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RODGER QUIGLEY
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RODGER QUIGLEY

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ABOUT THE AUTHOR: Rodger Quigley is the Editor in Chief of the 2016–2017 *New York Law School Law Review*, J.D. candidate, 2017.

Unpaid internships are a significant and widespread feature of the contemporary economy.[1] Substantial increases in the number of internships during the 1990s enticed job seekers with the promise of opportunity.[2] The new "intern economy" resulted in a widespread restructuring of the labor market.[3] Scant job prospects during the subsequent Great Recession further spurred the ubiquity of unpaid internships.[4] Unpaid interns often felt aggrieved for not receiving compensation despite performing essential tasks in their positions,[5] and turned to litigation as a means to seek justice.

This development brought into the spotlight questions about the legality of employers using unpaid interns to do the work of actual employees. In the aftermath of the Great Recession, legal claims of unpaid interns and subsequent judicial holdings that addressed various ways to classify unpaid interns caused debate in the legal arena about a proper method of classification.[6] One study from April 2014 showed that since September 2011, former interns filed over thirty high-profile lawsuits across the country, arguing that they were entitled to compensation as "employees" under the Fair Labor Standards Act (FLSA).[7] The Department of

1. *See* Ross Perlin, Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy, at xvii (paperback ed. 2012).

2. *See* Lori K. Miller et al., *The Internship Agreement: Recommendations and Realities*, 12 J. Legal Aspects Sport 37, 37 (2002) (noting a seventy-three per cent increase for student internships completed in the 1990s versus the 1980s).

3. *See* Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, Baffler, Spring 1997, at 51, 51–58 (discussing increased popularity of unpaid internships and resultant restructuring of the labor market).

4. *See* Perlin, *supra* note 1, at xvii ("[I]llegal internships are flourishing as never before thanks to the Great Recession. In a time of chronic high unemployment, internships are replacing untold numbers of full-time jobs: anecdotal evidence abounds of managers eliminating staff and using unpaid interns instead, and of organizations replacing paid internships with unpaid ones.").

5. *See* Raphael Pope-Sussman, *Unpaid Internships Should Be Illegal*, N.Y. Times: Room for Debate (Feb. 7, 2012, 10:43 AM), http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/unpaid-internships-should-be-illegal ("This week, thousands of young people will work 40 hours (or more) answering phones, making coffee or doing data entry—without earning a cent. These unpaid interns receive no benefits, no legal protection against harassment or discrimination, and no job security. They generate an enormous amount of value for their employers, and yet they are paid nothing. That is the definition of exploitation.").

6. For analyses concerning the legality of unpaid internships and the issue of conflicting interpretations of the applicable statute, see generally 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 (2015); Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 Conn. L. Rev. 1183 (2015); Kimberlee McTorry, Note, *Death of Unpaid Internships, the Rise of Social Equality: Legality of Unpaid Internships Under the Fair Labor Standards Act*, 8 S.J. Pol'y & Just. L.J. 47 (2014).

7. *See* Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, ProPublica (Apr. 15, 2014), https://projects.propublica.org/graphics/intern-suits. The FLSA grants employees a private right of action. 29 U.S.C. § 216(b) (2012).

Labor (DOL), through its enforcement of the FLSA, has actively sought to dispel the inequities that occur when employers substitute unpaid interns for employees.[8]

Despite efforts by the DOL and unpaid interns who bring claims to combat workplace exploitation, recent holdings that promote a highly employer-friendly "primary beneficiary test"[9] create dangerous and harmful precedent.[10] The holding by the U.S. Court of Appeals for the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*[11] contributes to this problem, and will ease employers' ability to manipulate the labor market and exploit unpaid interns.[12]

In *Glatt*, unpaid interns at Fox Searchlight Pictures, Inc. ("Fox Searchlight")—Eric Glatt, Alexander Footman, and Eden Antalik—sued Fox Searchlight for compensation as "employees" under the FLSA.[13] The Second Circuit vacated the district court's holding that Glatt, Footman, and Antalik were entitled to compensation for their work at Fox Searchlight.[14] This case comment contends that the decision by the Second Circuit in *Glatt* was incorrect for three reasons. First, in adopting the primary beneficiary test, the court unduly expanded the "trainee" exception that was laid out in the landmark U.S. Supreme Court opinion of *Walling v. Portland Terminal Co.*[15] Second, the court neglected to defer to the DOL, the agency charged with administering the statute.[16] Third, the court arbitrarily required

8. *See* Stephen A. Mazurak, *The Unpaid Intern: Liability for the Uninformed Employer*, 29 A.B.A. J. Lab. & Emp. L. 101, 101–02 (2013).

9. For this standard defined, see Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535 (2d Cir. 2016) ("Under this standard, an employment relationship is not created when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation.").

10. *Id.* at 536; Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011).

11. 811 F.3d at 538.

12. *See* discussion *infra* p. 171–72.

13. *Glatt*, 811 F.3d at 531–32. Glatt and Footman sued Fox Searchlight in September 2011—Antalik joined the suit at the district court level. *See* Steven Greenhouse, *Interns, Unpaid by a Studio, File Suit*, N.Y. Times (Sept. 28, 2011), http://www.nytimes.com/2011/09/29/business/interns-file-suit-against-black-swan-producer.html. Thus, Glatt and Footman sued Fox Searchlight at the beginning of a wave of unpaid intern litigations. *See* Suen & Brandeisky, *supra* note 7.

14. *Glatt*, 811 F.3d at 531–32. The unpaid interns also brought claims for compensation as employees under the New York Labor Law (NYLL). *Id.* at 531. However, the court construed the NYLL and FLSA's definitions of "employee" as the same in substance because both statutes define "employee" in nearly identical terms. *Id.* at 534. *Compare* 29 U.S.C. § 203(e)(1) (2012) ("[T]he term 'employee' means any individual employed by an employer."), *and id.* § 203(g) ("'Employ' includes to suffer or permit to work."), *with* N.Y Comp. Codes R. & Regs. tit. 12, § 142-2.14(a) (2015) ("Employee means any individual employed, suffered or permitted to work by an employer . . . ."). Because the scope of this case comment is limited to the employment claims under the FLSA, this case comment does not discuss claims made under the NYLL.

15. 330 U.S. 148 (1947) (holding that trainees not bound to employment at the end of their training period were not employees under the FLSA).

16. *See Major Laws Administered/Enforced*, U.S. Dep't Lab., http://www.dol.gov/whd/regs/statutes/summary.htm (last visited Oct. 21, 2016).

an individualized pre-discovery factual inquiry for class certification,[17] a heightened standard that has no basis in precedent. Consequently, the court created precedent that will give employers greater latitude to manipulate the labor market and to exploit unpaid interns who then will struggle to bring claims as a collective action.

Plaintiffs Glatt, Footman, and Antalik interned without pay for defendants Fox Searchlight and Fox Entertainment Group.[18] Glatt and Footman worked on the Fox Searchlight-distributed film *Black Swan*, and Antalik worked at the Fox corporate offices in New York City.[19] Glatt, Footman, and Antalik all performed work akin to that of a secretary or custodian.[20]

Glatt interned from December 2, 2009, through the end of February 2010, under the supervision of a production accountant in the Fox Searchlight accounting department, from approximately nine o'clock in the morning to seven o'clock in the evening, five days a week.[21] His responsibilities included: copying, scanning, maintaining files, tracking purchase orders, transporting paperwork items to and from the set, and answering questions about the accounting department.[22] Additionally, from March to August 2010, Glatt interned in the post-production department two days a week, from approximately eleven o'clock in the morning until six or seven o'clock in the evening, again under supervision and had responsibilities similar to those in the previous position.[23]

Footman interned from September 29, 2009, through late February or early March 2010, in the production department where he worked ten-hour days, five days a week, under the supervision of the production office coordinator and assistant production office coordinator.[24] Footman performed responsibilities such as setting up office furniture, arranging lodging for cast and crew, taking lunch orders, taking out the garbage, drafting daily call sheets, answering the phone, making coffee, photocopying, accepting deliveries, admitting guests to the office, conducting Internet research, compiling lists of local vendors, and sending party invitations.[25] Beginning in November 2009, when he was replaced with another unpaid intern in the production department, Footman's work schedule was reduced to three days a week.[26]

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17. *See infra* note 110 and text accompanying notes 96–106.

18. *Glatt*, 811 F.3d at 531–32.

19. *Id.* at 532–33.

20. *See id.*

21. *Id.* at 532.

22. *Id.*

23. Glatt's responsibilities in the post-production department included: drafting cover letters for mailings, organizing file cabinets, filing paperwork, making photocopies, keeping the take-out menus up-to-date and organized, taking documents to the payroll company, and running errands. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Antalik worked from May 2009 until mid-August 2009 as an unpaid publicity intern in Fox Searchlight's New York corporate office.[27] Antalik assembled daily briefs that summarized mentions of various Fox Searchlight films in the media.[28] She also made travel arrangements, shipped documents, organized catering, and set up rooms for press events.[29]

On October 19, 2012, Glatt, Footman, and Antalik filed a class certification complaint[30] seeking unpaid minimum wages and overtime for themselves and all others similarly situated on *Black Swan* and at Fox's New York corporate offices.[31] After discovery, Glatt and Footman moved for partial summary judgment and contended that they were "employees" under the FLSA.[32] Fox Searchlight and Fox Entertainment Group cross-moved for summary judgment and argued that Glatt and Footman were not "employees" under the statute.[33]

On June 11, 2013, the U.S. District Court for the Southern District of New York granted Glatt and Footman's partial motion for summary judgment and found that both were improperly classified as unpaid interns rather than employees.[34] In its analysis, the district court used the DOL's 2010 Intern Fact Sheet publication, created by the Wage and Hour Division of the DOL for unpaid interns working in the for-profit private sector.[35]

The Intern Fact Sheet contains the DOL's six-factor test for determining whether an employment relationship exists. The test provides that an employment relationship does not exist if all the following factors apply[36]: (1) the internship is similar to training that would be given in an educational environment; (2) the internship is for the benefit of the intern; (3) the intern does not displace regular employees; (4) the employer that provides training derives no immediate advantage from the intern's

27. *Id.* at 532–33.

28. *Id.* at 533.

29. *Id.*

30. The interns in *Glatt* brought claims under the NYLL and FLSA but this case comment considers class certification only under the FLSA, which permits employees to opt-in to the action if they are "similarly situated" to the employees who bring the claim. *Id.* at 540 (explaining the concept of class certification and its requirements under the FLSA).

31. *Id.* at 533.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 538; *see* Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (2010) [hereinafter Fact Sheet #71], https://www.dol.gov/whd/regs/compliance/whdfs71.pdf (providing "general information to help determine whether interns must be paid the minimum wage and overtime under the [FLSA] for the services that they provide to 'for-profit' private sector employers").

36. While the DOL requires that all six factors be met for an employee to be deemed an intern, the district court took a flexible approach and balanced these factors, finding that four out of the six factors weighed in favor of an employment relationship and thus deeming Glatt and Footman to be paid employees under the FLSA. *Glatt*, 811 F.3d at 535.

work, and at times the employer's work is actually impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) there is a mutual understanding that the intern is not entitled to wages.[37] The district court used these six factors in its analysis because it gave deference to the DOL as the agency charged with administering the FLSA and because the factors find support in *Portland Terminal*.[38]

The district court also granted Antalik's motion to conditionally certify the nationwide FLSA collective.[39] The district court found that conditional certification under the FLSA was warranted because Antalik put forth generalized proof that interns were victims of a common policy to replace paid workers with unpaid interns.[40] It reasoned that common issues of liability predominated over disparate factual settings that pertained to each individual plaintiff.[41] Further, the district court found persuasive that fairness and procedural considerations made the collective action a superior mechanism for the FLSA claims.[42]

On September 17, 2013, the district court certified its order for immediate appeal under 28 U.S.C. § 1292(b), the statute that governs interlocutory appeals.[43] On November 26, 2013, the Second Circuit granted defendants' petition for leave to file an interlocutory appeal.[44] The Second Circuit stated that the interlocutory appeal raised a broad question: What circumstances require unpaid interns to be deemed "employee[s]" under the FLSA and therefore compensated for their work?[45]

The Second Circuit concluded that the district court did not apply the correct standard and, therefore, erred when it held that Glatt and Footman had been improperly classified as unpaid interns.[46] As for class certification, the Second Circuit vacated the district court's order certifying the nationwide FLSA collective and held that the standard for class certification should comport with the primary beneficiary

37. *Id.* at 534–35; Fact Sheet #71, *supra* note 35.

38. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 531–32 (S.D.N.Y. 2013), *vacated*, 811 F.3d 528.

39. *Id.* at 522. Conditional certification is the initial stage of certification under the FLSA, in which the court has discretion to issue notice of the action to potential opt-in plaintiffs and to decide whether the action should proceed as a collective action. *See* Sam J. Smith & Christine M. Jalbert, Certification—216(b) Collective Actions v. Rule 23 Class Actions & Enterprise Coverage Under the FLSA 3 (2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/084.authcheckdam.pdf.

40. *Glatt*, 293 F.R.D. at 538.

41. *Id.*

42. *Id.* at 535, 538 ("A class action serves judicial economy and makes recovery economically feasible for class members who would otherwise need to retain lawyers for individual actions seeking relatively small recoveries." *Id.* at 535).

43. *Glatt*, 811 F.3d at 533. Interlocutory actions are taken by courts to seek an answer from an appellate court on a question of law before a trial may proceed or to prevent irreparable harm from occurring to a person or property during the pendency of a lawsuit or proceeding. *See* 28 U.S.C. § 1292(b) (2012).

44. *Glatt*, 811 F.3d at 533.

45. *Id.*

46. *See id.* at 538.

test, which requires individualized factual inquiries as opposed to generalized proof, which the district court deemed adequate.[47]

The Second Circuit stated that an analysis pursuant to the primary beneficiary test should consider the extent to which: (1) the intern and employer clearly understand there is no expectation of compensation; (2) the internship provides training similar to what would be given in an educational environment; (3) the internship is tied to the intern's formal education program; (4) the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the internship's duration is limited to the period in which it provides the intern with beneficial learning; (6) the intern's work complements the work of paid employees while providing significant educational benefits to the intern; and (7) the intern and employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[48]

The Second Circuit's holdings on the issues of class certification and plaintiff compensation under the FLSA were both based on the primary beneficiary test.[49] Therefore, the bulk of the opinion centered on specifying why the use of the DOL's factors was unpersuasive, given that undermining the DOL's list strengthened the apparent need to promote a different standard.[50]

The court preferred the primary beneficiary test for its flexibility and it presumed flexibility would lead courts to accurately consider the economic reality between intern and employer.[51] Referring to the reasoning advanced in *Portland Terminal*, the court noted that the primary beneficiary test has a similar focus: it emphasizes what interns receive in exchange for their work.[52] Despite the court's adherence to that aspect of *Portland Terminal*'s reasoning, it stressed that the relevant facts in that nearly seventy-year-old case about brakemen trainees were unrelated to the modern post-secondary education-oriented internship.[53]

Accordingly, the Second Circuit found that the DOL's six-factor test, which the district court favored and which stemmed from the DOL's interpretation of *Portland Terminal*, was unpersuasive.[54] The court presumed that adherence to the *Portland Terminal* facts on which the DOL's six-factor test is based does not afford the flexibility required in light of the modern-day internship, which did not exist when

47. *Id.* at 538–40.

48. *Id.* at 536–37.

49. *Id.* at 535–40.

50. *Id.* at 536–38.

51. *Id.*

52. *Id.* at 536. The court further emphasized that the more flexible approach is favorable to the *Portland Terminal* holding, given that the court found nothing in that decision to suggest that any particular fact was essential to its conclusion or that the facts relied on in that case would have the same relevance in every workplace. *Id.* at 537.

53. *Id.* at 537–38.

54. *Id.* at 536–38.

Portland Terminal was decided.[55] As for deference to the DOL, the court pointed out that the DOL is an agency and therefore "has no special competence or role in interpreting a judicial decision."[56] The Second Circuit concluded that it would not defer to the DOL[57] or to the district court that limited its review to the six factors in the DOL's Intern Fact Sheet.[58]

This case comment contends that the decision by the Second Circuit was incorrect for three reasons. First, by adopting the primary beneficiary test, it unduly expanded the "trainee" exception that the Supreme Court laid out in *Portland Terminal*.[59] Second, it neglected to defer to the agency charged with administering the statute.[60] Third, its arbitrary requirement for an individualized inquiry into facts pertaining to each plaintiff regarding pre-discovery class certification under the FLSA has no basis in precedent. The holding by the Second Circuit thus created precedent that will give employers greater latitude to manipulate the labor market and exploit unpaid interns who, in turn, will be hard-pressed to bring collective action claims.

First, by adopting the primary beneficiary test, the Second Circuit erred by unduly expanding the "trainee" exception that the Supreme Court laid out in *Portland Terminal*.[61] The Supreme Court has emphasized the breadth of the FLSA's definition of "employee,"[62] stating that there is "no doubt as to the Congressional intention to include all employees within the scope of the [FLSA] unless specifically excluded."[63] Accordingly, the *Portland Terminal* Court acknowledged limited circumstances when self-interest serving work is not within the FLSA's definition of "employee."[64]

The *Portland Terminal* Court formulated a "trainee" exception on the basis of facts it deemed pertinent to distinguish those whose work is self-interest serving.[65] The case involved prospective brakemen enrolled in a weeklong training program offered by the railroad.[66] The program was a prerequisite for employment but employment was not

55. *Id.* at 537–38.

56. *Id.* at 536 (quoting New York v. Shalala, 119 F.3d 175, 180 (2d Cir. 1997)).

57. The court emphasized that the DOL's interpretation is at most entitled to *Skidmore* deference to the extent that the court finds it persuasive. *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of [the Administrator's] judgment . . . will depend upon . . . all those factors which give it power to persuade . . . .")).

58. *Id.* at 538.

59. Walling v. Portland Terminal Co., 330 U.S. 148, 151–53 (1947).

60. *Glatt*, 811 F.3d at 536; *see Major Laws Administered/Enforced*, *supra* note 16.

61. *Portland Terminal*, 330 U.S. at 151–53.

62. *See supra* note 14.

63. United States v. Rosenwasser, 323 U.S. 360, 363 (1945).

64. *Portland Terminal*, 330 U.S. at 152–53.

65. *Id.* at 151–53.

66. *Id.* at 149.

guaranteed once the program ended.[67] Those who enrolled and participated neither expected nor received compensation for the program's duration.[68] Prospective brakemen learned about their responsibilities first through "observation" and then by performing tasks under "close scrutiny."[69] That they were closely supervised indicated to the court that the prospective brakemen had not displaced regular employees.[70] Further, their work did not expedite the railroad's business, and, in fact, impeded it because regular employees had to monitor the trainees while still performing other duties.[71]

The DOL took its factors directly from facts the *Portland Terminal* Court deemed pertinent.[72] Its test is faithful to *Portland Terminal*, both in maintaining the narrow exception to the FLSA and in applying the factors that the *Portland Terminal* Court used.[73] Because the primary beneficiary test lacks the requirement that all six factors must be met, it effectively broadens the "trainee" exception.[74] Additionally, the primary beneficiary test replaces an objective standard—the six-factor test—with one that is subjective, which consequently broadens the exception further by increasing judicial discretion.[75]

Second, the *Glatt* court erred by not deferring to the agency charged with administering the statute.[76] The Intern Fact Sheet was issued as an interpretive guideline to clarify minimum wage requirements under the FLSA for unpaid internships.[77] Guidelines even in the form of bulletins and opinions that interpret the FLSA have been recognized as an important function of the DOL.[78] But the extent

67. *Id.* at 150.

68. *Id.*

69. *Id.* at 149.

70. *Id.* at 149–50.

71. *Id.* at 150.

72. *Compare supra* text and accompanying note 37, *with supra* text accompanying notes 67–71.

73. *Portland Terminal*, 330 U.S. at 151–53.

74. *See* Iskra M. Bonanno, *"Primary Beneficiary" Is the New Test for Determining Whether an Intern Is Exempt from the FLSA in the Second and Eleventh Circuits*, HSE: Lab. & Emp. Blog (Oct. 23, 2015), http://www.hselaw.com/blog/entry/primary-beneficiary-is-the-new-test-for-determining-whether-an-intern-is-exempt-from-the-flsa-in-the-second-and-eleventh-circuits ("[T]he [Second and Eleventh Circuits] rejected the DOL's six-factor test as outdated and rigid. They replaced this test with a broader, non-exhaustive list of factors that appears to be more employer-friendly."). The district court in *Glatt* even erred on the side of increased flexibility by requiring a balancing of the six factors, as opposed to mandating that all six factors be met, Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013), *vacated*, 811 F.3d 528 (2d Cir. 2016), but the Second Circuit's holding was premised in part on providing even more flexibility than was provided by the district court, and thus expanded the exception to an unacceptable extent. *See Glatt*, 811 F.3d at 538.

75. *See* Morse v. Rudler (*In re* Rudler), 576 F.3d 37, 50–51 (1st Cir. 2009) (noting that use of an objective standard is a means by which Congress limits judicial discretion); *Glatt*, 293 F.R.D. at 532 (stating that the "'primary beneficiary' test is subjective and unpredictable").

76. *Glatt*, 811 F.3d at 536.

77. *See* Malik, *supra* note 6, at 1195.

78. Christopher Keleher, *The Perils of Unpaid Internships*, 101 Ill. B.J. 626, 628 (2013).

of deference to which guidelines are entitled is highly contended.[79] For example, Justice Antonin Scalia stated in *Christensen v. Harris County* that agency guidelines interpreting the FLSA are entitled to *Chevron* deference—the highest level of deference—when the interpretation represents the views of the agency.[80] Nonetheless, the *Christensen* Court held that agency interpretations that lack the "force of law" are entitled to deference under *Skidmore v. Swift & Co.*[81]

The "force of law" test as applied in *Christensen* was abandoned by the Supreme Court in *United States v. Mead Corp.*[82] The *Mead* Court used a modified analysis, stating that *Chevron* deference will apply to an informal agency determination if "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[83] The outcome of the *Mead* decision is that procedure is not determinative.[84] The subsequent Supreme Court decision *Barnhart v. Walton* followed suit by setting forth factors to consider in a totality of the circumstances approach used to determine whether *Chevron* deference applies, regardless of procedure.[85] The *Barnhart* factors are as follows: (1) the interstitial nature of the legal issue; (2) the related expertise of the agency; (3) the importance of the question to the administration of the statute; (4) the complexity of that administration; and (5) the consideration the agency has given the question over a long period.[86]

In *Glatt*, the Second Circuit neglected to even consider the *Barnhart* factors, and instead presumed that only *Skidmore* deference should apply to the DOL's six-factor test.[87] This exhibited a neglect of Supreme Court precedent that disfavors the view that

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79. *See id.*

80. 529 U.S. 576, 590 (2000) (Scalia, J., concurring in part and concurring in the judgment) ("[W]e have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats." (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647–48 (1990))).

81. *Id.* at 587 (majority opinion). While *Chevron* deference is the highest level of deference, and the settled rule is that any interpretation accorded *Chevron* deference courts should defer to if reasonable, *Skidmore* deference is a lower level of deference, whereby courts should only defer to the agency's interpretation to the extent that the court deems the interpretation persuasive. *See* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 Wm. & Mary L. Rev. 1105, 1129–47 (2001).

82. 533 U.S. 218 (2001).

83. *Id.* at 226–27.

84. *Id.* at 230–31 ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

85. 535 U.S. 212, 222 (2002).

86. *Id.*

87. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016).

procedure determines whether an agency action should be given deference.[88] Thus, the form of an opinion letter is not valid ground to mandate that *Chevron* deference is inapplicable. By finding the contrary, the Second Circuit erred.

The Second Circuit further erred when it concluded that it would not defer to the DOL in light of *Skidmore* precedent.[89] In *Skidmore*, the Supreme Court held that an agency's interpretation may warrant deference because of the "specialized experience and broader investigations and information" available to the agency and given the value in uniform administration of a statute.[90] The DOL's interpretive guidelines that set out the six-factor test "constitute a body of experience and informed judgment" courts should resort to for guidance.[91] If the DOL's six-factor test is entitled to *Skidmore* deference, a court must measure that deference as proportional to 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."[92]

The Second Circuit stated that it would not defer to the DOL's six-factor test because it was outdated in light of the modern-day internship, reasoning that the flexibility of the primary beneficiary test allows courts to consider changes in economic structure.[93] However, that flexibility necessitates judicial discretion and subjective inquiries that unduly expand the carefully limited exception created in *Portland Terminal*.[94] The agency's informed decision to base its test on the credible analysis in *Portland Terminal* affords the test deference.

That the DOL's six-factor test is relevant to the modern economy weakens the Second Circuit's argument that the test fails to consider the modern-day internship. Even the list of considerations set out by the Second Circuit highlights the same essential criteria.[95] But the DOL's mechanism is a superior application of these criteria. Therefore, the Second Circuit should have deferred to the DOL's list because its persuasiveness affords it deference under *Skidmore* precedent.

Third, the Second Circuit arbitrarily required an individualized factual inquiry in pre-discovery class certification, a heightened standard that has no basis in precedent. Class certification under the FLSA requires that class members be "similarly situated."[96] The FLSA provides no definition to make that determination.[97]

88. *See supra* notes 82–86 and accompanying text.

89. *Glatt*, 811 F.3d at 536.

90. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

91. *Id.* at 140.

92. *Id.*

93. *Glatt*, 811 F.3d at 537–38.

94. Walling v. Portland Terminal Co., 330 U.S. 148, 151–53 (1947).

95. *See supra* text accompanying note 48.

96. 29 U.S.C. § 216(b) (2012).

97. *See* O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009) ("The [FLSA] does not define 'similarly situated.'"), *overruled on other grounds by* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).

Therefore, the determination is based on precedent.[98] The Second Circuit follows the two-step process for certifying collective actions under the FLSA.[99] The initial step permits the district court to give notice to potential opt-in plaintiffs who may be "similarly situated" to the named plaintiffs with respect to the FLSA requirement.[100] The district court may send notice after "plaintiffs make a modest factual showing that they and [potential opt-in plaintiffs] together were victims of a common policy or plan that violated the law."[101] Thus, generalized proof ought to be sufficient, as the district court held.[102] Accordingly, the Second Circuit has stated that plaintiffs can meet the requirements by a showing that they and other potential opt-in plaintiffs are "similarly situated with respect to their job requirements and with regard to their pay provisions."[103]

The second step permits the district court to determine whether the collective action may proceed by determining whether the opt-in plaintiffs are similarly situated to the named plaintiffs.[104] This is the post-discovery stage, where the lenient standard at the initial step is raised to a preponderance of the evidence standard owing to the benefit of "additional factual development."[105] However, courts weigh the fairness and procedural considerations inherent in a collective action, which "serves judicial economy and makes recovery economically feasible for class members who would otherwise need to retain lawyers for individual actions."[106]

The district court correctly applied the two-step process and found that a general policy existed whereby Fox would replace paid workers with unpaid interns.[107] It therefore approved the class action.[108] The district court considered the fairness and procedural advantages and held that common issues of liability predominated over disparate factual settings.[109] In contrast, the Second Circuit noted the precedent on which the district court based its holding, but required individual factual inquiries at

98. *See* Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001) (discussing ways courts interpret the similarly situated requirement).

99. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 539–40 (2d Cir. 2016) (citing Myers v. Hertz Corp., 624 F.3d 537, 554–55 (2d Cir. 2010) (endorsing the two-step class certification process)).

100. *Id.* at 540.

101. *Id.*

102. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 538 (S.D.N.Y. 2013), *vacated*, 811 F.3d 528.

103. *Myers*, 624 F.3d at 555 (quoting Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1259 (11th Cir. 2008)).

104. *Glatt*, 811 F.3d at 540.

105. *Id.*; *see Myers*, 624 F.3d at 547–48.

106. *Glatt*, 293 F.R.D. at 535.

107. *Id.* at 538.

108. *Id.*

109. *Id.*

both steps per the court's application of the primary beneficiary test.[110] The holding disregarded fairness and procedural considerations that persuaded the district court to favor a collective action.[111] Further, it neglected widely acknowledged problems associated with individualized factual requirements before discovery.[112]

Glatt, Footman, and Antalik at the very least were, in accordance with the district court's conclusion and Second Circuit precedent, "similarly situated with respect to their job requirements and with regard to their pay provisions."[113] Each performed tasks akin to that of a secretary or custodian and the tasks performed were, for the most part, menial. Nonetheless, they were essential tasks that would have been completed regardless of the presence of unpaid interns at Fox.[114] Because tasks like taking out the trash, answering the phone, making deliveries, assembling briefs, and maintaining files are menial but essential in the daily course of business, had it not been for the availability of unpaid interns, paid employees would have performed those tasks in addition to their own job requirements. The district court noted these circumstances as not just extending to Glatt, Footman, and Antalik, but to all those who opted-in to the class action.[115]

The injustice inherent in this situation is substantially more difficult to address under the *Glatt* court's new standard. Plaintiffs must overcome the hurdle of demonstrating factual similarities among varying numbers of potential opt-ins

110. The Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 388 (2d Cir. 2015), *superseded by* 811 F.3d 528, held that class certification required a highly individualized inquiry. This requirement was applied without regard to the two-step process. *Id.* ("Under the primary beneficiary test we have set forth, courts must consider individual aspects of the intern's experience."). While the specific language from that requirement was omitted from the superseding opinion, and any variation of the word "individual" regarding class certification was either omitted or replaced with the phrase "context-specific," the substance of this revision has not changed. The "context-specific" inquiry will require individualized factual inquiries nonetheless because the requirement that class certification must be analyzed pursuant to the primary beneficiary test necessitates adherence to the factors that the Second Circuit laid out in its opinion, which require individualized inquiries. *See supra* text accompanying note 48. Thus, the seventeen cases, twenty trial court documents, four appellate court documents, and twenty-six scholarly sources that cited (and interpreted) the Second Circuit's initial opinion in *Glatt*, let alone any unpublished or unwritten interpretations over the nearly seven months between the time the initial opinion was decided and the date of the superseding opinion, will not have any cause to change those interpretations. *See* Citing References of *Glatt v. Fox Searchlight Pictures, Inc.*, WestlawNext, http://next.westlaw.com (sign in; search in search bar for "Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015)"; then select "Citing References") (last visited Oct. 21, 2016). This is despite the omission of the word "individualized," seeing as the essential criteria that are the bases of the primary beneficiary analysis are the same in both opinions, and those criteria are the key to the heightened standard.

111. *Glatt*, 293 F.R.D. at 538–39.

112. *See* Thompson v. Fathom Creative, Inc., 626 F. Supp. 2d 48, 53 (D.D.C. 2009) ("Pre-discovery summary judgment motions are usually premature and hence disfavored." (quoting Bourbeau v. Jonathan Woodner Co., 600 F. Supp. 2d 1, 3 (D.D.C. 2009))); Venables v. Sagona, 848 N.Y.S.2d 238, 239 (2nd Dep't 2007) (holding that limited facts in a pre-discovery record warrant denial of motions to dismiss as premature).

113. Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (citation omitted).

114. The district court made this argument when it stated, in reference to the plaintiff interns, "[m]enial as it was, their work was essential." *Glatt*, 293 F.R.D. at 533.

115. *Id.* at 538.

without the benefit of factual development that occurs in discovery. Without time necessary for factual development—a fundamental purpose of discovery—plaintiffs will be burdened to produce sufficient evidence that will demonstrate factual similarities necessary to plead a claim.

The *Glatt* court's holding, in light of these errors, hurts interns and employees alike. Policies that replace paid employees with unpaid interns will less likely constitute grounds for class certification under the FLSA. Unpaid interns with little-to-no bargaining power will thus more likely be required to pursue individual actions to combat unfair labor practices. And the decreased specificity inherent in the deviation from the DOL's bright-line rule will enable employers to "exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience."[116] The holding by the Second Circuit in *Glatt* indicates ignorance of that reality.

In conclusion, the *Glatt* court's endorsement of the primary beneficiary test not only broadens the *Portland Terminal* "trainee" exception but also makes class certification under the FLSA virtually impossible for unpaid interns. Therefore, opportunities for unpaid interns to bring claims seeking compensation under the FLSA will significantly decrease. Employers will have greater flexibility to manipulate the labor market while aggrieved interns will be forced to cope with increased difficulty in finding legal redress.

116. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535 (2d Cir. 2016).

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