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THE *FREE* LABOR STANDARDS ACT? A LOOK AT THE ONGOING DISCUSSION REGARDING UNPAID LEGAL INTERNSHIPS AND EXTERNSHIPS

Lauren K. Knight*

INTRODUCTION

> "[A]ll paid employments . . . absorb and degrade the mind."
> – Aristotle[1]

The Fair Labor Standards Act (FLSA) defines "employ" as "to suffer or permit to work" and generally prohibits for-profit businesses from "employing" individuals on an unpaid basis.[2] Yet some attorneys still balk at the notion that law students can only accept internships at their for-profit firms if the internships are paid.[3] The typical retort being: "That's not the way it was when I was in law school." And while law firms may have been unwittingly violating the FLSA and receiving free labor for years, interns at for-profit firms have long been entitled to wages under the law[4]—yes, even when *you* were in law school. An exception to the rule against free labor occurs

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1. ARISTOTLE, POLITICS bk. VIII, at 1337b (B. Jowett trans., Oxford Univ. Press 1885).
2. *See* 29 U.S.C. § 203 (2012); *see also* 29 U.S.C. § 206 (2012) (requiring employers to pay each employee a wage not less than the minimum set forth in the FLSA).
3. *Cf.* Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 443 (2013) (providing examples of unpaid internships and extremely low-paid jobs which suggests that low and unpaid internships are widely accepted and considered the norm).
4. *See* Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&_r=0. Not only does the Act prohibit employers from receiving free labor, but the Supreme Court has held that individuals cannot waive their rights to compensation under the Act. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945) ("[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."). *But cf.* 29 C.F.R. § 553.101 (2013) (defining volunteers as individuals who perform "hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered").

when an individual qualifies as a trainee rather than an employee.[5] Over the years the "trainee" exception has expanded to cover internships that meet the exception's requirements.[6] The circuits are split over what test to apply to determine whether an employment relationship exists or whether the exception is met under the FLSA.[7] Courts may look to the economic realities of the situation,[8] the totality of the circumstances,[9] who—between the intern and the employer—receives the primary benefit of the relationship,[10] or some combination of analyses.[11] However, lately the test receiving the most attention is one that strictly adheres to the six-factor test spurred by the 1947 Supreme Court's *Walling v. Portland Terminal* decision.[12]

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5. U.S. DEP'T OF LABOR WAGE AND HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET].
6. The Department of Labor's legal criteria for trainees and interns are virtually identical. *See id.*
7. *See infra* notes 8–11 and accompanying text.
8. Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005) (finding that chores performed by a boarding school student as part of his juvenile sentence were, as a matter of law, not "work" under the FLSA, because "[i]n determining whether an entity functions as an individual's employer, courts generally look to the economic reality of the arrangement" (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961))).
9. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993) ("'[N]o one . . . factor[] in isolation is dispositive; rather, the test is based upon a totality of the circumstances.'" (quoting Dole v. Snell, 875 F.2d 802, 805 (10th Cir. 1989))); Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1328 (10th Cir. 1981) (upholding the District Court's ruling that, considering the totality of the circumstance the resident assistants at a college "were not 'employees' within the meaning of the [FLSA], but student recipients of financial aid").
10. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011) ("[T]he proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship."); Carter v. Mayor & City Council of Balt. City, No. WMN-07-CV-3117, 2010 WL 761210, at *4 (D. Md. Mar. 2, 2010) ("[T]he Fourth Circuit 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.'" (quoting McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989))).
11. Bailey v. Pilots' Ass'n for Bay & River Del., 406 F. Supp. 1302, 1306–07 (E.D. Pa. 1976) ("The test to determine whether an employment relationship exists is one of 'economic reality.' To be considered are the circumstances of the whole activity, not merely isolated factors.") (citations omitted).
12. Walling v. Portland Terminal Co., 330 U.S. 148, 150–52 (1947); *McLaughlin*, 877 F.2d at 1209, 1211 (discussing the applicability of *Portland Terminal* and the subsequent six factor test).

In *Portland Terminal* the Department of Labor (DOL) brought an action against the railroad to enjoin an alleged violation of the FLSA for failure to pay certain trainees minimum wage.[13] The trainees were prospective brakemen in a weeklong course offered by the railroad.[14] First, the trainees would learn the routine activities through observation, and then the railroad would allow them to perform the actual work under close supervision.[15] At the successful conclusion of the training, the railroad placed the trainees' names on a list of men from which the railroad could draw their services as needed.[16] The trainees did not displace any of the regular employees and at times their work would impede the railroad's business.[17] The Court, "[a]ccepting the unchallenged findings . . . that the railroads receive no 'immediate advantage' from any work done by the trainees," held that the trainees were not employee's within the FLSA's meaning.[18] The rationale used to reach the holding in *Portland Terminal* was later formulated into a six-factor test and adopted by the DOL.[19]

I. THE CURRENT CONVERSATION

The renewed interest in the question of when an intern must receive compensation for an internship is the result of the 60-something year old six-factor test and the recent letters and litigation it has produced. Further adding to the dialogue, is the latest edition of the ABA Standards and Rules of Procedure adopted by the Council of the American Bar Association Section of Legal Education and Admission to the Bar (the Council) and concurred by the ABA House of Delegates on August 12, 2014.[20] The new edition is "substantially different than its predecessors" and the adopted changes to the mandatory requirements for law schools' curriculum have the potential to affect student participation at for-profit law firms.[21] If the

13. *Portland Terminal*, 330 U.S. at 149.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 153.
19. FACT SHEET, *supra* note 5.
20. AM. BAR ASS'N, 2014–2015 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2014) [hereinafter *ABA Standards*], *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf.
21. *Id.* at v.

test is not properly applied it could have a chilling effect on the intent of *Portland Terminal*, and in light of the new ABA Standards, a misapplication could even negatively impact educational and public service driven legal programs.

A. The Six-Factor Test

According to the DOL, internships in the for-profit sector are required to be compensated unless the internships pass the "Test for Unpaid Interns."[22] The DOL has stated that:

> There are some circumstances under which individuals who participate in "for-profit" private sector internships or training programs may do so without compensation. The Supreme Court has held that the term "suffer or permit to work" cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction. This may apply to interns who receive training for their own educational benefit if the training meets certain criteria. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.[23]

Notwithstanding this supposedly balanced approach, immediately thereafter the DOL explains that:

> The following six criteria *must* be applied when making this determination:
> 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

22. FACT SHEET, *supra* note 5.
23. *Id.*

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[24]

In this all-or-nothing test, an internship will only qualify as an "unpaid legal internship" not subject to the FLSA's minimum wage provisions if all six factors are satisfied.[25]

B. The Letters

Given the potential ramifications for law firms who violate the FLSA, the ABA sought clarification from the DOL in May of 2013.[26] Specifically, the ABA requested assurance that the agency would not take legal action "against intern hosts who utilize unpaid interns under circumstances that are consistent with the purposes of FLSA and do not violate the law."[27] The circumstances the ABA described, as consistent with the FLSA, narrowly focused on law students handling strictly pro bono matters at private for-profit firms.[28]

In September, the DOL responded.[29] The letter reinforced the agency's reliance on the six-factor test and applied the factors to students performing pro bono work at private for-profit law firms.[30] The letter purports to simply address the pro bono issue—claiming that the response is to the concerns raised "on the ability of law students to secure work experience through unpaid internships with private law firms where the work they perform is limited to pro bono activities."[31] However, the broad language addressing the narrowly-framed question seems to actually restrict all internships at for-profit firms to those where students perform exclusively pro bono work. The DOL implies that any participation in fee generating matters, or

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24. *Id.* (emphasis added).
25. *Id.*
26. Letter from Laurel G. Bellows, President, Am. Bar Ass'n, to the Hon. M. Patricia Smith, Solicitor U.S. Dep't of Labor (May 28, 2013) *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may28_probonointerns_1.authcheckdam.pdf.
27. *Id.*
28. *Id.* ("[The ABA] believe[s] that the language of the FLSA does not clearly, on its face, permit or prohibit pro bono internships with private law firms or business law departments related to purely pro bono matters in which the firm or business has no anticipation of revenue.").
29. Letter from the Hon. M. Patricia Smith, Solicitor, U.S. Dep't of Labor, to Laurel G. Bellows, Immediate Past President, Am. Bar Ass'n (Sept. 12, 2013), *available at* www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLSA_091213.pdf.
30. *Id.*
31. *Id.*

matters that allow others to engage in fee generating matters, requires that the intern receive compensation:

> [T]he student may be considered a trainee and not an employee . . . where a law student works on only pro bono matters that do not involve potential fee-generating activities, and does not participate in a law firm's billable work or free up staff resources for billable work that would otherwise be utilized for pro bono work . . . . In contrast, a law student would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm's licensed attorneys, or displaces regular employees (including support staff).[32]

C. *The Litigation*

1. *Glatt v. Fox Searchlight*

Last year the United States District Court for the Southern District of New York confronted the unpaid internship issue head on and sent profit-hungry movie entrepreneurs running for the hills.[33] In *Glatt v. Fox Searchlight*, two interns, who worked on the production set of the film *Black Swan*, filed suit for alleged violations of the FLSA.[34] The interns claimed that during the course of their internship—at which they performed basic administrative work—the production company improperly classified them as unpaid interns.[35] The production company argued that the "primary beneficiary" test was the proper analysis and urged the court to look at whether the internship experience primarily benefited the intern or the engaging entity.[36] Even though the court agreed that the interns received benefits from their internships including "resume listings, job references, and an understanding of how a production office works," it rejected the "primary beneficiary" test claiming that the test was subjective, unpredictable, and had little support in *Portland Terminal*.[37] Instead, the court openly deferred to the DOL six-factor

32. *Id.* at 2.
33. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013).
34. *Id.* at 521–22.
35. *Id.* at 533.
36. *Id.* at 531–32.
37. *Id.* at 531–33 (citing Walling v. Portland Terminal Co., 330 U.S. 148 (1947)).

test and held that the unpaid interns were actually employees entitled to compensation under the FLSA.[38]

2. *Kaplan v. Code Blue*

Prior to *Glatt*, the Eleventh Circuit faced the FLSA/trainee issue and delivered a different ruling.[39] In *Kaplan v. Code Blue*, two former externs filed suit against their externship host.[40] Externships, like internships, provide opportunities for students to observe and learn from real-life experiences at field placements such as courthouses or legal non-profit organizations.[41] However, unlike an internship, students participating in externships receive academic credit commensurate with the time and efforts spent at their field placement, are required to complete a classroom component supervised by a faculty member,[42] and are prohibited from receiving compensation.[43] In *Kaplan* the issue was whether students who were enrolled in MedVance Institute's Medical Billing and Coding Specialist Program and who completed unpaid externships at for-profit billing and consulting businesses were entitled to wages under the FLSA.[44] MedVance required its students to complete these unpaid externships as a prerequisite for graduation, but the externs argued that their externships lacked formal structure and complained of the repetitive nature of the tasks.[45] Despite the students' argument that the externships were of little educational value, the court found it relevant that the work they performed was part of their formal degree

38. *See id.* at 531–34.

39. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831 (11th Cir.), *cert. denied*, 134 S. Ct. 618 (2013).

40. *Id.* at 832.

41. Susan Harthill, *Shining the Spotlight on Unpaid Law-Student Workers*, 38 VT. L. REV. 555, 563 (2014) ("[Law students] gain valuable work experience in a variety of law school settings, as well as through law-school-sponsored externships and non-law-school-sponsored paid and unpaid internships in law firms and other legal offices.").

42. Nancy M. Maurer & Liz Ryan Cole, *Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses*, 19 CLINICAL L. REV. 115, 120 n.12 (2012) ("The difference between internships and externships is based on the site that has ultimate responsibility for the student. If the student's primary and ultimate supervision and evaluation is based internally at a work place, the student is an intern . . . . When, however, there is an external entity awarding credit, supervising some aspects of the student experience and/or otherwise taking ultimate responsibility for the student, then the EXTERNality of the supervision makes it an externship or field placement course.").

43. *See ABA Standards*, *supra* note 20, at 19.

44. *Kaplan*, 504 F. App'x at 832–33.

45. *Id.*

program.[46] The court, using the "economic realities" test, looked at whether the students' work conferred an economic benefit upon the businesses and then used the DOL factors to support its conclusion that the student externs met the trainee exception and therefore were not entitled to wages under the FLSA.[47] The students' petition for writ of certiorari was denied.[48]

D. The Revised ABA Standards

In 2014 the Council of the ABA Section of Legal Education and Admissions to the Bar (the Council) adopted several recommended changes to the mandatory ABA Standards governing the requirements for law school curriculum.[49] One of the revisions includes an increase in the required number of experiential course credit hours to six credit hours.[50] Experiential courses include simulation courses, clinical courses, and externships.[51] In addition, the Council adopted measures that it hopes will increase participation in public service.[52] One such revision expands the language requiring law schools to provide substantial opportunities for student participation in "pro bono activities" so that it now requires law schools to provide substantial opportunities for student participation in "pro bono legal services, including law-related public service activities."[53] A similarly motivated revision adds language to Interpretation 303-3 encouraging law schools to promote opportunities for law students to complete at least fifty hours of pro bono legal services.[54] Not making the final cut was a proposal to eliminate Interpretation 305-3, which survived the latest version of the ABA Standards as Interpretation 305-2.[55] Interpretation 305-2

46. *Id.* at 834.
47. *Id.* at 834–35.
48. Kaplan v. Code Blue Billing & Coding, Inc., 134 S. Ct. 618 (2013), *denying cert. to* 504 F. App'x 831 (11th Cir. 2013).
49. *ABA Standards*, *supra* note 20, at v.
50. *Id.* at 16.
51. *Id.* Standard 305 refers to externship experiences as "field placements." *Id.* at 18.
52. *Id.* at 16.
53. *Id.*
54. *Id.* at 16–17; MODEL RULES OF PROF'L CONDUCT r. 6.1 (2014).
55. *See Interpretation 305-3 Explanation of Changes*, ABA, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_proposed_interpretation_305_3.authcheckdam.pdf (last visited Nov. 17, 2014) [hereinafter *Interpretation 305-3*]; *see also Implementation of New Standards and Rules for Approval of Law Schools*, ABA, http://www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited Nov. 17, 2014).

prohibits externs from receiving compensation.[56] The elimination of the interpretation would have potentially allowed externs to earn money and course credit.[57] The Council's Standards Review Committee (the Committee) admitted that the initial vote to eliminate Interpretation 305-3 was not unanimous, but "felt that a blanket prohibition [against compensation] puts significant limits on the available field placement opportunities."[58] In August 2014, "the ABA House of Delegates concurred in all of the proposed new Standards and Rules of Procedure for Approval of Law Schools with the exception of Interpretation 305-2."[59]

II. AN ANALYSIS OF THE SIX-FACTOR TEST IN LIGHT OF THE LETTERS AND LITIGATION

The recent attention and confusion has led to many questions: If courts are going to defer to the DOL's test, should unpaid law

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56. *ABA Standards*, *supra* note 20, at 19. ("A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement.").

57. *See Interpretation 305-3*, *supra* note 55.

58. *Id.* The SRC acknowledged that "[w]hile there was some concern about the pedagogical difficulties when students are paid and receive credit, the Committee noted that whether or not students are paid schools must meet all of the requirements of Standard 305." *Id.*

59. AM. BAR ASS'N, 2014 AUGUST ANNOUNCEMENT, REVISED STANDARDS AND RULES CONCURRED IN BY ABA HOUSE OF DELEGATES (2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2014_hod_standards_concurrence_announcement.authcheckdam.pdf. The ABA Standards and Rules of Procedure Relating to Approval of Law Schools, Rule 57 states in pertinent part:

> A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations or Rules does not become effective until it has been concurred in by the ABA House of Delegates . . .
> . . . [T]he House shall . . . either agree with the Council's decision or refer the decision back to the Council for further consideration. If the House refers a decision back to the Council, the House shall provide the Council with a statement setting forth the reasons for its referral.
> A decision by the Council to adopt, revise, amend or repeal the Standards, Interpretations, or Rules is subject to a maximum of two referrals back to the Council by the House. If the House refers a Council decision back to the Council twice, then the decision of the Council following the second referral will be final
> . . . .

ABA Standards, *supra* note 20, at 78.

students at for-profit firms exclusively work on pro bono matters? Is it even proper to apply the six-factor test to students performing pro bono work? Should the ABA allow students to earn academic credit while getting paid? Would the payment of externships have actually increased experiential learning opportunities at a time when the Council has increased the required number of experiential credit hours needed to graduate? How will the internship/externship confusion affect student participation in pro bono legal services or law-related public service activities?

A. Educational Environment

The first obstacle for law firms to overcome under the six-factor test permitting unpaid internships requires that the firm qualify as an educational environment.[60] Although the DOL letter acknowledges that for-profit law firms may meet the educational environment prong of the test, it impliedly limits students' ability to intern only at for-profit firms that can generate additional pro bono work for the intern.[61] Moreover, in spite of the fact the educational environment prong requires that the internship "includes the actual operation of the facilities," the letter prohibits students from participating in a law firm's billable work or freeing up staff resources for billable work.[62] Is billable work not part of the actual operation of the facilities? For law students expecting to earn their future wages through billable work, exposure to situations that teach the student about a firm's daily operations and prepare the student for the actual practice of law seems to fulfill the educational environment requirement.

In *Glatt*, the court claimed that classroom training was not a prerequisite, but rejected the argument that the production office equated to an educational environment where the interns learned and performed the tasks of an employee of a production office.[63] Conversely in *Kaplan*, where the students had a structured academic program orchestrating their externships, the Eleventh Circuit held that the externs were in an educational environment despite the fact that they worked at a for-profit company and learned and performed the tasks of an employee of a billing and coding company.[64] The mere exposure to real-life work is not enough to create an educational

60. Smith, *supra* note 29, at 1.
61. *Id.* at 2.
62. *Id.* at 1–2.
63. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 532–33 (S.D.N.Y. 2013).
64. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831 (11th Cir.), *cert. denied*, 134 S. Ct. 618 (2013).

environment under the test. The distinction between the two cases is that the externs obtained real-life job experience *while earning academic credit.*

B. Benefit of Intern

In regard to the second prong of the six-part test, the intern host must structure the internship for the benefit of the intern. To evaluate whether the internship experience is for the benefit of the intern the DOL ostensibly focuses on the nature of the work performed. The agency indicated that non-substantive tasks that could be performed by a paralegal or a member of the regular staff would not satisfy this component of the test.[65]

Similarly, in *Glatt* the court held that the internship failed to benefit the interns because the interns performed menial tasks such as making deliveries and answering phones.[66] Although the *Glatt* court acknowledged that the interns received the benefits of resume listings, job references, and an understanding of how a production office works; it ultimately decided that those benefits were not enough to overcome the overall nature of the experience.[67] In *Kaplan* the court held that tasks such as calling insurance companies to follow up on claim statuses benefitted the externs, although once again the court heavily relied on the fact that the externs "received academic credit for their work and . . . satisfied a precondition of graduation."[68]

C. Supervision & No Immediate Advantage

The third and fourth prongs of the six-factor test demand close supervision and preclude the intern host from receiving an immediate advantage from the intern's presence. The issue of adequate supervision ties into the more in-depth analysis that comes with the "immediate advantage" factor because the adequacy of the supervision implicitly focuses on the overall productivity of the business.[69] According to the DOL, minimal supervision is not enough.[70] In fact, the agency calls for close and constant supervision from attorneys to the point that the supervision reduces the time

65. Smith, *supra* note 29, at 2.
66. *Glatt*, 293 F.R.D. at 533–34.
67. *Id.* at 533.
68. *Kaplan*, 504 F. App'x at 835.
69. Smith, *supra* note 29, at 2.
70. FACT SHEET, *supra* note 5.

attorneys may spend on other work—billable *or* pro bono.[71] To satisfy these factors a supervisor must be prevented from completing his or her normal workload whenever the intern is accomplishing anything advantageous for the business thereby ensuring a decrease in the overall productivity.[72] Alternatively, when the supervisor is not forced away from his or her productive work then the intern must avoid any tasks that would generate an immediate advantage for the business.[73]

And while the "immediate advantage" factor may be a proper inquiry in a trainee versus employee analysis, it is inapposite in any discussion on the delivery of pro bono matters. The DOL letter recognizes that a natural consequence of pro bono work is the potential for long-term reputational benefits, but still prohibits any immediate advantage.[74] To place any significance on the time at which a law firm may benefit from the unpaid intern's participation is a fallacy—as is trying to twist the facts to make it so that the employer never receives an immediate advantage. What if the intern offers a fresh perspective and makes suggestions that improve efficiency or morale? Some benefits may be impossible to measure. Similarly, how does one measure whether a firm would or would not have performed "x" amount of pro bono work with or without the intern? If the *Glatt* court deems the "primary beneficiary" test too subjective,[75] then it is odd that the court did not take issue with the immediate advantage factor. The *Glatt* court did not address the issue of supervision.[76] The court simply noted that the record showed that a paid employee of the production company would have worked longer hours if not for the interns' work.[77] Conversely, in *Kaplan*, the court took a slightly less inflexible approach and concluded that the externs were adequately supervised and that the company "received little if any economic benefit."[78]

D. No Job or Wages

The fifth and sixth prongs of the test are worth acknowledgment, although they are clearer than the other four factors in the context of

71. Smith, *supra* note 29, at 2.
72. *Id.*
73. *Id.*
74. *Id.*
75. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013).
76. *Id.*
77. *Id.* at 533.
78. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 834 (11th Cir.), *cert. denied*, 134 S. Ct. 618 (2013).

the current debate.[79] The last two factors plainly require that interns receive no pay and are aware that they are not necessarily entitled to a job at the conclusion of the internship. A properly drafted engagement letter at the outset of the arrangement resolves these factors or at least clarifies expectations for the parties.[80]

III. RECOMMENDATIONS IN LIGHT OF THE REVISIONS

> "For the things we have to learn before we can do them, we learn by doing them." – Aristotle[81]

The DOL's adherence to such a stringent test comes at a time when the legal community is calling for the overhaul of legal education and demanding the production of more practice-ready graduates.[82] The purpose of law school is to learn how to practice law, and a necessary consequence of practicing law is exposure to a law firm environment.[83] All or nothing approaches, while purportedly objective, can produce negative results. Students deserve the opportunity to learn the day to day proceedings of a law firm. The rulings in *Glatt* and *Kaplan* support the idea that the six factors apply regardless of the nature of the work and that structured academic programs have the best chance of creating a learning environment for the benefit of the intern.[84]

Regardless of whether a strict application of the test is appropriate for an unpaid internship at a for-profit firm, the test is misplaced in the pro bono context. The test originated from trainees—trainees at a for-profit corporation hoping to obtain employment. Public service

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79. From the outset, the interns and externs in *Glatt* and *Kaplan* were aware that they were not entitled to a job and would not be paid. *Glatt*, 293 F.R.D. at 534; *Kaplan*, 504 F. App'x at 833.

80. *Cf.* P.A. Henrichsen, *Sample Engagement Letters and Fee Agreements*, GPSOLO MAG., Jan.–Feb. 2007, at 22, 23–24 (an engagement letter between an employer and an intern would establish the same types of expectations as an attorney-client relationship); *Unpaid Internship Agreement: A Must if You Are Hiring an Unpaid Intern*, INTERNPROFITS, http://internprofits.com/articles/unpaid-internship-agreement-unpaid-intern/ (last visited Nov. 17, 2014) (highlighting the importance of a written unpaid internship agreement).

81. ARISTOTLE, THE NICOMACHEAN ETHICS bk. II, at 23 (David Ross trans., Oxford Univ. Press 2009).

82. *See, e.g.*, Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 605 (2010).

83. *Id.* at 605–06.

84. *Kaplan*, 504 F. App'x at 835; *Glatt*, 239 F.R.D. at 533.

projects should not overly burden attorneys who want to supervise law students. Since the purpose of pro bono work is to promote justice it seems counterintuitive to place restrictions on the delivery of pro bono services or to dissuade private firms from nurturing pro bono internship or externship programs. The DOL's overly restrictive response to an admittedly narrowly tailored ABA Letter seems to have this chilling effect—forcing firms to prove that but for the intern they would not have performed that particular amount of pro bono work.[85]

The importance of the DOL test will increase significantly for those jurisdictions that follow or show deference to the test in light of the Council's decision to increase the number of credit hours required for experiential courses.[86] On the other hand, the test could have become irrelevant if Interpretation 305-2, which prohibits compensation for externship field placements, had been eliminated—*but* only at placements willing to pay and at schools willing to adopt the policy. And yet, despite the Committee's concern that Interpretation 305-2 puts "significant limits" on externship opportunities, the removal of the provision was not going to help the Council achieve its other goals. Permitting externship compensation would not result in increased firm participation in externship programs, nor would it necessarily encourage students to engage in public service activities.[87] Few employers paying an extern would want an outside party (the faculty supervisor) telling them what they can or cannot do with their extern. Moreover, the removal of the prohibition on compensation was not a mandate; rather each school would have decided whether or not to implement such a policy.[88] Many law school externship

85. *See* Smith, *supra* note 29, at 2.

86. Courts not solely relying on the six-part test may still use it as a factor in their analyses. *See, e.g.*, Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993) ("We are satisfied that the six criteria are relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA . . . ."); *Kaplan*, 504 F. App'x at 834 (using the DOL's six-factor test to support its conclusion); Wang v. Hearst Corp., 293 F.R.D. 489, 493–94 (S.D.N.Y. 2013) ("[T]he six factors in Fact Sheet #71 ought not be disregarded; rather, it suggests a framework for an analysis of the employee-employer relationship."). *But cf.* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011) ("[T]he [DOL] test is inconsistent with *Portland Terminal* itself, which . . . suggests that the ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed. While the Secretary's six factors may be helpful in guiding that inquiry, the Secretary's test on the whole is not.").

87. *See ABA Standards*, *supra* note 20, at 16–17.

88. Letter from ABA Law Student Division Bd. of Governors, to Hon. Solomon Oliver, Jr., Council Chair, ABA Section of Legal Educ. & Admission to the Bar, and Barry Currier, Managing Dir., ABA Section of Legal Educ. & Admission to the Bar (Jan.

programs would have rejected such a course of action because allowing the employer to pay the student would jeopardize the academic institution's control over the externship and potentially affect the educational value of the program. If the ABA wishes to amend, and law schools' are willing to permit students to simultaneously earn money and credit, the Council could allow students to receive compensation but limit the source of the funding to outside or third-party sources. Allowing students to participate in externships and receive funding from third-party sources ensures that law schools can maintain the academic integrity of their externship programs and empowers externship supervisors to feel more like educators and less like bosses. Furthermore, third-party funding would likely come from sources such as public interest grants, which would achieve the complimentary goal of increased student participation in public service.[89]

As the Court stated in *Portland Terminal*, "The [FLSA] was not intended to penalize [employers] for providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner which would most greatly benefit the trainees[,]"[90] and one can certainly imagine that it was not intended to penalize or thwart an employer from providing both instruction and promoting public service. If the test is to be applied at all, it should be applied to students working at for-profit firms and observing and learning from billable work. Those law firms not chilled by the threat of lawsuits and still willing to take on unpaid interns would be wise to only take on interns enrolled in structured academic programs where the students earn credit towards the completion of their degree.

27, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201401_comment_ch_3_law_student_division.authcheckdam.pdf.

89. *See, e.g.*, *Public Interest Grant*, WOMEN LAWYERS ASS'N OF L.A., http://www.wlala.org/?66 (last visited Nov. 17, 2014).

90. Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947).