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## Glatt v. Fox Searchlight Pictures Inc.

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*New York Law School, 2015*

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ZACHARY EDELMAN

*Glatt v. Fox Searchlight Pictures Inc.*

59 N.Y.L. SCH. L. REV. 591 (2014–2015)

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GLATT v. FOX SEARCHLIGHT PICTURES INC.

For years, internships have been a fundamental building block for successful careers.<sup>1</sup> Today, students at all education levels still apply for, and gladly accept, unpaid internships,<sup>2</sup> hoping to apply the knowledge they learn in the classroom to real-world experiences in order to develop their skill set and, in many cases, gain subsequent employment.<sup>3</sup> A 2012 study by the National Association of Colleges and Employers found that more than one third of unpaid internships resulted in job offers.<sup>4</sup> However, a string of recent lawsuits against employers over the legality of unpaid internships may change the employment landscape as we know it.<sup>5</sup> In an effort to avoid being sued, several employers have ceased offering unpaid internships, even though many students still long for the chance to work without pay.<sup>6</sup>

In *Glatt v. Fox Searchlight Pictures Inc.*, the U.S. District Court for the Southern District of New York considered, inter alia, whether Fox Searchlight (“Searchlight”) violated federal and state labor laws when it classified two workers, Eric Glatt and Alexander Footman, as unpaid interns.<sup>7</sup> The district court granted Glatt and Footman’s motion for summary judgment, holding that they were actually “employees” under the Fair Labor Standards Act (FLSA).<sup>8</sup> In reaching its decision, the *Glatt* court focused primarily on a fact sheet created by the Wage and Hour Division of the U.S. Department of Labor (DOL), which set out a six-factor test to ascertain when an internship may be unpaid.<sup>9</sup>

This case comment contends that the *Glatt* court: (1) gave undue deference to the DOL factors;<sup>10</sup> (2) failed to adequately consider factors such as “the primary

1. Beth Braccio Hering, *Why Are Internships So Important?*, CNN (Apr. 14, 2010, 11:09 AM), <http://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important/>.
2. Mehroz Baig, *Unpaid Internships for Graduates Now the New Norm*, HUFFINGTON POST (Sept. 12, 2013, 10:57 AM), [http://www.huffingtonpost.com/mehroz-baig/unpaid-internships-for-gr\\_b\\_3908475.html](http://www.huffingtonpost.com/mehroz-baig/unpaid-internships-for-gr_b_3908475.html).
3. Heather Huhman, *Why You Should Get a Summer Internship*, U.S. NEWS (Apr. 29, 2011, 9:00 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2011/04/29/why-you-should-get-a-summer-internship>.
4. See Susan Adams, *Odds Are Your Internship Will Get You a Job*, FORBES (July 25, 2012, 6:20 PM), <http://www.forbes.com/sites/susanadams/2012/07/25/odds-are-your-internship-will-get-you-a-job/>; Lynne Guey, *A Shocking Number of Unpaid Internships Could Be Illegal*, BUS. INSIDER (June 24, 2013, 10:41 AM), <http://www.businessinsider.com/is-my-unpaid-internship-illegal-2013-6>.
5. *Id.*
6. See Cara Buckley, *Sued Over Pay, Publisher Ends Internship Program*, N.Y. TIMES, Oct. 2, 2013, at A23; Sam Hananel, *Unpaid Internships in Jeopardy After Court Ruling*, ASSOCIATED PRESS (June 13, 2013, 4:27 PM), <http://bigstory.ap.org/article/unpaid-internships-jeopardy-after-court-ruling>.
7. 293 F.R.D. 516 (S.D.N.Y. 2013).
8. *Id.* at 538–39.
9. U.S. DEP’T OF LAB., WAGE & HOUR DIV., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter *Fact Sheet #71*].
10. As discussed *infra*, the Department of Labor (DOL) factors are not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* because they were promulgated in an opinion letter by the Wage and Hour Division of the DOL. 467 U.S. 837 (1984). “[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines . . . are beyond the *Chevron* pale.”

beneficiary test” and the “economic realities” of the relationship in determining Glatt and Footman’s employment status;<sup>11</sup> and (3) relied on a flawed interpretation of the U.S. Supreme Court’s decision in *Walling v. Portland Terminal Co.*<sup>12</sup> The *Glatt* court set a dangerous precedent that threatens to affect all employers who wish to retain the services of unpaid interns, as well as students whose only avenue for breaking into niche industries may be through unpaid internships.

Eric Glatt worked for Searchlight from approximately December 2009 through August 2010.<sup>13</sup> He initially worked on the production phase of the film *Black Swan* in New York as an unpaid intern and went on to accept another unpaid position relating to the film’s post-production.<sup>14</sup> Glatt’s responsibilities on the production of *Black Swan* included obtaining documents for personnel files, picking up paychecks for co-workers, tracking and reconciling purchase orders, and traveling to the set for managers’ signatures.<sup>15</sup> In his post-production internship, he performed other “basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands.”<sup>16</sup>

Alexander Footman worked for Searchlight as an unpaid intern from approximately October 2009 through February 2010.<sup>17</sup> His responsibilities were similar to Glatt’s in the production of *Black Swan*, with additional duties that included assembling office furniture, arranging travel plans, taking out the trash, collecting lunch orders, answering phones, watermarking scripts, and making deliveries.<sup>18</sup>

While their work mostly involved low-level administrative tasks, Glatt and Footman received tangible benefits from their time at Searchlight, “such as resume listings, job references, and an understanding of how a production office works.”<sup>19</sup> Glatt and Footman were not paid for their work and both testified that they had understood they would not be receiving wages when accepting their positions.<sup>20</sup>

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United States v. Mead Corp., 533 U.S. 218, 234 (2001) (citation omitted); see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (finding a similar multifactor test released in an opinion letter as not “warrant[ing] *Chevron*-style deference”). Nor are the DOL factors entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see *Mead*, 533 U.S. at 221 (noting that under *Skidmore* an agency interpretation is “eligible to claim respect according to its persuasiveness” (citation omitted)).

11. *Glatt*, 293 F.R.D. at 533; see also Deborah F. Harris, *When Is Individual in Training an “Employee” for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.A. § 203(e)(1))*, 50 A.L.R. FED. 632, § 5 (1980) (describing the “economic realities” approach under the FLSA).

12. 330 U.S. 148 (1947).

13. Class Action Complaint at 8, *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11 Civ. 6784 (WHP)).

14. *Id.* at 60.

15. *Glatt*, 293 F.R.D. at 533.

16. *Id.*

17. Class Action Complaint, *supra* note 13, at 12.

18. *Glatt*, 293 F.R.D. at 533.

19. *Id.*

20. *Id.* at 534.

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Glatt and Footman (“plaintiffs”) filed their complaint against Searchlight (“defendant”) on September 28, 2011,<sup>21</sup> and the court granted their motion for summary judgment on June 11, 2013.<sup>22</sup> Plaintiffs argued that they did not fall under the “trainee” exception established by the Supreme Court in *Walling*, and pressed the court to apply the DOL six-factor test<sup>23</sup> as the standard for determining employment status under the FLSA.<sup>24</sup> Plaintiffs contended that because Searchlight improperly classified them as interns, Searchlight had “denied them the benefits that the law affords to employees, including unemployment and workers’ compensation insurance, sexual harassment and discrimination protections, and, most crucially, the right to earn a fair day’s wage for a fair day’s work.”<sup>25</sup>

Defendant argued that the DOL’s six-factor test was not the applicable standard<sup>26</sup> and urged the court to apply the primary beneficiary test, under which employment status turns on whether the benefits an intern derives from his work outweigh any benefits to the employer.<sup>27</sup>

The court acknowledged that the majority of circuit courts have rejected the DOL six-factor test in favor of the primary beneficiary test.<sup>28</sup> However, the court reasoned that the DOL factors were entitled to deference,<sup>29</sup> and were the applicable standard because the test had support in the Supreme Court’s decision in *Walling*.<sup>30</sup>

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21. See Class Action Complaint, *supra* note 13. The complaint was part of a larger class action lawsuit against multiple divisions of Fox Entertainment Group. See *id.*

22. See *Glatt*, 293 F.R.D. at 516.

23. The six factors to be considered are:

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

*Fact Sheet #71*, *supra* note 9.

24. Class Action Complaint, *supra* note 13, at 2; see also *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) (recognizing a trainee exception to the FLSA’s minimum-wage requirement).

25. Class Action Complaint, *supra* note 13, at 3.

26. *Glatt*, 293 F.R.D. at 531.

27. *Id.*

28. *Id.*

29. *Id.* at 532. The *Glatt* court reasoned that the DOL factors should be given *Chevron* deference “[b]ecause they were promulgated by the agency charged with administering the FLSA and [were] a reasonable application of it.” *Id.* However, as explained *infra*, agency interpretations not enacted pursuant to APA procedures, such as *Fact Sheet #71*, “are beyond the *Chevron* pale.” *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted).

30. *Glatt*, 293 F.R.D. at 532 (citing *Xuedan Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013)). While *Walling* was decided before the release of *Fact Sheet #71*, the *Glatt* court found that some of the DOL

The *Glatt* court's decision to focus exclusively on the DOL factors in determining Glatt and Footman's employment status was unsupported by case law.<sup>31</sup> First, the court erred by deferring to the DOL multifactor test, which warrant neither *Chevron* nor *Skidmore* deference. As contained in an opinion letter issued by the Wage and Hour Division, the DOL factors lack the force of law to warrant deference from the courts.<sup>32</sup> Second, while the DOL factors may be one of many considerations in a totality of the circumstances analysis, precedent in the Second Circuit precludes lower courts from treating these factors as the only relevant considerations.<sup>33</sup> In purporting to evaluate the totality of the circumstances, the *Glatt* court did not adequately weigh important aspects of the employment relationship because it ignored both the primary beneficiary test and the economic realities<sup>34</sup> of the employment relationship.<sup>35</sup> Third, the *Glatt* court improperly construed *Walling's* "immediate advantage" language<sup>36</sup> to reach the conclusion that Glatt and Footman were employees of Searchlight.<sup>37</sup>

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factors tracked the language of the *Walling* opinion. Specifically, the benefit the intern derives from the work, a relevant consideration under *Walling*, is reflected in the second factor of the DOL six-factor test—i.e., "[t]he internship experience is for the benefit of the intern." *Fact Sheet #71, supra* note 9; *see also Walling*, 330 U.S. at 152 (noting that the FLSA "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction"). But as some courts have concluded, *Walling* "rested upon whether the trainees received the primary benefit of the work they performed." *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011). Therefore, the *Walling* court's enumeration of other factors in dicta does not suggest that these factors "must be present in future cases to foreclose an employment relationship." *Id.* at 526 n.2.

31. Extensive research by the author for other courts that primarily focused on the DOL six-factor test and brushed over the "primary beneficiary test" or the "economic realities" of the employment relationship were unsuccessful.
32. *See infra* notes 45–52 and accompanying text.
33. "The determination of whether an employer–employee relationship exists does not depend on 'isolated factors but rather upon the circumstances of the whole activity.'" *Velez v. Sanchez*, 693 F.3d 308, 326 (2d Cir. 2012) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)); *see also Archie v. Grand Cent. P'ship*, 997 F. Supp. 504, 532 (S.D.N.Y. 1998).
34. When courts consider the economic realities of an employment relationship, they look at whether the worker relies financially on the alleged employer and expects compensation for his or her services. *See Williams v. Strickland*, 87 F.3d 1064, 1066–67 (9th Cir. 1996); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (noting that economic realities are a relevant consideration under the FLSA); *Solis*, 642 F.3d at 522 ("[I]t is the 'economic reality' of the relationship between parties that determines whether their relationship is one of employment or something else.>").
35. The *Glatt* court applied the second factor of the DOL multifactor test, which considers whether the intern benefits from the internship. But that factor involves a different question (and often leads to a different result) than the one underlying the primary beneficiary test. So much was conceded by the *Glatt* court. *See Glatt*, 293 F.R.D. at 532 (noting that under defendant's approach "the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot").
36. *Walling*, 330 U.S. at 153.
37. *See infra* notes 76–83 and accompanying text.

The U.S. Supreme Court has yet to articulate a bright-line test for determining employment status under the FLSA.<sup>38</sup> The Court’s 1947 *Walling* decision remains the most commonly cited case on the issue.<sup>39</sup> Therein, the Court considered whether a railroad, which gave practical training courses to prospective yard brakemen over a seven- to eight-day period, should have compensated its trainees.<sup>40</sup> The railroad never intended to pay the trainees and the trainees never expected to receive a wage in return for their work.<sup>41</sup> The Court stated that the FLSA 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.”<sup>42</sup> The Court reasoned that because the railroad received no immediate advantage from the work done by the trainees, the trainees were not employees under the FLSA.<sup>43</sup>

In April 2010, the Wage and Hour Division released Fact Sheet #71, an opinion letter which lays out a six-factor test for “determin[ing] whether interns must be paid the minimum wage and overtime under the [FLSA] for the services that they provide to ‘for-profit’ private sector employers.”<sup>44</sup>

Unlike interpretations reached after notice-and-comment rulemaking or during formal adjudication, the DOL guidelines (which are akin to policy statements) “lack the force of law” and are therefore not entitled to *Chevron* deference.<sup>45</sup> At most, the guidelines are “entitled to respect” under *Skidmore*, and even then “only to the extent that [they] have the ‘power to persuade.’”<sup>46</sup> While courts *may* defer to agency interpretations issued in opinion letters if they meet the standard set forth in

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38. Andrew Mark Bennett, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 305 (2011).

39. *Walling*, 330 U.S. at 148.

40. *Id.* at 149.

41. *Id.*

42. *Id.* at 150; *see also* 29 U.S.C. § 203(g) (2006) (defining “employ” to include those who employers “suffer or permit to work”). The FLSA only exempts medical interns. *See* 29 C.F.R. § 541.304(c) (2006).

43. *Walling*, 330 U.S. at 150. In *Walling*, the trainees actually delayed the railroad’s work. *Id.*

44. *Fact Sheet #71*, *supra* note 9. While Fact Sheet #71 was released in 2010, the DOL six-factor test pre-dates 2010 and has appeared in opinion letters “since at least 1967.” *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993). *See supra* note 23 for the DOL factors.

45. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (noting that agency interpretations which are not “subject to the rigors of the Administrative Procedure Act, including public notice and comment,” warrant no deference under *Chevron*); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that deference may be warranted where the agency interprets a statute it is charged with enforcing).

46. *See Christensen*, 529 U.S. at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

*Skidmore*,<sup>47</sup> the *Glatt* court erred by according the DOL factors deference on the ground that they are “entitled” to it.<sup>48</sup>

Further, while the DOL factors are properly reviewed under *Skidmore*’s lower level of deference,<sup>49</sup> the factors do not merit *Skidmore* “respect” because the test they purport to establish is self-contradictory. At one point, Fact Sheet #71 states that the determination “depends upon all of the facts and circumstances of each such program,” and yet later it states that “all of the factors” must be met.<sup>50</sup> Whether the DOL intended for the totality of the circumstances to be the ultimate inquiry under the FLSA or whether each of the six factors must be met is unclear.<sup>51</sup> Moreover, to the extent that the DOL guidelines fail to take the totality of the circumstances into consideration, this rigid approach runs contrary to *Walling*, providing an additional basis for withholding deference under *Skidmore*.<sup>52</sup>

There is little agreement across jurisdictions on the standard for determining employment status under the FLSA.<sup>53</sup> Circuit courts across the country are split on when and how to apply the Supreme Court’s decision in *Walling*, the DOL six-factor test, the primary beneficiary test, and the economic realities of the employment relationship approach.<sup>54</sup>

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47. The level of deference *Skidmore* accords to an agency interpretation “depend[s] upon 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.” *Skidmore*, 323 U.S. at 140.
48. See *Glatt*, 293 F.R.D. at 532.
49. “Most commentators and courts have interpreted [*Skidmore*] as reflecting a very weak form of deference. This lesser level of deference is commonly described as “*Skidmore*” deference to distinguish it from the stronger deference mandated by *Chevron*.” WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 386 (5th ed. 2014).
50. *Fact Sheet #71*, *supra* note 9.
51. See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011); see also *Harris*, *supra* note 11; *Bennett*, *supra* note 38.
52. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993); see also *Solis*, 642 F.3d at 525 (rejecting the DOL six-factor test as “overly rigid and inconsistent with a totality-of-the-circumstances approach”). *Fact Sheet #71* does, however, provide “a framework for an analysis of the employee-employer relationship,” and has thus been used as part of a totality of the circumstances approach in determining employment status under the FLSA. See *Bennett*, *supra* note 38 (“Where federal courts apply the six-part test, they apply the six parts as factors to consider in a totality of the circumstances analysis rather than the all-or-nothing approach applied by the [DOL].”); see also *Xuedan Wang v. Hearst Corp.*, 293 F.R.D. 489, 494 (S.D.N.Y. 2013); *Archie v. Grand Cent. P’ship*, 997 F. Supp. 504, 532 (S.D.N.Y. 1998).
53. See Bernice Bird, *Preventing Employer Misclassification of Student Interns and Trainees*, CORNELL HR REV. (Feb. 28, 2012), <http://www.cornellhrreview.org/preventing-employer-misclassification-of-student-interns-and-trainees/> (“The federal courts have not agreed upon a test in determining employment status of a trainee or intern.”); see also *Bennett*, *supra* note 38.
54. The Fourth Circuit considers who “principally benefit[s]” from an employment relationship. *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (holding that trainees who accompanied and assisted experienced snack food route-men during a week-long orientation period were employees covered by the FLSA). Whereas the Fifth Circuit applies a three-part test based on *Walling*, which considers:

The Second Circuit, where the *Glatt* court sits, has embraced a multifaceted employment test that considers the totality of the circumstances, uses the DOL factors as helpful guidelines, places a key consideration on the primary beneficiary test, and looks at the economic realities of the employment relationship.<sup>55</sup> Thus, as the Second Circuit noted in *Velez v. Sanchez*, “The determination of whether an employer-employee relationship exists does not depend on ‘isolated factors but rather upon the circumstances of the whole activity.’”<sup>56</sup> Although *Velez* involved a domestic worker, rather than unpaid interns, this totality of the circumstances approach is an overarching principle which the Second Circuit has applied in every context it has addressed under the FLSA.<sup>57</sup>

Therefore, even though the scope of employment at issue in *Velez* differs from that in *Glatt*, the *Glatt* court should have still followed *Velez*’s controlling principle. As the Tenth Circuit noted in *Reich*, although “the factors distinguishing [domestic workers] from [household members] are different from the factors distinguishing employees from trainees, [it is] informative that determinations of employee status under FLSA in other contexts are not subject to rigid tests but rather to *consideration of a number of criteria in their totality*.”<sup>58</sup>

In *Glatt*, the court paid lip service to the totality of the circumstances approach mandated by the Second Circuit.<sup>59</sup> First, the *Glatt* court warned of expanding the trainee exception created by the Supreme Court in *Walling*, without explaining how

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“(1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee’s work.” *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271–73 (5th Cir. 1982) (holding that participants in a flight attendant training program at an airline’s training school were not employees of the airline). The Ninth Circuit, on the other hand, combines the Supreme Court’s approach in *Walling* with an “economic realities” consideration, which in turn asks whether the worker relies financially on the alleged employer and expects compensation for his services. *Williams v. Strickland*, 87 F.3d 1064, 1066–67 (9th Cir. 1996); *see also* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (“The test of employment under the [FLSA] is one of ‘economic reality.’”). Finally, the Sixth and Tenth Circuits apply the primary beneficiary test. *See Solis*, 642 F.3d at 531 (finding that students at a boarding school who worked in the kitchen and housekeeping departments were not employees under the FLSA because the students were the primary beneficiaries of the work they performed); *Reich*, 992 F.2d at 1028 (finding that firefighter trainees who attended a firefighting academy maintained equipment and staffed a truck for a few weeks were not employees because the trainees were the primary beneficiaries of the work they performed). Circuit courts are thus clearly unable to agree on a uniform approach for determining employment status under the FLSA. *See Harris, supra* note 11, § 2 (“[T]he courts have employed several tests in determining whether a trainee qualifies as an employee.”).

55. *See Velez v. Sanchez*, 693 F.3d 309, 330 (2d Cir. 2012); *see also Archie*, 997 F. Supp. at 531.

56. 693 F.3d at 326 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

57. *See, e.g., Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141–42 (2d Cir. 2008) (addressing whether nurses can be considered employees of two different hospitals); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 & n.1 (2d Cir. 1984) (addressing whether inmates participating in an education program are employees of the sponsoring college); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (dealing with employment status in the garment industry).

58. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (emphasis added).

59. *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 525 (S.D.N.Y. 2013).

this concern favors foregoing a comprehensive analysis.<sup>60</sup> Second, the court called the primary beneficiary test “subjective and unpredictable,”<sup>61</sup> even though a majority of courts have successfully applied it,<sup>62</sup> and its importance has been particularly emphasized by the Second Circuit.<sup>63</sup>

The *Glatt* court also failed to consider the economic realities of the relationship between plaintiffs and Searchlight.<sup>64</sup> Instead, the court relied exclusively on the DOL six-factor test on the ground that it had support in *Walling* and was entitled to deference under *Chevron*.<sup>65</sup> However, the *Glatt* court erred by mechanically applying the DOL six-factor test because circuit precedent required the court to engage in a far more comprehensive analysis.<sup>66</sup>

The *Glatt* court ignored Second Circuit precedent making the primary beneficiary test a key consideration<sup>67</sup> and, instead, subsumed that test under its analysis of the second DOL factor.<sup>68</sup> Giving little insight into its reasoning, the court determined that *Glatt* and *Footman* were not the primary beneficiaries of the relationship, and provided no more than a few lines of analysis—a far cry from making the primary beneficiary test a key consideration.<sup>69</sup> Further, ignoring the economic realities of the relationship was erroneous and contrary to Supreme Court precedent, which requires that the ultimate question of employment status under the FLSA “[be] one of ‘economic

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60. *Id.* at 532; *see also* *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

61. *Glatt*, 293 F.R.D. at 532.

62. *See, e.g.*, *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *Reich*, 992 F.2d 1023.

63. *See Velez v. Sanchez*, 693 F.3d 308, 330 (2d Cir. 2012) (“A court should also consider who is the primary recipient of benefits from the relationship. This is the approach taken by courts determining if trainees and students providing services as part of their education are also employees.” (footnote and citation omitted)).

64. *See Glatt*, 293 F.R.D. at 532–34. *But see* *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999) (“[T]he ‘economic reality’ test encompasses the totality of circumstances, no one of which is exclusive. Since economic reality is determined based upon *all* the circumstances, any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition.”).

65. *Glatt*, 293 F.R.D. at 532; *see also supra* notes 29–30 and accompanying text.

66. *See supra* notes 55–57 and accompanying text.

67. *Velez*, 693 F.3d at 330.

68. *Glatt*, 293 F.R.D. at 533.

69. The passage applying the “primary beneficiary test” reads as follows:

Undoubtedly, *Glatt* and *Footman* received some benefits from their internships, such as resume listings, job references, and an understanding of how a production office works. But those benefits were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them. Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor. On the other hand, Searchlight received the benefits of their unpaid work, which otherwise would have required paid employees.

*Id.* This was determined as part of the second factor of the DOL multifactor test.

reality.”<sup>70</sup> Thus, courts have generally considered the economic realities of the relationship to determine whether interns who receive practical experience are properly classified as employees.<sup>71</sup> In *Glatt*, the DOL six-factor test was the court’s only consideration in determining Glatt and Footman’s employment status. Practical experience is exactly what Glatt and Footman received<sup>72</sup> and, as a matter of economic reality, they were neither financially dependent on Searchlight<sup>73</sup> nor did they expect to be compensated for their work,<sup>74</sup> which the *Glatt* court effectively refused to consider.<sup>75</sup>

Finally, the *Glatt* court erroneously relied on *Walling*’s “immediate advantage” language.<sup>76</sup> In concluding that Glatt and Footman were improperly classified as unpaid interns, the court observed that they provided an immediate advantage to their employer.<sup>77</sup> While it is true that plaintiffs provided Searchlight with an immediate advantage, that alone does not establish an employment relationship under the FLSA.<sup>78</sup> In *Walling*, the Supreme Court held that the railroad trainees were not employees “because the defendant railroads received no ‘immediate advantage’ from the trainees.”<sup>79</sup> However, “it does not logically follow that the reverse is true, i.e. [sic] that the presence of an ‘immediate advantage’ alone creates an employment relationship under the FLSA.”<sup>80</sup> The *Glatt* court did just that; it assumed that because Searchlight received an immediate advantage, an employment relationship existed under the FLSA.<sup>81</sup> For this to be so, the *Glatt* court would have needed to consider the immediate advantage test as part of a totality of the

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70. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985); *see also Velez*, 693 F.3d at 326 (“The nature of the [employer-employee] relationship . . . depends on its ‘economic reality.’”).

71. *See Harris*, *supra* note 11, § 5.

72. Specifically, Glatt and Footman learned how a production office works. *Glatt*, 293 F.R.D. at 532–33.

73. *See Williams v. Strickland*, 87 F.3d 1064, 1066–67 (9th Cir. 1996) (noting that “economic reality” goes to whether the alleged employees “expected to receive in-kind benefits—and expected them in exchange for their services”); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523 (6th Cir. 2011) (asking “whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer”).

74. Glatt and Footman both testified that they did not expect to be paid for their work. *Glatt*, 293 F.R.D. at 534.

75. The *Glatt* court reasoned that “this factor adds little” on the ground that “the FLSA does not allow employees to waive their entitlement to wages.” *Glatt*, 293 F.R.D. at 534. While true, the court’s reasoning is circular. To be sure, employees may not waive their right to receive wages under the FLSA. But whether an alleged employee has a right to wages in the first place depends at least in part on whether the employee expected to be compensated for his work. *See cases cited supra* note 73. It was therefore sheer circularity to refuse to accord this factor its proper weight.

76. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

77. *Glatt*, 293 F.R.D. at 534.

78. *Xuedan Wang v. Hearst Corp.*, 293 F.R.D. 489, 493 (S.D.N.Y. 2013). While *Wang*, as a district court case, did not bind the *Glatt* court, *Wang* highlights the inconsistency of outcomes within the Second Circuit.

79. *Wang*, 293 F.R.D. at 493 (citing *Walling*, 330 U.S. at 153).

80. *Id.*

81. *Glatt*, 293 F.R.D. at 534.

circumstances analysis, which it failed to do.<sup>82</sup> Thus, the court's reliance on *Walling* is misplaced, and its conclusion that plaintiffs were employees merely because they provided an immediate advantage to Searchlight is flawed.<sup>83</sup>

The *Glatt* court erred in holding that Searchlight violated the FLSA by classifying Glatt and Footman as interns. The court gave undue deference to the DOL six-factor test, which lacks the force of law to warrant deference under *Chevron*, and whose rigidity and ambiguity preclude according it even *Skidmore*-level deference. Moreover, the court also ignored settled precedent by failing to properly consider the primary beneficiary and the economic realities of the employment relationship, ultimately grounding its conclusion on a flawed interpretation of the Supreme Court's opinion in *Walling*.

The *Glatt* decision has already led to the elimination of several unpaid internships in New York and is likely to have further ramifications.<sup>84</sup> The inconsistency in outcomes of recent intern-employment suits in the Second Circuit leaves the legality of unpaid internships in question.<sup>85</sup> Employers, and students hoping to obtain unpaid internships in the future, are left in a precarious position. *Glatt* and similar decisions could ultimately result in an under-skilled workforce due to the lack of hands-on positions available to students. It may seem unlikely, but the *Glatt* decision could eventually hinder business growth in the United States as companies are forced to spend additional time training new employees who could have learned some of the required skills through unpaid internships. This in turn could lead to a higher employee turnover rate insofar as unpaid internships allow employers a trial period over which to decide whether a potential employee is the right fit for their organization.

From an intern's perspective, those students who may not otherwise have the chance to network and get a birds-eye view of a certain industry are able to experience and learn about a particular area they may want to work in one day. Further, candidates who have qualities that may not show up on a resume or in an interview will be less likely to obtain a permanent position because a potential employer will not have the first-hand benefit of seeing that student's work capabilities. The elimination of unpaid internships threatens all potential employees and employers who provide invaluable experience to students who, for their part, have worked hard to obtain these positions, causing a ripple effect with already-apparent consequences—and some that are yet to be seen.

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82. *See id.* at 532–34.

83. *See id.* at 534; *Wang*, 293 F.R.D. at 493.

84. Buckley, *supra* note 6. In October 2014, NBCUniversal agreed to pay \$6.4 million to settle a class action lawsuit filed by former *Saturday Night Live* unpaid interns who “accused NBCUniversal of illegally classifying them as interns exempt from federal and state minimum wage and spread-of-hours pay.” Aaron Smith, ‘SNL’ Interns Reach \$6.4 Million Settlement with NBCUniversal, CNN MONEY (Oct. 24, 2014, 9:19 AM), <http://money.cnn.com/2014/10/24/media/snl-intern-lawsuit/>.

85. Compare *Wang*, 293 F.R.D. 489, with *Glatt*, 293 F.R.D. 516. The *Glatt* litigation can be seen as “part of a nationwide trend of class-action lawyers attacking internship opportunities provided by companies in the media and entertainment industry.” Julia Marsh, *Ex-Intern Drops Suit, Apologizes to Letterman*, PAGE SIX (Sept. 10, 2014, 5:59 PM), [http://pagesix.com/2014/09/10/former-intern-apologizes-to-letterman-after-dropping-lawsuit/?\\_ga=1.94890012.1208659575.1384463952](http://pagesix.com/2014/09/10/former-intern-apologizes-to-letterman-after-dropping-lawsuit/?_ga=1.94890012.1208659575.1384463952).