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For years, internships have been a fundamental building block for successful careers. Today, students at all education levels still apply for, and gladly accept, unpaid internships, 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. A 2012 study by the National Association of Colleges and Employers found that more than one third of unpaid internships resulted in job offers. However, a string of recent lawsuits against employers over the legality of unpaid internships may change the employment landscape as we know it. 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.

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. 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). 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.

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

5. Id.
8. Id. at 538–39.
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;11 and (3) relied on a flawed interpretation of the U.S. Supreme Court’s decision in Walling v. Portland Terminal Co.12 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 2010.13 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.14 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.15 In his post-production internship, he performed other “basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands.”16

Alexander Footman worked for Searchlight as an unpaid intern from approximately October 2009 through February 2010.17 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.18

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.”19 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.20

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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)).

14. Id. at 60.
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.
Glatt and Footman ("plaintiffs") filed their complaint against Searchlight ("defendant") on September 28, 2011, and the court granted their motion for summary judgment on June 11, 2013. 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 as the standard for determining employment status under the FLSA. 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.”

Defendant argued that the DOL’s six-factor test was not the applicable standard 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.

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

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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.


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


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. 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. 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. 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 of the employment relationship. Third, the Glatt court improperly construed Walling’s “immediate advantage” language to reach the conclusion that Glatt and Footman were employees of Searchlight.

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.


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”).


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. The Court’s 1947 Walling decision remains the most commonly cited case on the issue. 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. The railroad never intended to pay the trainees and the trainees never expected to receive a wage in return for their work. 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.” 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.

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.” 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. At most, the guidelines are “entitled to respect” under Skidmore, and even then “only to the extent that [they] have the ‘power to persuade.’” While courts may defer to agency interpretations issued in opinion letters if they meet the standard set forth in

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 predates 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, the Glatt court erred by according the DOL factors deference on the ground that they are “entitled” to it.  

Further, while the DOL factors are properly reviewed under Skidmore’s lower level of deference, 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. 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. Moreover, to the extent that the DOL guidelines fail to take the totality of the circumstances into consideration, this rigid approach runs contrary to Wailing, providing an additional basis for withholding deference under Skidmore.

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

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 Wailing, 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. 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.’” 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.

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.”

In Glatt, the court paid lip service to the totality of the circumstances approach mandated by the Second Circuit. 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.”).

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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).
this concern favors foregoing a comprehensive analysis.\(^6^0\) Second, the court called the primary beneficiary test "subjective and unpredictable,"\(^6^1\) even though a majority of courts have successfully applied it,\(^6^2\) and its importance has been particularly emphasized by the Second Circuit.\(^6^3\)

The \textit{Glatt} court also failed to consider the economic realities of the relationship between plaintiffs and Searchlight.\(^6^4\) Instead, the court relied exclusively on the DOL six-factor test on the ground that it had support in \textit{Walling} and was entitled to deference under \textit{Chevron}.\(^6^5\) However, the \textit{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.\(^6^6\)

The \textit{Glatt} court ignored Second Circuit precedent making the primary beneficiary test a key consideration\(^6^7\) and, instead, subsumed that test under its analysis of the second DOL factor.\(^6^8\) 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.\(^6^9\) 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

\footnotesize
\begin{itemize}
  \item \(^6^0\) \textit{Id.} at 532; \textit{see also} \textit{Walling} v. Portland Terminal Co., 330 U.S. 148, 150 (1947).
  \item \(^6^1\) \textit{Glatt}, 293 F.R.D. at 532.
  \item \(^6^2\) \textit{See}, e.g., \textit{McLaughlin} v. \textit{Ensley}, 877 F.2d 1207 (4th Cir. 1989); \textit{Solis} v. Laurelbrooke Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011); \textit{Reich}, 992 F.2d 1023.
  \item \(^6^3\) \textit{See} \textit{Velez} v. \textit{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)).
  \item \(^6^4\) \textit{See Glatt}, 293 F.R.D. at 532–34. \textit{But see} \textit{Herman} v. \textit{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.").
  \item \(^6^5\) \textit{Glatt}, 293 F.R.D. at 532; \textit{see also supra} notes 29–30 and accompanying text.
  \item \(^6^6\) \textit{See supra} notes 55–57 and accompanying text.
  \item \(^6^7\) \textit{Velez}, 693 F.3d at 330.
  \item \(^6^8\) \textit{Glatt}, 293 F.R.D. at 533.
  \item \(^6^9\) 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.
    
    \textit{Id.} This was determined as part of the second factor of the DOL multifactor test.
\end{itemize}
“reality.” Thus, courts have generally considered the economic realities of the relationship to determine whether interns who receive practical experience are properly classified as employees. 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 and, as a matter of economic reality, they were neither financially dependent on Searchlight nor did they expect to be compensated for their work, which the Glatt court effectively refused to consider.

Finally, the Glatt court erroneously relied on Walling’s “immediate advantage” language. In concluding that Glatt and Footman were improperly classified as unpaid interns, the court observed that they provided an immediate advantage to their employer. While it is true that plaintiffs provided Searchlight with an immediate advantage, that alone does not establish an employment relationship under the FLSA. In Walling, the Supreme Court held that the railroad trainees were not employees “because the defendant railroads received no ‘immediate advantage’ from the trainees.” 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.” The Glatt court did just that; it assumed that because Searchlight received an immediate advantage, an employment relationship existed under the FLSA. For this to be so, the Glatt court would have needed to consider the immediate advantage test as part of a totality of the

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.
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.
77. Glatt, 293 F.R.D. at 534.
80. Id.
81. Glatt, 293 F.R.D. at 534.
circumstances analysis, which it failed to do. Thus, the court’s reliance on *Wailing* is misplaced, and its conclusion that plaintiffs were employees merely because they provided an immediate advantage to Searchlight is flawed.

The *Glatt* court erred in holding that Searchlight violated the FSLA 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. The inconsistency in outcomes of recent intern-employment suits in the Second Circuit leaves the legality of unpaid internships in question. 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.
