The Conflicting Judicial Interpretations of “Employee” under the Fair Labor Standards Act: Precluding Employee Status to Student Interns and its Effect on Employer Exploitation

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INTRODUCTION

As of 1992, nearly 50 percent of the student population has endured the benefits and exploits of unpaid student internships.\(^1\) Indeed, internships are a rite of passage in the burgeoning professional’s development.\(^2\) Many students rely on them as a necessary means to gain experience in corporate settings.\(^3\) Moreover, the recent decrease in available employment opportunities has served as an impetus for many graduating students to accept unpaid internships in hopes of retaining employment at its end.\(^4\) However, with the recession unpaid internships in the private sector have become more prevalent.\(^5\) As a result, the Wage and Hour Division of the Department of Labor (hereinafter “WHD”) has increased investigations upon interns’ reports of employers’ exploitation of unpaid internships.\(^6\)

Congress is silent to the legality of unpaid student internships\(^7\) and has only spoken to the student learner, a provisional employee who may be paid subminimum wages under the learner exemption of 29 U.S.C. § 214 of the Fair Labor Standards Act (hereinafter “FLSA”).\(^8\) Given

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3 Greenhouse, The Unpaid Intern, supra note 1.
4 Id.
5 Id.
6 Id.
8 See 29 U.S.C. § 214(b)(1) (2006). Section 214(b) states that:

The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the
Congressional silence as to when a trainee or intern qualifies as an employee, the determination of intern employment status falls on the Department of Labor (hereinafter “DOL”). If the DOL investigates and concludes there were employer violations under the FLSA, then it will usually attempt dispute resolution. However, if no resolution is attainable, the affected party must file a claim in a federal district court.

The United States Supreme Court in *Walling v. Portland Terminal Co.* held that the breadth of the FLSA did not intend to include in its definition of “employee” those individuals who “serve only his interest” and not the interest of his employer. The *Walling* Court heeded caution that its holding should not be construed to allow employer “evasion of the law,” even though the court ruled in favor of railroad employers and against prospective yard brakemen trainees. In so reasoning, the Court stated that Congress did not intend to “sweep . . . each person[], without promise or expectation of compensation” under the protection of the FLSA. Thus, *Walling* precluded minimum wage and overtime protection to trainees and student interns, unless they were considered student-employees. Otherwise, a student or trainee may be eligible for employee status when viewed in the totality of the “so-called ‘Walling factors.’”

employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 206 of this title or not less than $1.60 an hour, whichever is the higher, of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

*Id.*


12 *Id.* at 151-53.

13 *Id.*

14 *Id.*

15 *Summa v. Hofstra University*, 715 F. Supp. 2d 378, 389 (E.D.N.Y. 2010); *See also* Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993). *Walling* set out its factors in its dicta in a rather unwieldy opinion. *Walling*, 330 U.S. at 152-53. However, the Court in *Summa* clearly listed the “so called ‘Walling factors’” and clarified that the WHD adopted its guidelines from the factors. *Summa*, 715 F. Supp. 2d at 389. Thus, the Walling factors and the WHD Guidelines are nearly identical. *Id.* The factors are as follows:
The WHD has filled in the statutory gaps by issuing multiple interpretive guidelines applying the six “Walling factors” in its determination of a trainee or intern’s employment status. In truth, the WHD guidelines are merely an adaptation of the Walling factors. Thus, the WHD guidelines and the Walling factors are one and the same. The WHD’s language states that all six factors must be shown in proving that a trainee or intern is not an employee. The courts have consistently rejected the WHD guidelines and its implementation of them because they are a “rigid” application of the Walling factors insofar as Walling did not intend for the factors to be treated as elements.

Although the courts all agree that Congress did not intend for student interns to be included within the breadth of the FLSA absent a contractual obligation, the federal courts have applied conflicting interpretations of “employee” in light of the WHD’s guidelines. The courts have created three different tests: (1) an “immediate” or “primary benefit” test, in which the court analyzes whether the intern or employer received the benefit without regard to all of the Walling

(1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; 
(2) the training is for the benefit of the trainees or students; 
(3) the trainees or students do not displace regular employees, but work under their close observation; 
(4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded; 
(5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and 
(6) the employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.

Id. See also 1996 Opinion Letter, supra note 9.
17 Summa, 715 F. Supp. 2d at 389.
18 Id.
19 1996 Opinion Letter, supra note 9; Fact Sheet, supra note 16.
20 Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010).
22 Summa, 715 F. Supp. 2d at 389; See also Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993).
factors, only whether the intern conferred an “immediate advantage” or benefit to the
employer;\(^{23}\) (2) the “all-or-nothing” test, in which all of the Walling factors must be met prior to
meeting employee status,\(^{24}\) and; (3) the totality of circumstances test, in which the court
analyzes the Walling factors in its totality in applying employee status.\(^{25}\)

To this day, Walling is still good law. However, the factors set forth by the Walling Court
are in the dicta.\(^{26}\) Thus, it is unclear as to whether these factors are elements or considerations to
be viewed in totality. As a result, the federal courts are split in interpreting who is an employee
under the statute.\(^{27}\) Therefore, the employment rights of the student intern are unclear, at best,\(^{28}\)
given the persistent disagreement between the courts in determining the definition of an
“employee” in such a context.

The judiciary has broadly precluded interns and trainees employee status under the FLSA,
unless either a contractual obligation is shown\(^{29}\) or all of the Walling factors are substantiated.\(^{30}\)
With regard to the latter, the courts have incorrectly applied the rule of statutory construction as
it pertains to the FLSA. Rather than broadly interpreting whether one is an employee and
narrowly construing exemptions to the rule, the courts have seemed to make the exemption the
rule when analyzing student interns and trainees. As a result, frustration Walling’s subtle policy
of preventing employer exploitation or “evasion of the law” may occur.\(^{31}\) However, without a

\(^{25}\) Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993).
\(^{26}\) Walling, 330 U.S. at 152-53.
\(^{27}\) Summa, 715 F. Supp. 2d at 389; Contra Reich, 992 F. 2d at1027.
\(^{28}\) Id.
\(^{30}\) Walling, 330 U.S. at 151-53.
\(^{31}\) Id. at 153.
DOL federal regulation in place, the WHD’s pro-labor efforts to prosecute employer abuse\textsuperscript{32} are frustrated, as well, because of the judiciary’s general preclusion of employment status as to trainees and interns. A possible solution to this cyclical conflict is for the DOL to promulgate a federal regulation with the force and effect of law.

This comment addresses the judicial misinterpretation of the FLSA’s breadth in construing employment status and its subsequent effect on trainees and interns in the workplace. Part I describes the history of the FLSA and the broad interpretation of employee status under the FLSA. Part II explicates the WHD’s administrative authority to fill in statutory gaps in the FLSA left by Congressional silence. The WHD issued an Opinion Letter in 1975 addressing only trainees and an Opinion Letter in 1996 addressing both trainees and student interns. The letters were issued for the purpose of explaining when a student or trainee is an employee, given the Congressional silence on the matters. Finally, the authority of the opinion letters as rules or interpretive guidelines are determined. Part III delves into the employment status of the trainee or intern, and analyzes the judicial tests in applying the “Walling factors” to employment status of a trainee or intern, which include: (1) “immediate” or “primary benefit” test; (2) all-or-nothing test; and (3) the totality of circumstances test. Then, Part IV informs on the current status of the increased WHD investigations into employer abuse of unpaid interns in the workplace. Part V postulates whether the judicial interpretation of “employee” is resulting in a broad construction of exempted classes of trainees and interns and preventing a finding of employer “evasion of the law.” Part VI proposes that the DOL promulgates a federal regulation in order for the

\textsuperscript{32} Steven Greenhouse, \textit{As the Number of Unpaid Internships Rises, Many Regulators are Concerned that the Practice is Illegal}, 130 N.Y. TIMES 17, Apr. 6, 2010, available at http://tech.mit.edu/V130/N17/internships.html (last visited Nov. 12, 2011). (hereinafter \textit{“As the Number of Internships Rises”}).
continuous conflict to cease. Finally, the comment concludes with optimism that the ever-changing arena of employment law will soon reach a resolution for the afflicted student intern.

I. THE FAIR LABOR STANDARDS ACT

Generally, the FLSA has the “broadest definition [of an employee] that has ever been included in any one Act.” Any exempted classes to the Act’s protections are to be “narrowly construed against the employers seeking to assert them,” given the remedial nature of the FLSA. The FLSA exempts numerous classes of individuals from coverage as employees, including children, undocumented workers, and independent contractors. Ever since its enactment in 1938 Congress has since repealed various exempted classes of employees under the FLSA.

The implementation of the FLSA was among many of the economic incentives initiated during the New Deal. The fundamental purposes of the FLSA were to effectively eliminate oppressive child labor, establish a minimum hourly wage, and create a maximum hourly work week for employees. Moreover, the FLSA was created to increase substandard wages and living conditions during the Great Depression. The U.S. Supreme Court has interpreted the legislative purposes of the Act to ensure a “fair day’s pay for a fair day’s work” and “to aid the unprotected, the unorganized, and the lowest paid of the nation's working population, that is,

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35 29 U.S.C. § 203(1) (2006). The FLSA precludes with certain guidelines, for example: employment of children between the ages of 16 and 17 is lawful except in hazardous occupations as delineated by Secretary of Labor. Id. however, state statutes do allow some employability. PEGGIE R. SMITH, ET AL., PRINCIPLES OF EMPLOYMENT LAW, 12-13 (West 2009).
37 Id. at 11-12
40 Id.
42 Id.
those employees who lack bargaining power to secure for themselves a minimum subsistence wage."\textsuperscript{43} Thus, the Act is to be construed as a remedial statute for purposes of improving labor interests,\textsuperscript{44} and should be construed liberally.\textsuperscript{45}

\textit{a. The Broad Interpretation of “Employee” under the FLSA}

Employee is defined as “any individual employed by an employer.”\textsuperscript{46} An employer is includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.”\textsuperscript{47} The FLSA defines “employ” as “to suffer or permit to work.”\textsuperscript{48}

The Supreme Court has interpreted “employee” broadly under the FLSA. In 1945, the Court in \textit{U.S. v. Rossenwasser}\textsuperscript{49} interpreted the plain language of the statute as to include “each” and “any” individual as an “employee” unless specifically exempted.\textsuperscript{50} The Court supported its interpretation of the FLSA in referencing Senator Black’s comment on the Senate floor during the first session of the seventy-fifth Congress:\textsuperscript{51} he had stated that the status of “employee” had “the broadest definition that has ever been included in any one Act.”\textsuperscript{52}

In 1947, the Court in \textit{Rutherford Food Corp. v. McComb}\textsuperscript{53} reasoned that:

The definition of ‘employ’ is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, s 12. We have decided that it is not so broad as to include those ‘who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.’ In the same opinion, however, we pointed out that ‘This Act contains its own definitions, comprehensive enough to require its application to

\textsuperscript{43} Id.
\textsuperscript{44} Id. at 278.
\textsuperscript{45} Id.
\textsuperscript{46} 29 U.S.C. § 203(e).
\textsuperscript{47} Id. § 203(d).
\textsuperscript{48} Id. § 203(g).
\textsuperscript{49} 323 U.S. 360, 363 (1945).
\textsuperscript{50} U.S. v. Rossenwasser, 323 U.S. 360, 363 (1945) (citing Sen. Rep. No. 884, p. 6 (75th Cong. 1st Sess. )).
\textsuperscript{51} Rossenwasser, 323 U.S. at 363.
\textsuperscript{52} 81 Cong. Rec. 7657.
\textsuperscript{53} 331 U.S. 722 (1947).
many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.\textsuperscript{54}

Thus, the \textit{Rutherford} Court concluded that Congressional intent purported for a broad interpretation of “employee” under the FLSA in order to prevent oppressive child, and analogously, adult labor.\textsuperscript{55} The \textit{Rutherford} Court propounded that the broad interpretation of the FLSA is not only predicated on the plain language,\textsuperscript{56} but also on the policy reasons of preventing oppressive labor.\textsuperscript{57} This has remained good law as the District Court of Oregon in \textit{Nash v. Resources, Inc.} reiterated the breadth of the FLSA in 1997.\textsuperscript{58}

II. \textsc{The WHD’s Gap Filling Provisions: The Guidelines}

Congress has neither spoken to unpaid internships,\textsuperscript{59} nor to the compensation of minimum wages to student learners.\textsuperscript{60} Thus, “if Congress has explicitly left a gap for the agency to fill there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”\textsuperscript{61}

Federal courts generally give great deference to the Administrator of the WHD (hereinafter “Administrator”) in interpreting the regulations within the Act.\textsuperscript{62} Courts defer to agency discretion in statutory construction because they “constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance.”\textsuperscript{63} The U.S. Supreme Court in

\textsuperscript{54} \textit{Id.} at 728-29.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Rossenwasser}, 323 U.S. at 363.
\textsuperscript{57} \textit{Rutherford}, 331 U.S. 728-29.
\textsuperscript{58} 982 F. Supp 1487, 1433 (D. Or. 1997).
\textsuperscript{59} Curiale, \textit{supra} note 7, at 1548-49.
\textsuperscript{62} Vela v. City of Houston, 276 F. 3d 659, 667 (5th Cir. 2001) (relying on \textit{Chevron}, 467 U.S. at 844)).
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. set out the seminal, two-step test for judicial review of an agency’s statutory construction.  

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Notably, Chevron’s “reasonableness” standard results in deference to the agency’s discretion if there is Congressional silence or ambiguity in the statute. The Chevron Court reasoned that silence or ambiguity does not preclude agency decisionmaking. Hence, federal courts will defer to DOL regulations if “they are based on a permissible construction of the statute.” Generally, the regulations will be given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

a. The 1975 Opinion Letter: Trainees Only

In order to clarify the employment status within internships, the WHD issued a series of opinion letters. In 1975, the DOL adopted its guidelines in an opinion letter (hereinafter “1975 Opinion Letter”) regarding the employment status of trainees only, pursuant to the seminal case

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64 See Chevron, 467 U.S. at 842-43.  
65 Id.  
67 Chevron, 467 U.S. at 843.  
68 Vela v. City of Houston, 276 F. 3d 659, 667 (5th Cir. 2001) (citing Chevron, 467 U.S. at 842-43)).  
69 Chevron, 467 U.S. at 843.  
The WHD enumerated six factors in determining the employment status of trainees:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his/her operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and,
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

Absent plain language mandating otherwise from the WHD, the federal courts have either interpreted the guidelines to be analyzed in their totality or as requiring all of them to be met prior to meeting employee eligibility.

b. The 1996 Opinion Letter: Trainees or Student Interns

The WHD did not address the employment status of student interns until 1996. Deputy Assistant Administrator Daniel F. Sweeney of the WHD signed and issued the opinion letter (hereinafter “1996 Opinion Letter”) which stated:

If all of the following criteria are met, the trainees or students are not employees within the meaning of the FLSA: (1). The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school. (2). The training is for the benefit of the trainees or students. (3). The trainees or students do not displace regular employees, but work under their close observation. (4). The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded. (5). The

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71 Donovan v. Am. Airlines, Inc., 686 F. 2d 267, 272, FN 7 (5th Cir. 1982); Walling, 330 U.S. at 151.
73 Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993); But see Donovan v. Am. Airlines, Inc., 686 F. 2d 267, 273 (5th Cir. 1982).
75 Id.
trainees or students are not necessarily entitled to a job at the conclusion of the training period. (6). The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.76

If all the factors are met, then an employment relationship does not exist between the trainee or student and the employer.77 Thus, under the WHD’s standards a presumption exists that an individual is an employee, unless otherwise proven. That is, it is the employer’s burden to prove whether employment status does not apply to a given trainee or student intern.78 The WHD issued a Fact Sheet in 2010 further explaining the internship guidelines set out in the 1996 Opinion Letter.79 However, the 2010 Fact Sheet was limited to internships in the private sector.80 In requiring that all six factors be met to preclude employment status, the WHD advised that “the determination of whether an internship or training program meets this exclusion depends upon all the facts and circumstances of such program.”81 As such, some courts have

77 Id.
79 Fact Sheet, supra note 16. The WHD advises that if the following six factors are met then “an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern.” Id. The six factors are as follows:

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.

Id.
80 Id.
81 Id.
interpreted the DOL’s guidance as necessitating a totality of the circumstances approach in analyzing the guidelines, rather than viewing the factors as elements to a claim. 82

Furthermore, the Fact Sheet offered a detailed explanation of the factors when analyzed. 83 For example, the fact that training is similar to that given in a vocational school does not necessarily preclude employment status, unless the training is “structured around a classroom or academic experience as opposed to the employer’s actual operations.” 84 Moreover, if the intern does not shadow the employer, but rather “receives the same level of supervision as the employer’s regular workforce, this would suggest an employment relationship, rather than training.” 85

c. WHD’s Opinion Letters as Interpretive Guidelines

Generally, interpretations found in opinion letters are not granted Chevron-style deference because they are formulated without formal or informal rulemaking or adjudication procedures. 86 Opinion letters are issued when the Administrator determines that clarification or explanation of the statute in question is necessary. 87 Administrator’s opinions are not given “controlling” weight, but rather, given persuasive authority because of the expertise of the head of the agency. 88 In lieu of judicial deference, opinion letters may only be relied on as rulings for purposes of claiming a “good faith reliance” on the Portal-to-Portal Act. 89 Thus, as the Supreme Court in Skidmore aptly noted, “courts and litigants may properly resort [to the Administrator

82 Reich v. Fire Protection Dist., 992 F. 2d 1023, 1026-27 (10th Cir. 1993).
83 Fact Sheet, supra note 16.
84 Id.
85 Fact Sheet, supra note 16.
87 Wage & Hour Div., Dep’t of Labor, Rulings and Interpretations, http://www.dol.gov/whd/opinion/opinion.htm (last visited Nov. 17).
89 Id. The Portal-to-Portal Act states that “no employer shall be subject to any liability or punishment for . . . failure to pay minimum wages or overtime compensation” if the employer can establish that he or she relied on good faith upon the administrative ruling of an agency regulation. 29 U.S.C. § 259(a) (2006). This defense is a bar to the employee’s suit. Id.
Therefore, the Opinion Letters are merely interpretive guidelines and do not control the judiciary in its decisionmaking process.

III. THE EMPLOYMENT STATUS OF TRAINEES OR STUDENTS: DIFFERENT JUDICIAL INTERPRETATIONS AMONG THE FEDERAL DISTRICT COURTS

There is a scarcity of case law speaking to employment rights of student interns, directly. The FLSA “provides little guidance” in the determination of a trainee’s employment status. Nonetheless, there is ample case law speaking to trainees, whom have been interpreted in the same vein as students. The U.S. Supreme Court in Walling set out multiple factors in assessing the employment status of a trainee, which created the foundation for future federal jurisprudence and the WHD guidelines. The majority of federal courts have generally held that a trainee is not an employee unless there is an “immediate benefit” or “immediate advantage” or “primary benefit” conferred upon the employer, while considering the “Walling factors” in the totality. Those jurisdictions embracing the “primary benefit” tests do not evaluate the WHD guidelines. Rather, they reject the WHD guidelines and, instead, look to Walling proper. However, a small minority of courts have split in considering the Walling factors in one of two ways: (1) whether all the factors or none of them have been met, or the “all-or-nothing” test or (2) the totality of the circumstances test.

The seminal case of Walling provided multiple factors for determining whether a trainee is an employee. The WHD and courts applied the factors set out in Walling as a basis for their

90 Id.
91 Reich v. Fire Protection Dist. 992 F. 2d 1023, 1025 (10th Cir. 1993).
93 Id. at 153.
95 Walling, 330 U.S. at 151-53.
respective interpretations of employment status of interns and trainees. In 1947, the Walling Court ruled on the issue as to whether prospective yard brakemen were simply “trainees” or “employees” under the Act. Although Walling ruled that prospective yard brakemen were trainees because they required supervision and did not displace established employees, the Court based much of its reasoning on the relevant learner exemption governing student-learners. The Court interpreted the learner exemption to:

[P]lainly mean[] that employers who hire beginners, learners, or handicapped persons, expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum wage, unless a permit not to pay such minimum has been obtained from the Administrator. On the other hand, the section carries no implication that all instructors must either get a permit or pay minimum wages to all learners; the section only relates to learners who are in ‘employment.’

Thus, Walling created three classes of trainees or interns: (1) those who must be compensated with minimum wage; (2) those who may be paid subminimum wages; and (3) those who need not be paid at all. In Walling, respondent railroad company offered a seven to eight-day training course for the trainees. The trainees first observed the activities and then the employers were required to closely observe the trainees. None of the trainees displaced the established employees’ duties. Most importantly, the unchallenged finding that the employers received “no immediate advantage” from the trainees was a prominent factor in determining that

98 Walling, 330 U.S. at 151-52.
99 Id.
100 Id.
101 Id. at 149-50.
102 Id.
103 Id.
the yard brakemen were trainees, not employees.\textsuperscript{104} Basically, the Court reasoned that the railway yardmen were trainees because they “work[ed] for their own advantage on the premises of another [and therefore were] not ‘suffered or permitted to work.’”\textsuperscript{105} Thus, if the benefit of the duties flows to the employer, then the individual is defined as an employee.\textsuperscript{106} However, if the benefits flow to the individual, then the individual in question is a trainee.\textsuperscript{107}

The Court noted that the DOL promulgated the learner exemption’s subminimum wages rule only for student learners who are employed.\textsuperscript{108} Moreover, Congress had not intended “to sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.”\textsuperscript{109} The Court reasoned that if it were otherwise intended, then all students in schools would need to be paid standard minimum wages under this exemption.\textsuperscript{110} However, the Court mentioned in its holding that employer exploitation, or “evasion of the law,” was a necessary policy concern that would have to be carefully evaluated in future factual settings determining trainee or student employment status.\textsuperscript{111}

Regarding employer “evasion of the law,” the Court stated:

Accepting the unchallenged findings here that the railroads receive no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the Act's meaning. \textit{We have not ignored the argument that such a holding may open up a way for evasion of the law.} But there are neither findings nor charges \textit{here} that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law.\textsuperscript{112}

\textsuperscript{104} \textit{Walling}, 330 U.S. at 153.  
\textsuperscript{105} \textit{Id.} at 152.  
\textsuperscript{106} \textit{Id.}  
\textsuperscript{107} \textit{Id.}  
\textsuperscript{108} \textit{Id.}  
\textsuperscript{109} \textit{Walling}, 330 U.S. at 152.  
\textsuperscript{110} \textit{Id.} at 153.  
\textsuperscript{111} \textit{Id.}  
\textsuperscript{112} \textit{Id.} (emphasis added).
The Court acknowledged the possibility that this holding could result in future precedent granting leeway to employers under the Court’s reasoning. Particularly, the Court’s interpretation of the FLSA’s breadth of “employee” was a factor in the Court’s pronouncement.\(^{113}\)

The “so-called ‘Walling factors’”\(^{114}\) have become prominent influences in future precedent and in the creation of the WHD’s Guidelines.\(^ {115}\) Even though Walling is the basis for the WHD guidelines and the Opinion Letters, there is no set test in determining employment status of a trainee or intern as per the courts.\(^ {116}\) Thus, in light of this judicial tension, three “tests” have arisen: (1) the “immediate” or “primary benefit” test without regard to the WHD guidelines; (2) an “all-or-nothing” consideration of employee status pursuant to the WHD guidelines,\(^ {117}\) and; (3) a totality of the circumstances analysis evaluating the WHD guidelines, or the Walling factors.

\[a. \text{ No WHD Guidelines, Only the “Immediate” or “Primary Benefit” Test} \]

In 1964, the Fourth Circuit distinguished Walling from the case-at-bar in Wirtz v. Wardlaw where two underpaid young women assisted an insurance salesman in his place of business.\(^ {118}\) The Court granted employment protection on the basis that the employers were benefitting from the labor of the young women.\(^ {119}\) Unlike Walling, “where [the] workers[’]

\[^{113}\text{Id. at 152.}\]
\[^{114}\text{Summa v. Hofstra University, 715 F. Supp. 2d 378, 389 (E.D.N.Y. 2010); See also Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993).}\]
\[^{115}\text{Id.}\]
\[^{116}\text{Solis v. Laurelbrook Sanitarium and School Inc. 642 F. 3d 518, 529 (6th Cir. 2011).}\]
\[^{117}\text{Donovan v. Am. Airlines, Inc., 686 F. 2d 267, 272-73 (5th Cir. 1982).}\]
\[^{118}\text{339 F. 2d 785, 787 (4th Cir. 1964)}\]
\[^{119}\text{Wardlaw, 339 F. 2d at 787.}\]
efforts served their own interests exclusively and did not expedite and in fact impeded the business[,]” the young women in Wardlaw were assisting in their employer’s business.120

Wardlaw has been interpreted to have created its own version of the Walling factors.121 The Court in Donovan v. American Airlines, Inc. commented that the Wardlaw Court had “formulated three criteria: (1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee's work.”122 Wardlaw is one of the few cases to have a set enumerated test. However, Wardlaw remained faithful to the application of the “Walling factors” in applying the factors in their totality and determining, ultimately, whether the benefit weighed more greatly in favor to the employer or trainee.

One year after the release of the 1975 Opinion Letter regarding trainees, the District Court of Pennsylvania in Bailey v. Pilots Ass’n for Bay and River Delaware determined that pilot apprentices were employees, even though they did not anticipate compensation at the outset of the apprenticeship.123 Akin to Wardlaw, the Bailey Court analyzed the Walling factors in finding whether, ultimately, the trainee served an “immediate benefit” to the employer.124 The Court primarily relied on the findings that the pilots were called to duty during their vacation to maintain the vessel and many of the duties were not part of the apprenticeship.125 Thus, the pilots were serving an “immediate benefit” to the defendant.126

However, in 1981 the Sixth Circuit Court in Marshall v. Baptist Hospital, Inc. handed down an unusual holding on the basis of both the FLSA and the Portal-to-Portal Act. The Court

120 Id. at 788.
121 Am. Airlines, 686 F. 2d at 271-72 (interpreting Wardlaw, 339 F. 2d at 785).
122 Id.
124 Id.
125 Id.
126 Id.
affirmed the lower court’s findings that the x-ray technicians were, in fact, employees because they displaced other employees, conferred benefits upon the employers, and the employers did not supervise their activity. 127 Rather, other x-ray students in the vocational program trained the petitioners. 128 Nonetheless, the Court reversed on the grounds that the appellant-hospital relied on good faith on the WHD’s administrative rulings of the Portal-to-Portal Act in failing to compensate the appellees. 129

The Marshall court reversed on the grounds of the Portal-to-Portal Act citing extensively the Congressional purposes of said Act:

Congress found in 1947 that the federal courts were interpreting the minimum wage law “in disregard of long established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation;” that such interpretations “created . . . continuous uncertainty on the part of . . . both employer and employee;” and that employees were receiving “windfall payments including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in the agreed rates of pay;” and that individuals could potentially receive payment “for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged[.].” 130

Hence, even though there were extensive findings that the x-ray technicians were serving an immediate benefit to the employer and acting exactly as employees—displacing other employees and acting without supervision—the court ruled on the grounds for the purposes of the Portal-to-Portal Act, whether a valid contract was met, and whether good faith reliance on a valid ruling existed. 131

128 Id.
129 Id. at 236-37 (interpreting 29 U.S.C. § 259 (2006)).
130 Id. at 237-38 (citing 29 U.S.C. § 251(a) (2006)).
131 Id.
In 1989, the Fourth Circuit in *McLaughlin v. Ensley* created its own version of the “Walling factors” and ruled in favor of the trainees in finding employment status. In fact, the *McLaughlin* Court disavowed the six-part test set out by the WHD and instead relied on prior precedent ruled on by the courts, such as *Wirtz v. Wardlaw*. The Fourth Circuit stated that “this court has concluded that the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor.” The Court granted employment protection because the employer was the primary beneficiary of the labor. In *McLaughlin*, the employers benefitted from the workers’ weeklong orientation duties in loading, unloading trucks, and delivering supplies. The Court reasoned that the workers were learning simple tasks in an abundant amount of time.

Furthermore, exemption from the overtime and wage protection of the Act would only apply if the workers required more training in more complex duties, such as “outside salesmanship.”

The most recent case heard on the issue was decided on April 28, 2011 in the Sixth Circuit. The Secretary of Labor brought a permanent action against a school for allegations of illegal child labor against a school with a vocational program with a “50-bed intermediate care nursing home” (Sanitarium) for the purposes of training students with their Certified Nursing

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132 877 F. 2d 1207, 1209 (4th Cir. 1989).
133 *McLaughlin*, 877 F. 2d at 1210, FN 2 (citing *Wardlaw*, 339 F. 2d at 785). The Court also relied on another Fourth Circuit case called *Isaacson v. Penn Community Services, Inc.*, which set forth the “primary beneficiary” test holding that in determining the employment status of a trainee the primary issue is whether the trainee or employer is the primary beneficiary of the labor. 450 F. 2d 1306, 1308 (4th Cir. 1971).
134 *McLaughlin*, 877 F. 2d at 1209.
135 877 F. 2d at 1209.
136 *Id.* at 1209.
137 *Id.*
138 *Id.* at 1210. Notably, the Court declined to rely on the WHD opinion letter delineating criterion in determining when trainees should be classified as employees and instead relied on case precedent. See *Id.* at 1210, FN 2.
139 See generally *Solis v. Laurelbrook Sanitarium and School Inc.* 642 F. 3d 518, 529 (6th Cir. 2011).
Assistant (CNA) license.\textsuperscript{140} The lower court’s finding of facts, to which the Court of Appeals upheld, revealed that:

The Sanitarium is an integral part of Laurelbrook’s vocational training program. As part of their training, students are assigned to the Sanitarium’s kitchen and housekeeping departments. Students sixteen and older may participate in the CNA program, which is approved by the State of Tennessee licensing authority. Students who receive their CNA certification may then be assigned to the Sanitarium to provide medical assistance to patients. Students assist patients in relation to the students’ training and in line with Laurelbrook’s guiding philosophy of education. Laurelbrook receives Medicaid funding for the care it provides at the Sanitarium.\textsuperscript{141}

Despite the facts that the students assisted in nursing, that the school benefitted from the Sanitarium program, and that the school received Medicaid funding, the Court found that the students were not qualified for employment protection.\textsuperscript{142} Rather, the court found that the teachers were burdened by the duties of supervising the students with nursing licenses, that there was no displacement of employees, and finally, that the students did not expect employment at the end of the training.\textsuperscript{143} Instead, the court found that the student interns gained the primary benefit of the experience because they learned the value of caring for the sick and the infirm.\textsuperscript{144}

The Solis Court readily endorsed the primary benefit test set out by previous case law and expressly rejected the WHD guidelines.\textsuperscript{145} The Court stated that the WHD’s six test was a “poor method for determining employee status in a training or educational setting. For starters, it is overly rigid and inconsistent with a totality-of-the-circumstances approach, where no one factor (or the absence of one factor) controls.”\textsuperscript{146} The court reasoned that the guidelines were not

\begin{footnotes}
\item[140] Id. at 520.
\item[141] Id.
\item[142] Id. 530-31.
\item[143] Id.
\item[144] Id. at 531.
\item[145] 642 F. 3d 518, 529 (6th Cir. 2011).
\item[146] Solis, 642 F. 3d at 525.
\end{footnotes}
entitled to any deference at all and, instead, followed the rationale of previous case precedent that either rejected or struck a balance between the “Walling factors” and the WHD guidelines. The Court in Solis reasoned that the WHD’s guidelines were internally inconsistent because their all-or-nothing approach was incongruent with previous interpretations “endorsing a flexible approach.” Of course, the court found the WHD’s guidelines to be inconsistent with Walling holding in that Walling espoused a flexible approach to viewing the factors of employment, as well. However, the Court explained that Walling applied a “relative benefits” approach in which the court must analyze the “relative benefits” of the work completed by the purported employee. That is, the putative employee must demonstrate that he or she has conferred the primary benefit, or relative benefit, or the work completed prior to receiving employment status.

b. The All-or-Nothing Test

The “all or nothing” test espouses the view that, unless all of the Walling factors are met, then the trainee or intern is not an employee under the FLSA. The “all or nothing” approach is the minority view among the federal courts. Nonetheless, the Fifth Circuit Court’s holding in Donovan v. American Airlines, Inc. is instructive as to how some courts may determine employment status of student interns.

In 1982, the Fifth Circuit Court in American Airlines followed the 1975 WHD opinion letter and found that flight attendant trainees were not employees for purposes of the FLSA. The court analyzed both the benefit and the WHD guidelines in determining the employment

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147 Id. at 525-26.
148 Id.
149 Id.
150 Id. at 526 (citing Isaacson v. Penn Cmty. Servs., Inc., 450 F. 2d 1306, 1309 (4th Cir. 1971).
151 Id.
153 686 F. 2d 267, 272-73.
154 Id.
status of the trainees.\textsuperscript{155} The Court found trainee status because the trainees did not displace established employees of work, the trainees were not given compensation, and the trainees were not promised employment at the conclusion of the training.\textsuperscript{156} Moreover, the employers did not receive an “immediate benefit” from the trainees.\textsuperscript{157} Rather, the Court reasoned that the trainees derived more of a benefit from the training.\textsuperscript{158}

c. The Totality of Circumstances Test

However, in 1993, the Tenth Circuit Court in \textit{Reich v. Parker Fire Protection District} rejected an “all or nothing” interpretation of the 1975 Opinion Letter and instead employed a totality of circumstances approach in finding that plaintiffs-firefighter trainees were not employees.\textsuperscript{159} After assessing each of the six factors in the totality of circumstances, the Court determined that the only one factor—the expectation of employment—yielded any finding of employment status.\textsuperscript{160}

The Court noted that the creation of the six factor test set out by the WHD was influenced by the reasoning of the \textit{Walling} Court.\textsuperscript{161} Furthermore, other case precedent had formulated similar tests identifying the factors of \textit{Walling}.\textsuperscript{162} However, the \textit{Reich} Court reasoned that no language in previous Administrator decisions or Wage and Hour opinions had ever denoted that all factors must be met prior to gaining employment status.\textsuperscript{163} Rather, the Court asserted that the DOL’s six-factor test and \textit{Walling}’s holding were meant to be viewed in the totality of the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{155} \textit{Id.} at 272.
  \item \textsuperscript{156} \textit{Id.} at 273.
  \item \textsuperscript{157} \textit{Id.}
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027-28 (10th Cir. 1993).
  \item \textsuperscript{160} \textit{Id.} at 1029.
  \item \textsuperscript{161} \textit{Id.} at 1026.
  \item \textsuperscript{162} \textit{Id.} (citing to McLaughlin v. Ensley, 877 F. 2d 1207, 1209 (4th Cir. 1989); Wirtz v. Wardlaw, 339 F. 2d 785, 787-88 (4th Cir. 1964); Bailey v. Pilot’s Ass’n for the Bay & River Delaware, 406 F. Supp. 1302, 1306 (E.D. Pa. 1976).
  \item \textsuperscript{163} \textit{Reich}, 992 F. 2d at 1027.
\end{itemize}
\end{footnotesize}
circumstances. In support of this assertion, the Court pointed out to the agency’s language, which stated that “whether trainees are employees . . . will depend upon all of the circumstances surrounding their activities on the premises of the employer.”

In 2010, the Northern District of California in *Harris v. Vector Marketing Corp.* followed the reasoning of the *Reich* Court. Primarily, the *Harris* court based its reasoning to certify a collective action against an employer for back pay in interpreting the DOL’s guidelines in its totality, not “strictly or rigidly” in determining whether salespeople were “employees.” The Court viewed the totality of circumstances with analysis of “the economic realities of the relationship between the alleged employer and the trainees” for the benefit of the parties. Furthermore, the Court echoed the *Reich* Court’s rationale and noted that *Walling* did not mandate an “all or nothing approach.”

The Court analyzed the distinction between whether the trainee site is to the primary benefit of the employer or to the trainee. As a basis for support, the Court highlights that the WHD takes the position that the trainee benefit from the training site, whereas certain courts have argued otherwise. Therefore, the Court concluded that the relationship of benefits between employer and worker in training sites was inconclusive because of the disparity of opinions among the WHD and courts. Hence, the Court deferred to the six-factor guidelines.

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164 *Id.*
165 *Id.* (citing to the Wage & Hour Manual (BNA) 91:416).
166 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010).
167 *Harris*, 753 F. Supp. 2d at 1006.
168 *Id.*
169 *Id.*
170 *Id.* at 272.
171 *Id.*
172 *Id.* at 272, FN 5 (citing to Bailey v. Pilots Ass’n for the Bay & River Delaware, 406 F. Supp. 1302 (E.D. Pa. 1976) (stating that trainees are a “primary benefit” to the employer)); *Contrast* Wage & Hour Administrator’s Criteria, Wage & Hour Manual (BNA) 91:416 (1975) (stating that “training is ‘for the benefit of the trainees’”).
set out by the WHD and found that all the factors were met in precluding employment status to the airline trainees.  

The strain in judicial interpretation has only worsened with the release of more policies and rulings by the WHD. How the courts may rule in the future is speculative. However, the courts seem resistant to adapting its interpretations to the needs of the potential employees because of the *stare decisis* power of Walling. Meanwhile, amidst the conflict, the DOL has increased its policies and investigations of employers in response to their constituencies’ needs.

IV. **INTERNSHIPS: AN INCREASE IN INVESTIGATIONS AND EMPLOYER EXPLOITATION**

Internships are a common experience for students while in school or upon graduation. Usually, internships are acquired in efforts of building a resume or, hopefully, securing a job at the internship’s end. However, internship abuse has steadily increased with the worsening of the economy. As of 2008 the National Association of Colleges and Employers estimated that the rate of graduating interns has increased from 17 percent to 50 percent since 1992. In response to increased reports of employer abuse in our recession, the DOL as of 2010 has “cracked down” on employers and instituted nation-wide investigations, fines and awards of backpay to aggrieved interns.

Officials in various states, such as Oregon and California, have instituted investigations, and even fined employers, pursuant to the large increases of unpaid internships. The DOL’s acting director of the WHD, Nancy J. Leppink, advised employers in a statement in the *New York Times*: “If you're a for-profit employer or you want to pursue an internship with a for-profit

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174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.”

With the increase in unpaid internships, and subsequent investigations of employer abuse, an increased floodgate of federal litigation is anticipated. In fact, currently there is a case pending where unpaid interns, Alex Footman and Eric Glatt, are suing Fox Searchlight Productions for backpay and an injunction preventing the company from hiring other unpaid interns. Footman worked as an accountant maintaining financial records for the production of Black Swan in hopes that the six-month internship would “open doors” to a career with the company. If heard in federal court, this case will hopefully clarify the confusion over the iteration of guidelines.

V. THE JUDICIAL TENSION & ITS STRAIN ON PREVENTING EMPLOYER EXPLOITATION

The federal courts’ tension in defining an “employee” among interns and trainees has essentially frustrated the purpose of Walling’s underlying, yet barely noted, policy: to prevent employer exploitation, or “evasion of the law.” Generally, the courts interpret employee status on the reasoning that the FLSA broadly defines “employee.” It is upon the employer to demonstrate that the employee falls within an exempted class and should not be afforded minimum wage or overtime protection. However, the courts have almost created a per se exemption or rule that interns and trainees shall be excluded from employee status, unless the trainee or intern can prove otherwise. The courts’ interpretation of Congressional intent to

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182 Id.
183 Id.
prevent the “sweeping”\textsuperscript{187} of unintended classes has done more harm than good to the constituents to which both the WHD and the FLSA was meant to serve.

\textit{a. The Trend of Precluding Employee Status and Perpetuating Employer “Evasion of the Law”}

Judicial interpretation of the FLSA to preclude all students the right of employment protection, for lack of an employment contract, could potentially run afoul of the underlying policy of preventing employer exploitation. Furthermore, the ambiguous language set out in the WHD’s guidelines only further divides the federal districts in their unique interpretations of student employee status.

The \textit{Walling} Court noted that its holding had the risk of tipping the scales in favor of employers so that employer “evasion of law” may become more commonplace in the future.\textsuperscript{188} The Court went so far as to heed caution that its holding was not meant to be construed to condone that all cases of trainees and interns should be exempt from protection.\textsuperscript{189} The language implies that, as an economic realities analysis, determination of an intern’s employment status is fact-intensive.\textsuperscript{190} In \textit{Walling}, the Court found that the facts did not warrant a finding of employment status or threat of employer abuse.\textsuperscript{191} However, \textit{Walling}’s policy arguably afforded considerations of future workplace environments in discerning the student interns’ and trainees’ employee status.

To meet modern day needs, the WHD amends its guidelines periodically to address increased reports of employer abuse that have occurred as a result of decreased job opportunities

\begin{footnotes}
\item[187] Id. at 153.
\item[188] \textit{Walling}, 330 U.S. at 153.
\item[189] Id.
\item[190] Id.
\item[191] \textit{Walling}, 330 U.S. at 151-52.
\end{footnotes}
and the recession. However, the courts have generally rejected the WHD’s guidelines on the contention that the WHD has created a “rigid” test. Although, all the factors are to be met prior to meeting intern status, the WHD advises that the factors are to be analyzed in their totality with regard to prevention of employer exploitation. The current WHD guidelines state:

[I]f the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA’s minimum wage and overtime requirements because the employer benefits from the interns’ work.

In fact, the Reich court based its reasoning in employing a totality of the circumstances test, while construing the 1975 Opinion Letter, because “[t]he prefatory language to the Secretary’s test itself makes clear that the six factors are meant as an assessment of the totality of the circumstances.” In the 1996 Opinion Letter, the WHD clearly states that “[i]f all of the following criteria are met, the trainees or students are not employees within the meaning of the FLSA.”

The language connotes a mandate indicating treatment of the factors almost as elements of law. However, in the Fact Sheet of 2010 explaining the Opinion Letters setting out guidelines in determining the employment status of interns, the WHD describes that these factors will be analyzed in their totality in determining whether they have been met. The WHD’s failure to state clearly how these factors should be analyzed has exacerbated the judiciary’s interpretation of interns’ and trainees’ employee status. Arguably, the WHD’s ambiguity has aggravated the

192 1996 Opinion Letter, supra note 9; Fact Sheet, supra note 16.
193 Harris v. Vector Marketing Corp., 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010).
194 Fact Sheet, supra note 16.
195 Fact Sheet, supra note 16 (emphasis added).
198 Fact Sheet, supra note 16.
common law creation of the “totality of the circumstances” and “all-or-nothing” tests in interpreting employment status.

The confusion and subsequent interpretation of the FLSA in this manner has resulted in a more narrow interpretation of “employee” than the Act intends. Rather than viewing the labor relationship in the purview of the economic realities, it seems as though the courts have been reverting almost to a common law test, in addition to precluding protection by creating a *per se* exemption “rule.” These interpretations of the judiciary are contradicting the legislative intent of the FLSA, instead of adhering to it, despite its interpretation of *Walling*. The Court’s admonition of future “evasion of the law,” perhaps, was meant to remind future sister courts of the FLSA’s original legislative purpose. Sadly, none of the cases adhering to *Walling* have mentioned the words “evasion of the law” or the Court’s policy.

*b. The Primary Benefit Test: A Narrow View of the Employment Relationship and Frustration of Preventing Future “Evasion of Law”*

Judiciary interpretation of interns’ employee status has generally resulted in the intern’s detriment, primarily because of a finding that there was no benefit to the employer. Again, the courts have created three different types of tests to determine intern employee status: (1) “immediate” or “primary benefit” test, in which the court analyzes whether the intern or employer received the benefit without regard to the WHD guidelines;\(^{199}\) (2) the totality of circumstances test, in which the court analyzes the Walling factors in its totality in applying employee status,\(^{200}\) and; (3) the “all-or-nothing” test, in which all of the Walling factors must be met prior to meeting employee status.\(^{201}\) The “primary benefit” test analyzes the employee status

\(^{199}\) Summa v. Hofstra University, 715 F. Supp. 2d 378, 389 (E.D.N.Y. 2010); See also Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993).

\(^{200}\) Reich v. Parker Fire Prot. Dist., 992 F. 2d 1023, 1027 (10th Cir. 1993).

\(^{201}\) Donovan v. Am. Airlines, Inc., 686 F. 2d 267, 272-73 (5th Cir. 1982).
of an intern or trainee without regard to the WHD guidelines, which may unfairly determine an individual as an intern without considering the entirety of the working experience.

The “immediate” or “primary benefit” test is simply a different variation of Walling’s “immediate advantage” conclusion, without consideration of the agency’s guidelines. In Walling, the Court concluded that the prospective yard brakemen were not employees because there was no “immediate advantage” yielded to the employers.202 The “primary benefit” test is a common law test that assesses the flow of benefit with regard to only the economic realities of the employment relationship.

In the jurisdictions that implement this test, the “primary benefit” test also frustrates Walling’s policy to prevent employer evasion of the law. Under the judiciary’s “primary benefit” test, which disregards the WHD guidelines, many petitioners were rejected their employment protection, even when the facts demonstrated multiple benefits conferred to the employer.203 Thus, expectation of future employment, expectation of compensation, or whether the training was similar to that of a vocational school, among other WHD guidelines, would not be considered under the “primary benefit” test.

It is perplexing to notice how the courts expressly refuse to consider WHD guidelines when hearing claims brought by the DOL on behalf of the its constituents. After all, the DOL has the expertise to address the current state of labor and employment. Instead, the courts applying the “primary benefit” test have seemed to defer only to a 1947 Supreme Court case, and its dicta, that surrounded facts of a blue collar yardman worker for a railroad company. Professionals have argued that it is precisely this fact that makes the reasoning of Walling obsolete for private

202 Walling, 330 U.S. at 153.
203 See generally Solis v. Laurelbrook Sanitarium and School Inc. 642 F. 3d 518, 529 (6th Cir. 2011) (found no employment status because students earned “intangible benefit” of caring for sick and infirmed, even though vocational high school qualified for Medicaid on behalf of high school students with nursing licenses caring for up to fifty ill patients in the Sanitarium of the school).
sector abuse, as it is not relevant to white collar interns who may have special skills that can confer a benefit to employers. If anything recent precedent has been more concerned with upholding an interpretation of the FLSA that engenders merely the restraint of including far too many classes into the status of “employee,” rather than allowing for the possibility of current, or future, employer “evasion of law.”

VI. PROPOSED RESOLUTION: DOL FEDERAL REGULATION

The judicial split and subsequent confusion will likely not end unless the DOL promulgates a federal regulation that carries with it the force and effect of law.

a. Proposed DOL Federal Regulation

The DOL could promulgate a federal regulation that addresses this issue. A federal regulation would give the test the force and effect of law, so long as any agency action is reasonable when Congress is silent on the matter of interns and trainees.

The WHD could retain the six factors in place. A proposed solution would be to precisely state in its regulation as to whether the factors are to be interpreted in the totality or as elements of a claim. As it is, the WHD’s language states specifically that “all” the factors must be met prior to a determination that one is an intern. However, courts have interpreted the DOL to implement a totality of the circumstances approach. Hence, some clarification is needed.

Moreover, a federal regulation streamlining the judicious litigation of such suits would effectively meet the policy purpose of preventing employer exploitation, as well.

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204 Greenhouse, As the Number of Unpaid Internships Rises, supra note 32 (quoting attorney Camille A. Olsen, Chicago-based attorney for employers, arguing for a “mutual benefits” because the “immediate advantage” test is “hard to meet [because] many employers agreed to hire interns because there is very strong mutual advantage to both the worker and the employer.”)


206 Fact Sheet, supra note 16.

207 Reich v. Fire Protection Dist. 992 F. 2d 1023, 1026-27 (10th Cir. 1993).
VIII: CONCLUSION: AN ACCORD FOR THE INTERNS

Given how quickly employment law evolves, surely the esoteric nature of interpreting the employment status of interns will hopefully be resolved in the near future. Although Walling has interpreted the FLSA to preclude its broad protection of “employee” to interns,208 the policy of Walling notes that the FLSA also aims to prevent employer exploitation. Hopefully, the federal judiciary will soon agree on a test that can meet the dual goals of Walling’s policy and still-resounding holding. If anything, an accord among the federal courts would be providential for the judicious litigation and subsequent protection of future aggrieved interns in the workplace.

208 Walling, 330 U.S. at 151-52.