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Intern or Employee in Disguise? The Rise of the Unpaid Internship and the Primary Beneficiary Test

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NOTE

Intern or Employee in Disguise? The Rise of the Unpaid Internship and the Primary Beneficiary Test

Benjamin v. B&H Education, Inc., 877 F.3d 1139 (9th Cir. 2017)

Morgan Knott *

I. INTRODUCTION

When people imagine an internship, they usually think of someone getting coffee or running errands. In today's competitive job market, however, internships are much more likely to reflect the job of an entry-level employee.[1] Employers seek to hire people who have completed an internship because they value the skills and practical experience gained from an internship.[2] Employers especially like to use unpaid interns so they can observe and train their prospective employees while simultaneously benefitting from the free labor.[3] Many students see an internship as a "way of getting one's foot in the door" with the hope of receiving a job offer at the end of the internship.[4] The frequency with which unpaid internships are made available by employers is increasing, particularly in highly competitive fields, because employers know the job market is tough and students are willing to work for free in the hopes of obtaining an offer of employment or – at the very least – a compelling addition to their resume.[5] The number of unpaid internships being offered is rising in

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1. WILLIAM D. WELKOWITZ, BLOOMBERG BUREAU OF NAT'L AFFAIRS, U.S. SUPREME COURT MAY ULTIMATELY HAVE THE FINAL WORD ON THE FUTURE OF UNPAID INTERNSHIPS IN THE PRIVATE SECTOR 1 (2015), https://www.wwdlaw.com/library/files/the_future_of_unpaid_internships_in_the_private_sector_by_bloomberg_bna.pdf.

2. 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, 1187 (2015).

3. *Id.* at 1187–88.

4. *Id.* at 1187.

5. *Id.*; *see also* Neil Howe, *The Unhappy Rise of the Millennial Intern*, FORBES (Apr. 22, 2014), https://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/#70bf43601328 ("College credit started to replace pay as more

all fields, but they are "especially prevalent in high-prestige creative fields like music, media, and fashion."[6] Additionally, in areas such as law, government, and nonprofits, unpaid internships are "replacing many traditional entry-level positions."[7] With this rise in unpaid internships comes a corresponding rise in unpaid internship lawsuits.[8] Interns who perform menial tasks have claimed that they are actually employees within the meaning of the Fair Labor Standards Act ("FLSA") and thus are entitled to minimum wage and overtime payments.[9]

Courts use a variety of tests to decide if an unpaid intern should actually be classified as an employee under the FLSA.[10] The Department of Labor ("DOL") created one test ("DOL Test") based on its interpretation of the 1947 United States Supreme Court case of *Walling v. Portland Terminal Co.*[11] However, many circuits have chosen not to apply the DOL Test and have instead created their own unique tests.[12] In *Benjamin v. B&H Education, Inc.*, a case involving cosmetology students, the U.S. Court of Appeals for the Ninth Circuit became one such circuit.[13] The Ninth Circuit, when ruling in *Benjamin*, expressly rejected the DOL Test because it was too strictly based on the facts of *Portland Terminal*.[14] Instead, the Ninth Circuit adopted the "primary beneficiary test."[15] If the intern is the primary beneficiary of his or her own work at the internship, then the intern will be classified as an intern and will not be entitled to minimum wage; however, if the employer receives the primary benefit of the intern's work, then the intern will be classified as an employee under the FLSA and will be entitled to minimum wage and overtime payment.[16] In response to the Ninth Circuit's decision in *Benjamin*, the DOL changed its test to reflect the primary beneficiary test, which may lead to a rise in the number of unpaid internships being offered by employers across the nation.[17]

This Note discusses the effect the Ninth Circuit's decision has on the future of unpaid internships in the United States. Part II discusses the facts and holding of the Ninth Circuit's decision in *Benjamin*. Part III explains the law

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high-prestige companies offered unpaid positions, which continued to attract plenty of well-qualified applicants willing to compete for free.").

6. Howe, *supra* note 5.

7. *Id.*

8. WELKOWITZ, *supra* note 1, at 1.

9. *Id.*

10. *See infra* Part III.

11. *See* 330 U.S. 148, 150–52 (1947).

12. *See infra* Part III.

13. 877 F.3d 1139 (9th Cir. 2017).

14. *Id.* at 1145.

15. *Id.* at 1146–47.

16. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2015).

17. *See* WAGE & HOUR DIV., U.S. DEPT. OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT, https://www.dol.gov/whd/regs/compliance/whdfs71.pdf (last updated Jan. 2018) [hereinafter FACT SHEET #71 2018].

regarding unpaid internships and the different tests that the circuit courts have adopted to determine if the intern should be classified as an intern or as an employee under the FLSA. Part IV describes the Ninth Circuit's holding in *Benjamin*. Part V analyzes the effects that holding had on the law regarding unpaid internships and discusses the need for the United States Supreme Court to adopt a uniform test.

II. FACTS AND HOLDING

Jacqueline Benjamin, Taiwo Koyejo, and Bryan Gonzalez (collectively, "Plaintiffs") are cosmetology and hair design students who sued the operator of their school, B&H Education, Inc. ("B&H").[18] The name of the for-profit beauty school is Marinello School of Beauty, and it holds licenses in Nevada and California.[19] The school includes both classes and clinical work.[20] It provides reduced salon services to customers because students work at the salon as part of their clinical training.[21] Students must complete certain requirements before being allowed to work in the clinic, and they do not get paid for working in the salon.[22] Marinello students attend lectures, take tests, and get practical experience by working in the clinic.[23] In return, they receive academic credit.[24] In California and Nevada, cosmetologists must have a license, which they obtain by taking the state licensing exam.[25] In order to qualify to take the exam, students must have completed a required number of clinical and classroom hours, during which they learn cosmetology skills along with sanitation procedures.[26]

Plaintiffs filed a class action suit in the U.S. District Court for the Northern District of California, accusing B&H of using them to get free labor and not actually teaching them skills they would need for the licensing exam.[27] They claimed that B&H did not supervise them in the salon as required and unlawfully kept profits from the salon, fees incurred from charging students for being late or absent from the salon, Plaintiffs' tuition money, and money Plaintiffs spent on products for the salon.[28] Plaintiffs sought a declaratory judgment stating B&H's practices were unlawful.[29] They also sought payment for minimum and overtime wages, payment for premium wages for unused breaks, restitution for fines they received, payment for their supply purchases, and civil

18. *Benjamin*, 877 F.3d at 1141–42.
19. *Id.* at 1142.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

penalties for violating wage laws.[30] Plaintiffs moved for summary judgment, contending that they were employees under both state and federal law.[31] Defendants also moved for summary judgment, claiming the students were in fact students – not employees – and thus not entitled to be paid minimum wage.[32]

The district court relied on *Glatt v. Fox Searchlight Pictures, Inc.*, a case decided by the U.S. Court of Appeals for the Second Circuit, and followed its use of the primary beneficiary test to determine whether Plaintiffs were employees of Marinello.[33] The district court held Plaintiffs were students, not employees, because they received the primary benefit of the school in that they received an education required for the state licensing exam.[34] The court also held that Marinello did not use the clinic to sacrifice the students' education in favor of making a profit.[35] Accordingly, the district court denied Plaintiffs' motion for summary judgment and granted B&H's motion.[36] Plaintiffs appealed to the Ninth Circuit.[37]

To determine whether Plaintiffs were interns or employees, the Ninth Circuit relied on the same primary beneficiary test from *Glatt* that the district court used.[38] The Ninth Circuit affirmed the district court's decision and held that the "students were the primary beneficiaries of their labors."[39] Consequently, Plaintiffs were not employees under the FLSA and were not entitled to compensation for their work in the salon.[40]

III. LEGAL BACKGROUND

The FLSA was enacted in 1938 as a part of the New Deal.[41] Congress determined that labor conditions not sufficient to support minimum standards for living "burden[ed] . . . the free flow of goods in commerce" and led to unfair

30. *Id.*
31. *Id.*
32. *Id.* at 1142–43.
33. *Id.* at 1143.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 1146–47.
39. *Id.* at 1148.
40. *Id.* The court also held that Plaintiffs could not recover under their state claims. *Id.* at 1150. Nevada's test was the same as the primary beneficiary test under the FLSA, so Plaintiffs were not employees under Nevada law either. *Id.* at 1148. Although the court said California law was a little different, it discarded California's "control" test, concluding it was not applicable to this kind of educational situation, and applied the primary beneficiary test, holding that Plaintiffs were not employees under California law either. *Id.* at 1149–50.
41. Fair Labor Standards Act of 1938, Pub. L. 718, 52 Stat. 1060 (codified as amended at 29 U.S.C. ch. 8 (2018)).

competition.[42] Congress enacted the FLSA to correct these conditions "without substantially curtailing employment or earning power."[43] Over the years, many lawsuits have arisen under the FLSA. One typical dispute concerns who is covered under the FLSA because the FLSA includes only vague definitions. For example, "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ," and "employee" is defined as "any individual employed by an employer."[44] This Note focuses on one area of the FLSA in particular: whether or not interns are considered employees under the FLSA. This Part discusses the development of the definition of "employee" under the FLSA and the different tests that have been used to decide who falls within the definition of "employee."

A. Test for "Employee" in the United States Supreme Court

The United States Supreme Court has not yet addressed the issue of when unpaid interns should be classified as employees under the FLSA, but it has decided other cases involving unpaid workers (e.g., trainees and volunteers) and whether they are employees under the FLSA.[45] The first United States Supreme Court case to interpret who was considered an "employee" under the FLSA was *Walling v. Portland Terminal Co.*[46] *Portland Terminal* concerned an eight-day practical training course offered by a railroad company for those who wanted to learn how to become a yard brakeman.[47] The trainees first observed current employees and then were closely supervised while they performed some of the work.[48] They did not displace any regular employees and in some cases actually slowed down the railroad's business because of the close supervision they required.[49] Once the trainees completed the training, their names were put onto a list from which the railroad could draw when it needed to hire more people.[50] The trainees were not paid for the training.[51] However, in 1943, because of the war, the railroad and the collective bargaining agent agreed to pay the trainees four dollars per day in retroactive pay if they successfully completed the training and were put on the list of available workers.[52]

The issue in the case was whether the trainees were considered "employees" under the FLSA and were thus entitled to minimum wage for the days they

42. *Id.*
43. *Id.*
44. *Id.*
45. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2015).
46. 330 U.S. 148, 150–52 (1947).
47. *Id.* at 149.
48. *Id.*
49. *Id.* at 149–50.
50. *Id.* at 150.
51. *Id.*
52. *Id.* This was well above minimum wage and was agreed to only during the war period. *Id.* The trainees did not have a compensation agreement or expect to receive payment for their training other than this "contingent allowance." *Id.*

trained.[53] The Court ruled that the old common law categories of employees and other statutes defining an "employer-employee" relationship were no longer relevant because the FLSA included definitions for those terms.[54] In fact, the Court held that the FLSA's definitions cover a larger group of people than the previous laws did.[55]

The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[56] "Employee" is defined as "any individual employed by an employer," and "employ" means "to suffer or permit to work."[57] The Court concluded that these definitions should not be taken at face value because Congress did not intend for people who work on someone else's property, for their own personal benefit and without a compensation agreement, to be considered employees.[58] Because the purpose of the FLSA is to make sure each person with a compensation agreement receives a fair wage, the Court concluded it was reasonable to limit the scope of "employee" to include only those who perform work that gives an "immediate advantage" to another as opposed to work that only benefits themselves.[59] Interestingly enough, in *Portland Terminal*, the Court also reasoned that had the "trainees taken courses in railroading in a public or private vocational school, . . . it could not reasonably be suggested that they were employees of the school within the meaning of the [FLSA]."[60] The Court held that the trainees were not employees under the FLSA because the railroad did not receive an "'immediate advantage' from any work done by them."[61]

The test for defining an "employee" under the FLSA was further developed in *Rutherford Food Corp. v. McComb*.[62] In *Rutherford*, the United States Supreme Court confirmed that the test for determining whether one is considered an employee under the FLSA is one of *economic reality*.[63] The Court held that "the determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity."[64] The Court looked at the work the workers did as a whole to see if it "follow[ed] the usual path of an employee" in determining if they should be considered employees

53. *Id.* at 149.
54. *Id.* at 150.
55. *Id.* at 150–51.
56. 29 U.S.C. § 203(d) (2018).
57. *Id.* § 203(e)(1); *id.* § 203(g).
58. *Portland Terminal*, 330 U.S. at 152.
59. *Id.* at 152–53. The Court was concerned that if this limitation was not put into place, students could claim to be employees of their school because they were permitted to work on the school's property. *Id.* at 152.
60. *Id.* at 152–53.
61. *Id.* at 153.
62. 331 U.S. 722 (1947).
63. *Id.* at 727.
64. *Id.* at 730.

under the FLSA.[65] Several years later, in *Goldberg v. Whitaker House Cooperative, Inc.*, the Court continued using the economic realities test when it held that "'economic reality' rather than 'technical concepts' is to be the test of employment."[66]

The most recent United States Supreme Court case involving the economic reality test was decided in 1985.[67] In *Tony & Susan Alamo Foundation v. Secretary of Labor*, a religious foundation operated commercial businesses that were run by former criminals and drug addicts who had been rehabilitated by the foundation.[68] The workers received food, shelter, clothing, and other benefits in return for their services but received no cash compensation.[69] Although the workers claimed they were "volunteers" and did not expect payment, the Court held that, under the economic reality test, the workers were employees within the meaning of the FLSA.[70] The Court reasoned that although the workers did not expect to be paid in cash, they did expect to receive other benefits like food and shelter, which were just "wages in another form."[71] The content of the expected wages was irrelevant, but the fact that they expected to receive some form of compensation in return for their work was important.[72]

B. Department of Labor Test for "Employee"

The nature of internships today has changed dramatically from the nature of internships in the past.[73] Instead of getting coffee and making copies, many interns perform the same type of work as an entry-level employee in that position.[74] In response to this change, litigation has spiked, as more and more interns claim they should be classified as employees under the FLSA and are therefore entitled to minimum wage.[75] In 2010, the DOL created the DOL Test, which was a six-prong test, based on the United States Supreme Court's holding in *Portland Terminal*, to determine if an intern was "employed" under the FLSA.[76] The DOL Test included a list of six elements that had to be met for the intern *not* to be considered an employee:

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65. *Id.* at 729.

66. 366 U.S. 28, 33 (1961).

67. Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1144 (9th Cir. 2017) (noting *Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985) as "the United States Supreme Court's most recent discussion").

68. 471 U.S. at 292.

69. *Id.*

70. *Id.* at 301.

71. *Id.*

72. *Id.*

73. *See* WELKOWITZ, *supra* note 1, at 1.

74. *Id.*

75. *Id.*

76. *Id.* at 2.

> 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.[77]

The DOL Test was a narrow exception to the definition of "employ" and favored a finding that an intern was in an employment relationship covered by the FLSA.[78]

C. Federal Circuit Courts of Appeal Refuse to Follow the DOL Test

Most of the federal circuits have addressed the issue of whether an individual is an employee under the FLSA. However, only some circuits have specifically addressed the question of whether an unpaid intern is an employee. Other circuits have answered the similar question of whether a trainee is an employee but have not specifically applied that test to unpaid interns. The cases that follow are divided into those two categories.

1. Circuit Tests for Unpaid Interns

Even though the DOL Test specifically addressed when interns must be considered employees, the Second Circuit refused to adopt the DOL Test and instead created a test of its own.[79] In *Glatt v. Fox Searchlight Pictures, Inc.*, the plaintiffs were unpaid interns who worked for either Fox Searchlight or Fox Entertainment Group.[80] They claimed they were employees under the FLSA and should have received compensation.[81] The district court used the DOL Test, but instead of requiring each factor to be met, it used the factors as a

77. *Id.* at 1–2.
78. *Id.*
79. *See* 811 F.3d 528, 536 (2d Cir. 2015).
80. *Id.* at 531–32.
81. *Id.*

balancing mechanism and determined that the first four factors weighed in favor of the plaintiffs being employees but the last two factors weighed in favor of classifying the plaintiffs as interns.[82] Consequently, the district court held that the plaintiffs should have been classified as employees and paid minimum wage.[83] The defendants appealed.[84]

In *Glatt*, the issue of whether an intern was an employee under the FLSA was a matter of first impression for the Second Circuit.[85] The plaintiffs asked the court to adopt a test similar to the test announced in *Portland Terminal*, where interns would be considered employees under the FLSA if the employer received an immediate advantage from their work.[86] The defendants urged the court to adopt a primary beneficiary test, where the benefits provided to both the employer and the intern would be weighed and then used to determine who received the greater benefit.[87] The defendants argued that this test was similar to other tests used when deciding if someone is an employee because the court would still need to consider the "economic realities" and the "totality of the circumstances" regarding the relationship between the intern and employer.[88] The DOL, as amicus curiae in support of the plaintiffs, urged the court to use the DOL Test because it was derived from *Portland Terminal*.[89]

The Second Circuit expressly rejected the DOL Test.[90] The court reasoned that the test came directly from the facts of *Portland Terminal* and therefore was "too rigid" to fit other factual situations.[91] Instead, the court adopted its own test, agreeing with the defendants' argument that the proper test is to determine who was the primary beneficiary of the work.[92] The court set out a list of seven, non-exhaustive factors to help determine who was the primary beneficiary of the relationship.[93] The factors included:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment,

82. *Id.* at 534–35.
83. *Id.*
84. *Id.* at 531.
85. *Id.* at 535.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 535–36.
90. *Id.* at 536 ("We decline DOL's invitation to defer to the test laid out in the Intern Fact Sheet.").
91. *Id.*
92. *Id.*
93. *Id.* at 536–37.

> including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[94]

The Second Circuit further stated that courts should weigh all of the circumstances when deciding who was the primary beneficiary of the work, including other evidence not listed as one of the seven factors.[95] It also stated that not all the factors had to weigh in the same direction for the court to conclude that the intern is not an employee.[96]

The Second Circuit articulated three important aspects of the primary beneficiary test that supported its decision to adopt the primary beneficiary test instead of the DOL Test.[97] The first feature of the primary beneficiary test is that it "focuses on what the intern receives in exchange for his work."[98] The second feature is its flexibility in giving courts the chance to look at the economic reality of the relationship.[99] Finally, the third feature is that it recognizes the difference between an intern and an employee: interns expect to receive educational benefits from the relationship, whereas employees usually do not.[100] The court thought this third feature was important because modern internships are usually connected to some sort of educational program.[101] The primary beneficiary test is different from the DOL Test because it does not

94. *Id.*
95. *Id.*
96. *Id.* at 537.
97. *Id.* at 536.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 537.

require all the factors to be met before the worker will be classified as an intern, and it focuses a lot more on the educational aspect of the relationship.

Other circuit courts have also rejected the DOL Test and have adopted some form of the primary beneficiary test. The U.S. Court of Appeals for the Eleventh Circuit rejected the DOL Test because it only fit the facts of *Portland Terminal*, which were very different from the facts in *Schumann v. Collier Anesthesia, P.A.*[102] *Schumann* concerned student-registered nurse anesthetists who claimed they were employees when they worked in a clinical program required for their academic degree.[103] The court adopted the primary beneficiary test from *Glatt*, including *Glatt*'s seven factors, rather than the DOL Test.[104] The court concluded that even if the employer does receive some benefits from the internship program, that fact alone does not mean the interns are employees under the FLSA.[105] In evaluating this, it said courts must look at the benefits students receive and the way "in which the employer implements the internship program" to see if the employer is taking advantage of the students.[106] This is the main difference between the primary beneficiary test and the DOL Test because the DOL Test follows *Portland Terminal* in requiring that the employer receive no "immediate advantage," but the primary beneficiary test allows the employer to receive an advantage from the internship as long as it is not an unfair advantage.[107]

The U.S. Court of Appeals for the Sixth Circuit also adopted a form of the primary beneficiary test. In *Solis v. Laurelbrook Sanitarium & School, Inc.*, students at a boarding school received practical training, as well as classroom lessons, by working in a sanitarium.[108] The Sixth Circuit rejected the DOL Test as "inconsistent with a totality-of-the-circumstances approach, where no one factor (or the absence of one factor) controls."[109] Instead, the court said the appropriate test was to focus on who receives the primary benefit of the work.[110] Two factors important in this analysis were whether the students displace regular employees and whether the students receive any educational benefits from the relationship.[111]

In 2017, the U.S. Court of Appeals for the Seventh Circuit, in a beauty school case with facts remarkably similar to *Benjamin v. B&H Education, Inc.*, rejected the DOL Test and cited the Second Circuit's primary beneficiary test from *Glatt*.[112] Although the court did not adopt the multifactor approach from

102. *Id.* at 1202.
103. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1202 (11th Cir. 2015).
104. *Id.* at 1211–12.
105. *Id.*
106. *Id.* at 1211.
107. *Id.* at 1212–13.
108. 642 F.3d 518, 520 (6th Cir. 2011).
109. *Id.* at 525.
110. *Id.* at 525–26.
111. *Id.* at 529.
112. Hollins v. Regency Corp., 867 F.3d 830, 835–36 (7th Cir. 2017).

either test, it seemed to nonetheless apply certain factors from the primary beneficiary test while also considering the economic reality of the relationship.[113] It held that this type of case "normally turns on the facts of the particular relationship and program" and made clear that it was not adopting a standard test to fit all cases involving internships.[114]

2. Circuit Tests for Trainees

Other circuits have developed tests for determining when someone is considered an employee, but the cases have not specifically involved unpaid interns. The U.S. Court of Appeals for the Fourth Circuit, in *McLaughlin v. Ensley*, cited *Portland Terminal* when deciding if trainees for a snack distribution business were employees within the meaning of the FLSA.[115] The court held that the proper test for determining if a worker is an employee under the FLSA is to determine who is the primary beneficiary of the trainees' work.[116]

In *Blair v. Wills*, the U.S. Court of Appeals for the Eighth Circuit was asked to decide whether a student who was required to perform certain chores at his boarding school was an employee of the school under the FLSA.[117] The court found that the chores were primarily for the student's benefit and that the student was not an employee of the school under the FLSA when one considered the "totality of the economic circumstances."[118] The Eighth Circuit did not specifically mention the DOL Test or the primary beneficiary test and instead mostly relied on *Goldberg*'s economic reality test.[119]

In *Atkins v. General Motors Corp.*, a case involving trainees for General Motors, the U.S. Court of Appeals for the Fifth Circuit relied on the DOL Test to determine if trainees were employees under the FLSA, holding that the DOL Test was "entitled to substantial deference."[120] The U.S. Court of Appeals for the Tenth Circuit applied a totality of the circumstances test in a case involving firefighter trainees and held that the DOL Test was a totality of the circumstances test – meaning no one factor was dispositive.[121] It used the DOL Test but refused to apply it using an "all or nothing" approach.[122] The U.S. Court of Appeals for the First and Third Circuits have yet to decide a case on this issue.

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113. *Id.* at 836.

114. *Id.* at 837; *see also* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 291 (7th Cir. 2016) ("[W]e reject[] the strict application of a similar multifactor test in favor of a more flexible standard.").

115. 877 F.2d 1207, 1209 (4th Cir. 1989).

116. *Id.*

117. 420 F.3d 823, 829 (8th Cir. 2005).

118. *See id.*

119. *See id.*

120. 701 F.2d 1124, 1128 (5th Cir. 1983). The DOL's test for trainees is the same as the DOL's test for interns. *Id.* at 1127; *see supra* Section III.C.1.

121. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993).

122. *Id.* at 1026.

IV. INSTANT DECISION

Benjamin v. B&H Education, Inc. was a case of first impression for the Ninth Circuit. While it had addressed whether an individual was an employee under the FLSA, it had never before decided a case involving whether *interns* should be considered employees under the FLSA.[123] In the instant case, the court recognized *Portland Terminal*'s holding that students were not employees.[124] The court noted that in the past it had followed *Portland Terminal* and *Alamo* by creating an economic reality test that considered the totality of the circumstances when deciding if someone is an employee under the FLSA.[125] The test consisted of four factors: (1) whether the employer can hire and fire the employees, (2) whether the employer supervises and controls the employee schedule and conditions of employment, (3) whether the employer decides the method and rate of compensation, and (4) whether the employer keeps records of employment.[126] However, this test had never been applied to cases involving unpaid interns.

The majority then mentioned the DOL Test, characterizing it as "informal guidance" and stating that the DOL has "struggled with formulating the appropriate test or guidelines to apply in dealing with issues relating to interns/employees."[127] The court noted the Second Circuit's rejection of the DOL Test as "'too rigid' and 'too dependent on the particular facts of *Portland Terminal*.'"[128] It set out the list of factors the Second Circuit used in creating the primary beneficiary test in *Glatt* and noted that those factors were useful in the particular circumstance of student workers.[129] The court concluded that the primary beneficiary test used by the Second, Sixth, and Eleventh Circuits reflected the United States Supreme Court's economic realities test and allowed courts to focus on the totality of the circumstances.[130] The Ninth Circuit held that "the primary beneficiary test best captures the . . . Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA."[131]

The majority applied the *Glatt* factors to the instant case and held that Plaintiffs were students – not employees – and were therefore not entitled to compensation under the FLSA.[132] The court explained that Plaintiffs agreed

123. 877 F.3d 1139, 1144–45 (9th Cir. 2017).

124. *Id.* at 1144 ("It is important for our purposes that in so holding, the Court expressly compared the trainees to students in an educational setting, emphasizing that students are not employees.").

125. *Id.* at 1144–45.

126. *Id.* at 1145.

127. *Id.*

128. *Id.*

129. *Id.* at 1144.

130. *Id.* at 1147.

131. *Id.*

132. *Id.*

to attend Marinello knowing they were not going to be paid for their work.[133] Plaintiffs also received academic credit for their work at the salon, and the clinical work was required before they would be allowed to take the state licensing exam.[134] Further, the majority stated that Marinello did not require the students to work in the clinic once they received the number of hours required for the exam.[135] Students did not displace regular employees, as the employees were hired specifically to teach the students at the clinic, and the students did not expect an offer of employment from Marinello after graduation.[136] Based on the application of the facts to the *Glatt* factors, Plaintiffs were the primary beneficiaries of their work, and thus the court held they were not employees under the FLSA or entitled to be paid minimum wage.[137]

V. COMMENT

As competition for employment has increased over the past several years, more and more students are seeking internships to improve their chances in the job market.[138] Employers use internships as a way of generating a pool of job applicants that they can choose to hire from in the future.[139] Employers like to hire from their pool of former interns because they have trained the interns during the internship program and have had a chance to observe how each of them will perform and fit in with the company.[140] The rise in popularity of internships has also led to a rise in unpaid intern lawsuits, where interns claim they should be classified as employees under the FLSA and are thus entitled to minimum wage and overtime compensation.[141] The lack of certainty and clarity created by the different tests that permeate the different federal circuits has also added to the increase in the filing of these lawsuits.[142] This is problematic for both interns and employers. Students need internships to give them an advantage in their search for employment, but they do not want to be exploited by employers who are only seeking free labor.[143] Employers need internships to help in the vetting process for new employees, but they may be hesitant to

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1147–48.
137. *Id.* at 1148.
138. *See* Malik, *supra* note 2, at 1187.
139. *Id.* at 1188.
140. *Id.* at 1187–88; *see also* NAT'L ASS'N OF COLLEGES AND EMPLOYERS, INTERNSHIP AND CO-OP SURVEY: EXECUTIVE SUMMARY 3 (2016), http://www.naceweb.org/uploadedfiles/content/static-assets/downloads/executive-summary/2016-internship-co-op-survey-executive-summary.pdf ("[C]onverting students who have taken part in an internship . . . into full-time employees is a primary goal for most programs.").
141. WELKOWITZ, *supra* note 1, at 1.
142. *Id.*
143. *See* Malik, *supra* note 2, at 1211.

create internship programs because they are afraid of being sued.[144] The United States Supreme Court needs to grant certiorari on a case involving the issue of unpaid interns and the FLSA to clear up this uncertainty. The best test for the Court to adopt would be the primary beneficiary test. This test would give clear guidance to employers in creating their internship programs, help them avoid liability, encourage them to make more internship programs available, and require the programs to benefit the employer's interns, allowing the interns to learn and participate in useful, substantive activities related to their future careers.

A. The Ninth Circuit's Decision in Benjamin *Pushes the Department of Labor to Change Test*

The impact of the instant case has been significant. The previous DOL Test made it almost impossible for employers to take on unpaid interns because the test usually resulted in a finding that the individual was an employee rather than an intern.[145] The DOL claimed that the individual was an employee unless all six factors were met, making it a difficult test to pass.[146] The DOL itself described the test as "quite narrow."[147] Because this test was so rigid, many circuits either chose to disregard it and create their own test[148] or use it as a balancing set of factors where not all six had to be met for the individual to be classified as an intern.[149]

After the Ninth Circuit rejected the DOL Test in *Benjamin*,[150] the DOL changed its test.[151] It discarded the DOL Test and updated Fact Sheet #71 to reflect its new test.[152] In Fact Sheet #71, the DOL explicitly adopted the primary beneficiary test as the test for unpaid interns and students under the FLSA and listed the seven pertinent factors from *Glatt*.[153] Fact Sheet # 71 states, "This test allows courts to examine the 'economic reality' of the intern-employer relationship to determine which party is the 'primary beneficiary' of the relationship."[154] Fact Sheet #71 directly cites *Benjamin v. B&H Education,*

144. *Id.* at 1209–10.

145. WELKOWITZ, *supra* note 1, at 1–2.

146. WAGE & HOUR DIV., U.S. DEPT. OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), http://webdoc.agsci.colostate.edu/ansc/InternshipUSDeptofLabor.pdf ("If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern.").

147. *Id.*

148. *See, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2015); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1202 (11th Cir. 2015).

149. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993).

150. Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1145 (9th Cir. 2017).

151. *See* FACT SHEET #71 2018, *supra* note 17.

152. *See id*.

153. *See id.*

154. *Id.*

Inc., along with other cases, to support its statement that courts use the primary beneficiary test in determining if an intern is actually an employee.[155] It follows the Second and Ninth Circuits' approach in making the test a flexible one in which "no single factor" is determinative.[156] While the DOL's adoption of the primary beneficiary test clears up some of the uncertainty regarding the appropriate test, courts are not bound by Fact Sheet #71,[157] and other circuits have adopted tests that are different from the primary beneficiary test.[158] Consequently, there is still a need for the United States Supreme Court to provide a uniform test.

B. Advantages and Disadvantages of the Primary Beneficiary Test

The test with the most support is the primary beneficiary test – now that at least four circuits and the DOL have adopted it.[159] Although the United States Supreme Court may adopt the primary beneficiary test simply because of the amount of support behind it, the advantages and disadvantages of the primary beneficiary test should be considered. The primary beneficiary test is closely tied to education, with three of the seven factors including an educational component.[160] This requirement makes it easier for employers to comply with the test because they can create internship programs in conjunction with educational institutions.[161] If the test is more predictable, employers will be

155. *Id.* (citing the Second, Sixth, Ninth, and Eleventh Circuits as having adopted the primary beneficiary test).

156. Malik, *supra* note 2, at 1207.

157. WELKOWITZ, *supra* note 1, at 4 ("The DOL having conceded that *Chevron* deference was not appropriate, the court was free to effectively ignore the DOL's interpretation if it found it unpersuasive, which was indeed the case . . . ."); *see also* Malik, *supra* note 2, at 1195 ("Courts have viewed DOL Fact Sheets as informal interpretations subject to Skidmore deference, and therefore are only to be considered if they are determined to be 'persuasive.'" (footnote omitted)).

158. *See, e.g.*, Hollins v. Regency Corp., 867 F.3d 830, 837 (7th Cir. 2017); Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005).

159. FACT SHEET #71 2018, *supra* note 17 (citing the Second, Sixth, Ninth, and Eleventh Circuits as having adopted the primary beneficiary test).

160. *Id.* (factors 2, 3, and 4).

161. WELKOWITZ, *supra* note 1, at 5. ("[E]mployers will have a greater burden to design internship programs that are predominantly educational and closely aligned with an academic program."); *see also* Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L. J. 184, 193 (2013) ("The more an internship program is structured to provide a 'classroom or academic experience,' the more likely it is to be viewed as an extension of the intern's education and thus satisfy the requirement . . . that the experience be similar to training that would be given in an educational environment." (footnote omitted)).

more willing to use unpaid interns and create more internship programs because their fear of litigation will be reduced.[162] This is good for students who are looking to complete an internship connected with their degree program. More students will have an opportunity to gain practical experience and training that will benefit them upon graduation.[163] Furthermore, because the test is closely tied to education, it may provide more consistency in court decisions.[164]

The primary beneficiary test also makes it easier for employers to formulate an internship program that complies with the test.[165] The employer knows that it has to make the intern the primary beneficiary of the internship, so it can structure its internship program with that in mind.[166] The primary beneficiary test will likely lead to the creation of more internship programs because it makes it easier for courts to find that the intern was in fact an intern and not an employee.[167] The employer is allowed to receive *some* benefit from the intern's work as long as the intern receives the *primary* benefit.[168] This is different from the DOL Test where employers could not receive *any* immediate advantage from the intern's work.[169] Because the primary beneficiary test gives employers specific guidance on what is required for the student to be classified as an intern, employers can follow the test more easily, which may incentivize employers to create more internship programs.

On the other hand, the educational requirements will make it harder for employers to create internship programs that are *not* connected to an educational program.[170] If the intern is not in an educational program, then the work the intern does may primarily benefit the employer, making it more likely that the intern is an employee.[171] That is a risk that most employers may not be willing to take. Thus, there may be fewer opportunities for individuals who

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162. WELKOWITZ, *supra* note 1, at 2 (stating that the primary beneficiary test will give employers "the confidence to use unpaid interns, connected with an educational program, without fear of liability.").

163. Robert J. Tepper & Matthew P. Holt, *Unpaid Internships: Free Labor or Valuable Learning Experience?*, 2015 B.Y.U. EDUC. & L. J. 323, 325 ("Students see internships as a way to gain much-needed experience, improve job skills, and potentially receive an offer of future employment with a firm or government entity . . . .").

164. WELKOWITZ, *supra* note 1, at 3.

165. *Id.*

166. *Id.* (explaining that the primary beneficiary test will allow "an employer throughout the internship to ensure that the student intern is the primary beneficiary of the training").

167. *Id.* at 4 ("This standard will be much easier for employers to meet . . . .").

168. *Id.* at 5 ("Under *Glatt*, the analysis moves to the *relative* benefit received by the intern in relation to the employer." (alteration in original)).

169. *Id.* ("Under the DOL standard, most unpaid intern programs foundered on [the] requirement that the 'employer that provides the training receive *no immediate advantage* from the activities of the intern.'" (alteration in original)).

170. *Id.* at 2.

171. *Id.* ("Programs that primarily have interns do regular work alongside paid employees without a significant educational component will likely primarily benefit the employer, which points toward an employment relationship . . . .").

want an internship but are not in an educational program, which puts them at a disadvantage compared to students who are in educational programs. This may affect certain fields more than others. For example, those looking to get a job in the entertainment industry may be less likely to find an internship connected with an educational program when compared to those in the communication or psychology fields.[172]

C. The United States Supreme Court Needs to Create a Uniform Test

There are a multitude of different tests applied by various courts to decide this same issue.[173] This creates difficulty for employers who are multijurisdictional companies.[174] Large employers may have interns in offices throughout the country, so the lack of uniformity amongst the circuit courts on the proper test regarding unpaid internships creates problems for these employers when attempting to structure their internship program.[175] They may have interns in one jurisdiction who are classified as interns under the primary beneficiary test, and other interns in a different jurisdiction who are classified as employees because that jurisdiction uses a different test – despite the fact that the interns perform the same duties and are involved in the same internship. This lack of uniformity and predictability may cause employers to turn away from unpaid internships.[176]

The absence of a uniform test also allows employers to take advantage of unpaid interns.[177] Internships are highly coveted in today's tough job market.[178] Employers benefit by using unpaid interns in that they get free labor and the ability to train and observe prospective employees. Employers also know how valuable internships are to students and are therefore in a "position of power" when compared to students.[179] The employers do not need unpaid interns for their business to continue, but interns normally need an internship on their resume to get hired.[180] Because employers have the upper-hand, they sometimes take advantage of unpaid interns by requiring them to perform menial tasks or labeling unpaid workers "interns" to try to avoid paying them minimum wage.[181]

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172. Magaldi & Kolisnyk, *supra* note 161, at 208 ("[F]ields like communications, psychology, social work, and criminology . . . are often more integrated into the curriculum.").

173. Malik, *supra* note 2, at 1186.

174. *Id.*

175. *Id.* at 1209.

176. *Id.* at 1210 ("Without reliable legal standards to determine the legality of unpaid internships, businesses and employers who would otherwise provide opportunities for unpaid internships have a strong incentive to discontinue their programs.").

177. *Id.* at 1211.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.*

A United States Supreme Court decision that creates a uniform test to be applied in unpaid intern cases could help reduce these problems. The primary beneficiary test would be the best test for the Court to adopt in that it could help reduce the number of employers taking advantage of unpaid interns because it would require the employer to make the intern the *primary* beneficiary of the internship. If the intern is only doing menial tasks, like making copies and getting coffee, the intern will not be considered the primary beneficiary and will be required to be paid at least minimum wage as an employee.[182] Thus, adoption of the primary beneficiary test would force the employer to create an internship program where the intern actually learns things and completes tasks that will benefit the intern in his or her future career.

For example, Plaintiffs in *Benjamin v. B&H Education, Inc.* were cosmetologists required to complete a certain number of clinical hours in order to receive a cosmetology license.[183] To satisfy the primary beneficiary test, the program had to teach students cosmetology skills in order for the students to receive the primary benefit of their work; the program would not have qualified if the students were only doing menial tasks not required to pass the state licensing exam. If the court had held that the students were employees, it would have made employers much less likely to continue offering that internship program, and that would have, in turn, made it harder for cosmetology students to get the clinical hours they need. However, by using the primary beneficiary test and concluding that the students were not employees,[184] employers will be more likely to continue offering these types of unpaid internship programs, which will allow more students to obtain their cosmetology license. This is just one example of how the primary beneficiary test benefits interns. The primary beneficiary test would be the best test for the United States Supreme Court to adopt because it has already been adopted by at least four circuits, it provides employers with specific guidance to help them create more internship programs,[185] it requires internship programs to primarily benefit their interns,[186] and it allows for predictability and consistency in court decisions.[187]

On the other hand, the economic realities test, developed by the Court about sixty years ago in *Rutherford*[188] and adopted by the Eighth Circuit,[189] is too vague and unpredictable. It requires the court to look not at "isolated fac-

182. 877 F.3d 1139, 1148 (9th Cir. 2017).

183. *Id.* at 1147.

184. *Id.* at 1148.

185. WELKOWITZ, *supra* note 1, at 3 (explaining that the primary beneficiary test "provide[s] employers with more guidance").

186. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2015).

187. WELKOWITZ, *supra* note 1, at 2 (stating that the primary beneficiary test will give employers "the confidence to use unpaid interns . . . without fear of liability").

188. 331 U.S. 722 (1947).

189. *See, e.g.*, Blair v. Wills, 420 F.3d 823 (8th Cir. 2005); Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 400 (8th Cir. 1983), *aff'd sub nom.* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290 (1985).

tors" but at the work as a whole to see if it "follows the usual path of an employee."[190] This offers little guidance to employers, and thus does not aid them in creating an internship program that complies with the test. It is likely that employers will not know if their program falls within the economic realities test until after the intern completes the internship and files a subsequent lawsuit – because only then can a court examine the internship to see if it followed the path of an employee. This could result in inconsistent court decisions, leaving employers with virtually no guidance regarding how their internship programs should be structured. Employers may not want to take that risk, which may result in employers offering fewer internship opportunities.

Finally, as mentioned by several circuits, the previous DOL Test is too rigid because it is based strictly on the facts of *Portland Terminal*.[191] This makes it hard to apply to other factual situations. It would not be the best test for the United States Supreme Court to adopt, as evidenced by the fact that several circuits and the DOL itself have rejected it.[192]

"The variation in the tests adopted by the different circuits, as well as the fact that one of its own decisions is at the heart of the issue, make it more likely that the [United States] Supreme Court will hear a case involving unpaid interns in the foreseeable future."[193] Regardless of the test the Court adopts, because almost all of the circuits have considered this issue and because there is a circuit split on the correct test to use, the United States Supreme Court needs to create a uniform test for unpaid interns.

VI. CONCLUSION

With its decision in *Benjamin v. B&H Education, Inc.*, the Ninth Circuit joined three other federal circuit courts in rejecting the DOL Test in favor of the primary beneficiary test. The court concluded that in cases involving whether an unpaid intern should be deemed an employee under the FLSA and therefore be entitled to minimum wage, the court must resolve the following question: who is the primary beneficiary of the intern's work – the intern or the employer? According to the Ninth Circuit, if the intern is the primary beneficiary of his or her own work, then he or she is not an employee under the FLSA and is not required to be paid minimum wage.

The effect of this decision has been widespread. The DOL eliminated its former all-or-nothing DOL Test and endorsed the primary beneficiary test less than one month after the Ninth Circuit's decision in *Benjamin*. The DOL's adoption of the primary beneficiary test undoubtedly clarifies the area of unpaid interns under the FLSA and makes it easier for employers to create intern-

190. *Rutherford Food Corp.*, 331 U.S. at 729–30.

191. *See, e.g.*, *Glatt*, 811 F.3d at 536; Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1145 (9th Cir. 2017).

192. *See supra* Section III.B & C.

193. WELKOWITZ, *supra* note 1, at 4.

ship programs that comply with the test. It also helps employers predict liability and determine what is needed to avoid liability under the FLSA. Confusion and uncertainty still remain, however, because other circuits have applied different tests and no circuit is strictly bound by Fact Sheet #71. To protect interns from exploitation and to increase the number of internship programs available, the United States Supreme Court should create a clear test for unpaid interns.