guidance-on-the-unpaid-intern-question/> (describing the decision in Glatt as “pro-employer” and a “setback for plaintiffs.”).

A. *Anchoring theory*

Anchoring theory, or focalism, is a cognitive bias that refers to the human tendency to rely on the first piece of information offered (the anchor) during the decision-making process.¹⁴⁸ Anchoring theory suggests that “individuals anchor, or overly rely, on specific information or a specific value and then adjust to that value to account for other elements of the circumstance.”¹⁴⁹ For example, a person looking to buy a used car who places significant value on the odometer reading and the year of the car may use those criteria to evaluate the value of the car, rather than considering how well the engine is maintained.¹⁵⁰

In the context of applying the “tweaked primary beneficiary” test to clinical interns, anchoring theory suggests two interrelated outcomes: First, that the courts will overly rely on the seven listed criteria when evaluating a clinical intern’s employment status despite a commitment to “weighing and balancing [of] all of the circumstances, including, where appropriate, other considerations not expressed in the seven factors.”¹⁵¹ Second, this over reliance on the seven listed factors will almost always result in the clinical intern failing to be classified as an employee under the FLSA.¹⁵² This is the case because *four* (possibly five) of the seven factors examine the internship’s relationship to the intern’s educational program and curriculum.¹⁵³ Thus, similar to the used car purchaser who places

¹⁴⁸ See Linda Sapadin, Ph.D., *The Anchoring Effect: How it Impacts Your Everyday Life*, PSYCHCENTRAL (July 27, 2013), <http://psychcentral.com/blog/archives/2013/07/27/the-anchoring-effect-how-it-impacts-your-everyday-life/>; Dr. Jeremy Dean, *Anchoring Effect: How the Mind is Biased By First Impressions*, PSYBLOG (May 23 2013), <http://www.spring.org.uk/2013/05/the-anchoring-effect-how-the-mind-is-biased-by-first-impressions.php>.

¹⁴⁹ *Anchoring Bias In Decision-Making*, SCIENCE DAILY, <http://www.science-daily.com/terms/anchoring.htm> (last visited May 19, 2016).

¹⁵⁰ See *id.*

¹⁵¹ *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015) (internal quotations omitted).

¹⁵² 29 U.S.C. §§ 201–19.

¹⁵³ Factors two discusses training that is similar to that which would be given in an educational environment, factor three examines how integrated the internship is into the student’s curriculum, factor four addresses whether the internship corresponds to the academic calendar and factor five examines whether the internship endures after beneficial learning concludes. See *Schumann*, 803 F.3d at 1212.

undue significance on the odometer reading and the year of the car, courts using the “tweaked primary beneficiary” test may place an over-emphasis on the relationship between the internship and the intern’s educational experience, instead of evaluating which party is the primary beneficiary of the relationship. In the context of the clinical internship, in which the clinical training and the academic program are fully integrated and indistinguishable,¹⁵⁴ this over-emphasis will likely be fatal.

B. *Isolated Issues With Factors Two through Six*

Just as factors two through six of the “tweaked primary beneficiary” test may prove problematic as a group for clinical internships due to cognitive bias in a court’s evaluation process, these factors are similarly troublesome in isolation.

1. FACTOR 2: SIMILARITIES TO TRAINING IN AN EDUCATIONAL ENVIRONMENT

Factor two examines the parallels between the training offered by the internship and the training which would be offered in an educational setting, including clinical and hands-on training.¹⁵⁵ Because clinical internships required for graduation and professional licensure *are* the training that would be offered in an educational setting, there is a total overlap, and the consideration will continually favor the employer over the clinical intern.

Moreover, a reference to what kinds of training activities are educational in nature is ambiguous and subjective, especially if the court chooses to consider intangible educational benefits, as has been done on various occasions in the past.¹⁵⁶ Of course, in a different internship scenario, such as the movie production internship in *Glatt*, the determination of educational training activities may be more clear-cut. This author can envision a court having a difficult

¹⁵⁴ *Id.* at 1213 (“[i]n a case like this one, where the clinical training and the academic commitment are one and the same . . .”).

¹⁵⁵ *Id.* at 1212 (“[t]he extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.”).

¹⁵⁶ For a further discussion of intangible benefits considered by the courts see *supra* notes 101 and 108–110 and accompanying text.

time accepting an argument that brewing coffee and fetching a hypoallergenic pillow¹⁵⁷ are forms of experiential learning¹⁵⁸ that would be taught in the classroom. However, returning to the required clinical internship scenario, a court will likely have much more difficulty discerning what activities are educational.¹⁵⁹ Tasks that may be deemed non-educational in other settings may very well be the types of tasks that a clinical intern would be responsible for mastering in a classroom setting. For example, borrowing from the list of tasks that must be mastered by a student nurse anesthetist in order to graduate and obtain a professional license, how would a court interpret the completion of preoperative forms? The setup and cleaning of anesthesia equipment? The stocking and re-stocking of anesthesia carts?¹⁶⁰

2. FACTOR 3: RELATIONSHIP TO FORMAL EDUCATION

Similarly, factor three examines “the extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.”¹⁶¹ In a clinical internship setting, the clinical training is a mandated component of the degree and professional certification, thus the coursework is always integrated and academic credit is always received.¹⁶² This consideration will likewise consistently favor the employer.

¹⁵⁷ See Miller, *supra* note 1; Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 532. (2d Cir. 2015).

¹⁵⁸ See Adams, *supra* note 147 (“[i]t’s tough to argue that emptying the garbage and fetching a pillow is educational.”).

¹⁵⁹ Note that the *Schumann* court explicitly identified student nurse anesthetists’ key training activities. See Schumann, 803 F.3d at 1203–04. However, unlike its approach to factors four through six, it did not attempt to provide any guidance on how to identify similarities to training for nurse anesthetists in an educational setting. See *id.* at 1213–14.

¹⁶⁰ See *id.* at 1203–04.

¹⁶¹ See *id.* at 1212.

¹⁶² See *id.* at 1203 (referring to the clinical internship as “a universal clinical-placement requirement necessary to obtain a generally applicable advanced academic degree and professional certification and licensure in the field.”); see also *supra* notes 7–12 and accompanying text.

3. FACTOR 4: CORRESPONDENCE TO THE ACADEMIC CALENDAR

Factor four assesses whether the internship corresponds to the intern's academic calendar.¹⁶³ In a clinical internship scenario, in which the clinical training and academic commitment are indistinguishable,¹⁶⁴ this consideration again favors the employer. In *Schumann*, however, the court provided supplementary guidance on this factor, suggesting that "this consideration must account for whether a legitimate reason exists for clinical training to occur on days when school is out of session."¹⁶⁵ Taken at face value, the court's guidance could be interpreted to suggest a higher burden placed on the employer to justify training during periods of no school. Concededly, this could be the case in other internship scenarios. Returning to the internship scenario in *Glatt*, a movie studio could face an uphill battle in explaining why it required its interns to work on a Sunday morning only to re-arrange furniture and file paperwork.¹⁶⁶ But for clinical internships, in which the vast majority required for graduation and professional certification revolve around the health industry,¹⁶⁷ health care employers may have little trouble justifying the training in the name of public health and safety.¹⁶⁸ As one doctor eloquently explained, "hospitals permit around-the-clock observation of patients . . . [i]f medical staff observe an acute change, they can then deliver an acute intervention."¹⁶⁹

¹⁶³ See *Schumann*, 803 F.3d at 1212. ("The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.")

¹⁶⁴ See *id.* at 1213 ("[i]n a case like this one, where the clinical training and the academic commitment are one and the same . . .").

¹⁶⁵ *Id.*

¹⁶⁶ These were tasks typical of accounting and production interns. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 532 (2d Cir. 2015).

¹⁶⁷ No data exists to demonstrate the actual proportion of clinical internships that are related to the health industry. However, a simple Google search of "clinical internships" generates a list of health-related clinical internships at hospitals, medical research institutions, mental health facilities, etc. See GOOGLE, <http://google.com> (last visited Dec. 30, 2015).

¹⁶⁸ This furthers the argument that the Eleventh Circuit did not adopt the "tweaked primary beneficiary" test in response to the *specific* internship before the court. See *supra* note 146.

¹⁶⁹ Dr. Maria Yang, *What Is A Hospital?* MARIA YANG, M.D. (Dec. 10, 2013), <http://www.mariayang.org/2013/12/10/what-is-a-hospital/>.

4. FACTOR 5: LENGTH OF INTERNSHIP VERSUS BENEFICIAL LEARNING

Factor five, which assesses the correlation between the internship's duration and the period of beneficial learning,¹⁷⁰ is equally problematic in the context of clinical internships.

First, it is very unclear how a court would distinguish between beneficial learning and non-beneficial learning when the *entire* internship is a component of an overall academic program. Implicit in the clinical internship is the idea that the student remains a student—a learner¹⁷¹—until the degree is conferred and/or professional licensure is obtained. Unlike other internship scenarios, in which the hands-on activities may or may not be included to teach a skill required for success in the field,¹⁷² clinical training activities have been included in the curriculum because the accredited academic institution and the agencies governing the field have decided that a mastery of these skills is a necessary prerequisite to full-time employment.¹⁷³ For a court to determine that a clinical internship required for graduation and licensure exceeds the period of beneficial

¹⁷⁰ See Schumann, 803 F.3d at 1212 (“[t]he extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.”).

¹⁷¹ See 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, 1553 (2010) (analogizing the modern intern to the “learner”, a category of workers subject to exemption from the FLSA because they lack of skills which are needed for the occupation). For further discussion on the intern as a student and not an employee, see *infra* Part V.

¹⁷² For example, it is unclear whether the tasks Glatt and Footman performed during their internships contributed or were designed to contribute to beneficial learning. A determination falls outside of the scope of this Note but the ambiguity is relevant.

¹⁷³ See Schumann, 803 F.3d at 1203 (noting that the clinical training component of the nurse anesthetist program mandated by the school, Florida law, and the governing accreditation agencies is in place “to ensure that when a student graduates and becomes licensed, she will be able to safely and competently monitor the status of her patients without another licensed professional in the room.”); see *id.* at 1211 (“modern internships can play an important—indeed critical—role in preparing students for their chosen careers. Imagine if a CRNA could report to work on her first day and be allowed unsupervised to conduct the induction, maintenance, and emergence phases of anesthesia administration, having only ever read about or watched someone else perform them.”).

learning would necessarily require the court to find not only the academic program problematic, but also the standards set out by the accreditation agencies.

Second, assuming that a court could somehow determine when learning was no longer beneficial, the Eleventh Circuit's supplementary guidance on this factor makes the playing field for clinical interns and employers unequal yet again.¹⁷⁴ The Eleventh Circuit explains that "designing an internship is not an exact science"¹⁷⁵ and cautions that courts "should consider whether the duration of the internship is *grossly excessive* in comparison to the period of beneficial learning."¹⁷⁶ To solidify its position, the court then offers its opinion that "it does not seem . . . that the four-semester duration of the [nurse anesthetist] program would have been excessive, *no matter how many cases* the student completed"¹⁷⁷ unless the reason for the excessive cases was because the students were required to work "*grossly excessive hours*."¹⁷⁸ Through this supplementary guidance, the court has granted significant leeway to employers to permit internships that exceed any period of beneficial learning up until a level of gross excess.¹⁷⁹ Similarly, in assessing an intern's daily schedule for potential abuse by an employer, anything less than "grossly excessive hours" will be permitted.¹⁸⁰

5. FACTOR 6: LEVEL OF SUPERVISION

In the Eleventh Circuit's words, factor six relates "directly to *Portland Terminal's* consideration of whether the intern displaces regular employees and whether the interns work under the close supervision of existing employees."¹⁸¹ For clinical internships, an assessment of whether the interns displace regular employees does not appear to be problematic. What is of concern, however, is the con-

¹⁷⁴ See Schumann, 803 F.3d at 1213–14. (discussing the application of factor five to the intern plaintiffs).

¹⁷⁵ *Id.* at 1213.

¹⁷⁶ *Id.* at 1213–14 (emphasis added).

¹⁷⁷ *Id.* at 1214. (emphasis added).

¹⁷⁸ *Id.* (emphasis added).

¹⁷⁹ See *id.* at 1213 – 14.

¹⁸⁰ See *id.*

¹⁸¹ *Id.* at 1212.

sideration of the level of supervision by existing employees. Because of the nature of the work involved in clinical settings—and unlike many other types of internships—supervision is not only recommended, but it is often required. For example, Florida law mandates that nursing programs have provisions in place which ensure direct or indirect supervision by program faculty or clinical preceptors for nursing students engaged in clinical training.¹⁸² Likewise, the student nurse anesthetists in *Schumann* were supervised and evaluated daily by a certified nurse anesthetist or an anesthesiologist on a variety of specific categories including the anesthesia cart and machine, airway set up, patient assessment, and interpersonal behavior.¹⁸³ Evaluating these categories would not be possible without some level of close supervision.¹⁸⁴ As a result, if a court in the Eleventh Circuit were assessing the employment status of a clinical nursing student, this factor would likely tip in the employer's favor.

Thus, in a clinical internship scenario such as the one before the court in *Schumann*, factors two through six will consistently skew in favor of the employer due to the unique considerations of the clinical internship.¹⁸⁵ What remains is factors one and seven, which consider the extent to which the parties understand that there is no expectation of compensation or entitlement to a job¹⁸⁶ at the conclusion of the internship. Standing alone, these factors do little to address which party is the primary beneficiary of the relationship. At best, these factors provide only an indication of the parties' expectations. For a clinical internship required for graduation and licensure in which the internship is a component of the academic curriculum and not a means to recruit a full-time labor force, the parties should not expect that the intern will be compensated or entitled to a job at the program's conclusion.¹⁸⁷

¹⁸² See FLA. STAT. § 464.019.

¹⁸³ See *Schumann*, 803 F.3d at 1204.

¹⁸⁴ Beginning on January 1, 2010, under the new "CRNA Teaching Rule" set forth by the Department of Health and Human Services, the hospital instituted a two-to-one SRNA-to-CRNA supervision ratio. See *id.* at 1206, 1206 n.5.

¹⁸⁵ See *supra* Part IV.B.

¹⁸⁶ See *Schumann*, 803 F.3d at 1212.

¹⁸⁷ See David E. Amaya, *A New And More Flexible Approach To Internship Programs*, LEXOLOGY (Feb. 1, 2016), <http://www.lexology.com/library/de->

On the contrary, many academic programs such as the one in *Schumann* require their student interns to explicitly acknowledge that they are not entitled to compensation, are not considered employees by their participation, and will not be guaranteed a job upon graduation.¹⁸⁸ In any event, it is unclear how this analysis will help identify whether the employer or the student intern is the primary beneficiary. Consequently, the net result is a test which may be workable in other internship scenarios but which will almost exclusively find that an intern engaged in clinical work required for degree conferral and licensure is not an employee under the FLSA.

C. *The Parsing Approach Is Not Workable*

The Eleventh Circuit added its own twist to the “tweaked primary beneficiary” framework by suggesting that it does not need to be applied in an all-or-nothing fashion.¹⁸⁹ According to the *Schumann* court, the student worker can be deemed an employee for certain activities (and entitled to wages for those activities), and purely an intern for other activities (and entitled to no compensation for engaging in those efforts).¹⁹⁰ Paradoxically, the court confirms the difficulty in applying this parsing approach by referring to only one far-fetched example, in which an intern engaged in clinical training required for an academic degree and professional licensure in the medical field is required to paint an employer’s house.¹⁹¹ The court has little difficulty concluding that the student would not be an intern “for work performed within the legitimate confines of the internship but could qualify as an ‘employee’ for all hours expended in painting the house.”¹⁹²

tail.aspx?g=8e9ffab3-f2fb-4cec-882c-3729721ffb2e (noting that modern internships in the healthcare industry take the form of clinical trainings required merely “for students to advance in their field and become treating providers.”)

¹⁸⁸ See *Schumann*, 803 F.3d at 1204.

¹⁸⁹ See *id.* at 1214–15.

¹⁹⁰ See *id.*

¹⁹¹ *Id.* at 1215.

¹⁹² *Id.* The court also implies that the clinical intern would not qualify as an employee, effectively providing a concrete answer to the question that the “tweaked primary beneficiary” test is supposed to assess.

The court constructs this parsing approach to address the possible exploitation of student interns.¹⁹³ There is an unquestionable need to protect student interns from being taken advantage of by employers.¹⁹⁴ However, the Eleventh Circuit's parsing approach is flawed because it is largely unworkable in a clinical internship setting. Apart from blatant violations such as the house-painting example suggested by the court, it will be extremely challenging for a court to assess activities that have a more-direct relationship to the clinical training at issue.¹⁹⁵ Further, and possibly more importantly, the parsing approach may open the doors to an influx of litigation in which unpaid interns dice their internships up into subparts and assert claims under the FLSA for specific activities that allegedly do "not serve to further the goals of the internship."¹⁹⁶

¹⁹³ See *id.* at 1214–15 ("we can envision a scenario where a portion of the student's efforts constitute a *bona fide* internship that primarily benefits the student, but the employer also takes unfair advantage of the student's need to complete the internship . . .").

¹⁹⁴ See, e.g., Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. TIMES, (April 2, 2011), <http://www.nytimes.com/2011/04/03/opinion/03perlin.html> (discussing the exploitation of student interns); Nick Chowdrey, *Internships: Inevitable Career Step or Exploitation?*, THE GUARDIAN, (April 29, 2014), <http://www.theguardian.com/careers/careers-blog/internships-exploitation-career-graduates-work-experience> (discussing the effects of a race-to-the-bottom culture born out of employers' emphasis on experience rather than a diploma and the resulting potential for exploitation of student interns); Paul Solman, *How Unpaid Interns Are Exploited, Fighting Back, and Winning*, PBS NEWS HOUR, (Sept. 27, 2013), <http://www.pbs.org/newshour/making-sense/how-unpaid-interns-are-exploit/> (interviewing Eric Glatt and discussing his own experience and the ways in which students interns are exploited); Sarah Braun, Comment, *The Obama "Crackdown:" Another Failed Attempt to Regulate The Exploitation Of Unpaid Internships*, 41 SW. L. REV. 281, 286 (2012) (discussing the need for new legislation to respond to exploitative unpaid internships while maintaining beneficial internship programs).

¹⁹⁵ See *supra* Part IV.B.1.

¹⁹⁶ See Schumann, 803 F.3d at 1215.

V. THE CLINICAL INTERN IS A STUDENT—AND A STUDENT IS NOT AN EMPLOYEE

*“Sometimes when you’re looking for an answer, you search everywhere else before you take a look at what’s right in front of you.”*¹⁹⁷

In adopting the “tweaked primary beneficiary” test specifically for clinical interns, the *Schumann* Court emphasized its desire to stay faithful to the text of *Portland Terminal*.¹⁹⁸ The Court then engaged in a comparative analysis, evaluating the DOL’s six-factor test, the more traditional “primary beneficiary” test, and the Second Circuit’s “tweaked primary beneficiary” test, ultimately settling on the Second Circuit’s interpretation.¹⁹⁹ As Part IV illustrates, the “tweaked primary beneficiary” test is unworkable when applied to the clinical intern.²⁰⁰ But what if no test is workable, and *Portland Terminal* provides the very guidance the Court was looking for in the narrow context of clinical interns?

As *Portland Terminal* explains,

Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Nor could they, in that situation, have been considered as employees of the railroad merely because the school’s graduates would constitute a labor pool from which the railroad could later draw its employees.²⁰¹

In reference to the clinical internship, this statement is telling because it indicates that a clinical student is not an employee of

¹⁹⁷ Dean Hughes, *Dean Hughes Quotes*, AZ QUOTES, (Jan. 24, 2016, 10:30 PM), http://www.azquotes.com/author/18248-Dean_Hughes.

¹⁹⁸ *See* *Schumann*, 803 F.3d at 1209 (“we prefer to take our guidance on this issue directly from *Portland Terminal* and not from the DOL’s interpretation of it”); *id.* at 1212 (agreeing with the Second Circuit’s description of the “tweaked primary beneficiary” test as faithful to *Portland Terminal*).

¹⁹⁹ *See id.* at 1208–13.

²⁰⁰ *See supra* Part IV.

²⁰¹ *Walling v. Portland Terminal Co*, 330 U.S. 148, 152–53 (1947).

his/her educational institution. Although seemingly obvious, this appears to have been overlooked by the *Schumann* court in its adoption of *any* test to assess the employment status of clinical interns. In reality, the clinical intern is not a worker but a student engaged in required experiential learning in lieu of traditional classroom education. Unlike *all* other internship scenarios—ranging from the internship independent of an academic program²⁰² to the loosely-regulated but required internship for academic credit²⁰³—this hands-on learning is not supplementary to the clinical intern’s education. Rather, it *is* the clinical intern’s education, a mandatory (and significant) component of the intern’s academic program.²⁰⁴ Furthermore, the licensing and accreditation agencies which govern the field have determined that a mastery of certain skills developed through experiential training is required to transition from student to licensed practitioner.²⁰⁵ Thus, the clinical intern is a student until he or she completes the academic program and any additional licensure requirements—and a student is not an employee.²⁰⁶

Similarly, the clinical setting is not a place of work but an external learning environment where the student is taught critical skills

²⁰² For example, the movie production internship at issue in *Glatt v. Fox Searchlight Picture, Inc.* See *supra* text accompanying notes 116–23.

²⁰³ For example, the internship/practicum requirement in place in the majority of sports management curriculums. See Kristi L. Schoepfer & Mark Dodds, *Internships In Sports Management Curriculum: Should Legal Implications Of Experiential Learning Result In The Elimination Of The Sports Management Internship?*, 21 MARQ. SPORTS L. REV. 183, 184–85 (2010).

²⁰⁴ See *supra* Part IV.B.1, note 164 and accompanying text and text accompanying notes 170–73.

²⁰⁵ See *supra* note 173 and accompanying text.

²⁰⁶ The FLSA contains a statutory exemption for employees working in a professional capacity. See 29 U.S.C. § 213(a)(1) (exempting those “employed in a bona fide executive, administrative, or professional capacity” from FLSA coverage). The Department of Labor has clarified that this exemption extends to physicians as well as medical interns but only if “such a training program is entered upon *after* the earning of the appropriate degree required for the general practice of their profession.” See Niki Kuckes, *Designing Law School Externships That Comply With The FLSA*, 21 CLINICAL L. REV. 79, 89–90 (2014) (emphasis added) (quoting U.S. Department of Labor, Wage and Hour Division Opinion Letter (July 27, 1995)). The clear focus on possession of a degree suggests that medical students (and by proxy, similarly-situated clinical interns) would not be subject to the exemption prior to degree conferral because they are students and not “professionals.”

required for practice in the field. Unlike skills taught in other academic programs, these clinical skills cannot be taught sufficiently in the traditional classroom setting because their very nature require a functioning clinical environment with licensed practitioners who perform both teaching and supervisory roles.²⁰⁷ For the clinical setting, the intern is not transformed from a student into an employee merely because the supervision and teaching arranged with the academic institution results in tangential benefits for the clinical setting (a point the *Schumann* Court readily concedes).²⁰⁸ And for the student, the clinical setting is not transformed from a classroom into an office merely because his/her instructor is not directly employed by the student's academic institution. The student's academic requirements, and not the clinical setting's business needs, still drive the need for the learning to take place.²⁰⁹

In light of the unique circumstances of the clinical program, in which the student must engage in hands-on education in an external setting that is closely monitored, but not controlled by, the student's academic institution, viewing the environment as anything but educational mischaracterizes the relationship between the clinical student and the clinical setting.²¹⁰ The issue thus becomes one of re-

²⁰⁷ See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015) (“[i]magine if a CRNA could report to work on her first day and be allowed unsupervised to conduct the induction, maintenance, and emergence phases of anesthesia administration, having only ever read about or watched someone else perform them. The potential danger and discomfort to the patient under such circumstances is self-evident and startling. So we need anesthesiologists and CRNAs who are willing to teach SRNAs their trade through internships.”).

²⁰⁸ See *id.* at 1211 (“[w]e cannot realistically expect anesthesiology practices to expose themselves to these [teaching and supervising] costs by providing students with the opportunity to participate in 550 cases each, without receiving some type of benefit from the arrangement”). Most studies indicate that care is costlier at teaching hospitals than at non-teaching hospitals; however, teaching hospitals have traditionally offset research and teaching costs through higher prices for private payers and supplemental payments from Medicare. John Z. Ayanian & Joel S. Weissman, *Teaching Hospitals and Quality of Care: A Review of the Literature*, THE MILBANK QUARTERLY, (Sept. 2002), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690120/>.

²⁰⁹ See *Schumann*, 803 F.3d at 1213.

²¹⁰ Note that in an employer-employee relationship, the “purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about the result.” *N.L.R.B. v. H & H Pretzel Co.*, 831 F.2d 650, 653–54 (6th Cir. 1987) (internal

framing: if the clinical setting is correctly viewed as an external learning environment and the clinical intern is correctly classified a student, then the question is no longer whether the student or the clinical setting is the primary beneficiary. Indeed, and as *Portland Terminal* alludes to,²¹¹ it would be a perverse exercise for the courts to assess whether a student is entitled to wages merely because the student enrolls in an academic program that provides “training and experience . . . under the close supervision of doctors before practicing on . . . [his or her] own.”²¹²

Thus, the courts should classify as students the narrow subset of interns whose clinical training is a required component of their academic program and professional certification and licensure. Because these interns are students, the courts should not apply **any** test to assess employment status and subsequent entitlement to wages under the FLSA.

CONCLUSION

Congress enacted the FLSA in 1938 with the goal of protecting the nation’s lowest-paid employees who lacked sufficient bargaining power to obtain a subsistence wage.²¹³ Unfortunately, Congress

quotations omitted); *see also* RESTATEMENTS (SECOND) OF AGENCY § 220(1) (1958). In clinical settings that teach and supervise clinical students, control is shared between the clinical setting and the academic institution over the result to be accomplished as well as the manner and means by which to bring about the result. For example, the clinical setting in *Schumann* determined the process used to train the nurse anesthetists on a variety of procedures, but the procedures themselves were identified as part of the curriculum by the academic institution and the governing accreditation agencies. *See* *Schumann*, 803 F.3d at 1203–04. Because the control test only applies to the employer-employee relationship, the clinical intern remains a student if control is shared, but the intern loses an entitlement to employee status if the clinical setting does not retain control. As the example from *Schumann* illustrates, the clinical internship involves a variety of scenarios in which the clinical setting does not have control over the result or the manner and means by which to accomplish the result. It follows, then, that the clinical intern cannot be an employee of the clinical setting by process of elimination, but he/she remains a student for all experiential training in a clinical setting.

²¹¹ *See supra* text accompanying note 201.

²¹² Tripp, *supra* note 18, at 345.

²¹³ *See* *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945).

failed to identify what types of workers qualified as employees under the FLSA, and courts and the Department of Labor have struggled to address this issue ever since.

Portland Terminal provided some clarity and carved out a “trainee” exception to the FLSA’s minimum wage requirement.²¹⁴ In the wake of Portland Terminal, courts have construed different tests to assess whether certain working relationships fall under the FLSA.²¹⁵

The unpaid internship’s meteoric rise in recent years has caused significant debate, but the Supreme Court has yet to address the legality of the unpaid internship. In *Glatt*, the Second Circuit formulated a non-exhaustive seven factor test to be used to address the employment status of modern internships.²¹⁶ Critically, the court failed distinguish between the various types of modern internships a court may face and instead provided a one-size-fits-all framework.

In kind, the Eleventh Circuit adopted the test wholesale and applied it to a group of student nurse anesthetists engaged in clinical training required for graduation and professional licensure.²¹⁷ The Eleventh Circuit should have considered the internship at issue before adopting the test. As this Note illustrates, the test is not workable in the clinical internship setting because it essentially ensures that the clinical intern will never be considered an employee under the FLSA absent unrealistically extreme abusive scenarios.²¹⁸ The test should be abandoned specifically for this subset of student interns. Moreover, no test should be applied to clinical interns because clinical interns are students whose required experiential training is completed in lieu of traditional classroom learning and in accordance with degree and professional certification requirements.²¹⁹ As students, the clinical interns should not be assessed for employment status and entitlement to wages.

In the future, more courts will begin to address the legality of the unpaid internship head on, and will undoubtedly formulate new tests and build upon the old. Until the Supreme Court making a final

²¹⁴ See *supra* Part I.B.

²¹⁵ See *supra* Part II.

²¹⁶ See *supra* Part III.A.

²¹⁷ See *supra* Part III.B.

²¹⁸ See *supra* Part IV.

²¹⁹ See *supra* Part V.

ruling on how to address the unpaid internship, it is critical for courts to consider the specific internship at issue before deciding what framework to apply.