EMPLOYMENT LAW — FAIR LABOR STANDARDS ACT — SECOND CIRCUIT CRAFTS "PRIMARY BENEFICIARY" TEST FOR UNPAID INTERNS. — *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015).

In the wake of the 2007–2008 financial crisis and recession, the market for unpaid interns has grown considerably.[1] Today, thousands of students spend their summers — and sometimes their semesters — working for no pay. Seeing internships as valuable learning experiences and even prerequisites to paid jobs in their industries of choice,[2] students with financial means forego paid jobs for unpaid positions with prestigious for-profit companies.[3] Students from less privileged backgrounds, meanwhile, are forced to choose between taking on additional loans and missing out on opportunities that may be necessary to secure their futures.[4] Commentators have noted that some of these unpaid internships may violate the Fair Labor Standards Act of 1938[5] (FLSA), the United States' national minimum wage law.[6] In *Glatt v. Fox Searchlight Pictures, Inc.*,[7] the Second Circuit held, on a question of first impression, that whether interns qualify as "employees" under the FLSA depends on whether they or the company that hired them is the "primary beneficiary" of their relationship.[8] Applying this new rule, the *Glatt* court overturned the district court's summary judgment ruling in favor of the plaintiff-interns and decertified the plaintiffs' class.[9] In so doing, the Second Circuit adopted a defensible means of determining which unpaid interns qualify as "employees," at least in light of the mixed case law in other circuits. However, in adopting the primary beneficiary test, the *Glatt* court created problems of fit with the rest of the FLSA.

---

[1] *See* Gregory S. Bergman, Note, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 552–55 (2014); Joanna Venator & Richard V. Reeves, *Unpaid Internships: Support Beams for the Glass Floor*, BROOKINGS INST.: SOCIAL MOBILITY MEMOS (July 7, 2015, 2:18 PM), http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/07/07-unpaid-internships-reeves [http://perma.cc/C58D-LK8Q].

[2] *See* Bergman, *supra* note 1, at 554 (noting that work experience was the primary factor for 76.3% of employers when deciding which candidates to hire); Venator & Reeves, *supra* note 1.

[3] *See* Bergman, *supra* note 1, at 555; Venator & Reeves, *supra* note 1.

[4] *See* Bergman, *supra* note 1, at 555 (illustrating why a less privileged student might forego an internship).

[5] 29 U.S.C. §§ 201–219 (2012).

[6] *See generally* Jaclyn Gessner, Note, *How Railroad Brakemen Derailed Unpaid Interns: The Need for a Revised Framework to Determine FLSA Coverage for Unpaid Interns*, 48 IND. L. REV. 1053 (2015).

[7] 791 F.3d 376 (2d Cir. 2015).

[8] *Id.* at 382–83.

[9] *Id.* at 379.

Eric Glatt, Alexander Footman, and Eden Antalik worked for Fox Searchlight Pictures (Fox) as unpaid interns.[10] Glatt worked on the Fox-produced film *Black Swan* in the film's accounting department and then in postproduction, Footman worked in the *Black Swan* production department, and Antalik worked as a publicity intern in Fox's corporate headquarters.[11] All three were responsible for numerous administrative and clerical tasks.[12] On October 19, 2012, they filed a class action complaint in the Southern District of New York against Fox for "unpaid minimum wages and overtime for themselves and all others similarly situated."[13] Glatt and Footman ultimately decided to proceed as individuals and moved for partial summary judgment, claiming they were "employees" under the FLSA and the New York Labor Law (NYLL).[14] Antalik moved to certify a New York State class of interns under the NYLL and an opt-in national class under the FLSA.[15]

On June 11, 2013, the district court granted Glatt and Footman's motion for summary judgment, certified Antalik's New York class, and conditionally certified her national class.[16] The district court took note of the 1947 decision *Walling v. Portland Terminal Co.*,[17] in which the Supreme Court found that certain railroad "'trainees' were not covered employees under the FLSA."[18] The district court then consulted a Department of Labor (DOL) fact sheet based on *Portland Terminal*, which enumerated six criteria for determining whether an intern is an employee.[19] The court decided the DOL fact sheet was entitled to persuasive deference.[20] It also rejected the primary beneficiary test — which other circuits already applied — as being "subjective and unpredictable"[21] and as having "little support" in *Portland Terminal*.[22] The district court then applied the DOL fact sheet's criteria to Glatt and Footman's case, finding that the first four criteria cut

---

[10] *Id.* at 379–80.

[11] *Id.*

[12] *See id.*

[13] *Id.* at 380.

[14] *Id.* The NYLL is New York State's equivalent of the FLSA. *See id.* at 381.

[15] *Id.* at 381.

[16] Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 538–39 (S.D.N.Y. 2013). "Under the FLSA . . . 'conditional certification' does not produce a class with an independent legal status . . . . The sole consequence of conditional certification is the sending of court-approved written notice to employees," who then become parties to the action by opting in. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013).

[17] 330 U.S. 148 (1947).

[18] *Glatt*, 293 F.R.D. at 531.

[19] *Id.*

[20] *Id.* at 532.

[21] *Id.*

[22] *Id.* at 531.

in favor of the interns[23] but the latter two cut in favor of Fox.[24] Because the balance of the factors weighed in favor of finding that Glatt and Footman were employees, the district court found they "d[id] not fall within the narrow 'trainee' exception to the FLSA's broad coverage."[25] Next, the court found that Antalik's proposed New York class met Federal Rule of Civil Procedure 23's requirement that the party seeking certification show that "questions of law or fact common to class members predominate over any questions affecting only individual [class] members."[26] In support of this determination, the district court pointed to common evidence — including documents suggesting Fox had a policy of hiring interns when business was busier — which could generate common answers capable of driving the resolution of the case, such as whether Fox hired interns to replace paid staff.[27] The court also relied on that generalized proof to find that the proposed class members were "similarly situated" under the FLSA's opt-in class action provision.[28]

On appeal, the Second Circuit vacated the district court's summary judgment holding and decertified Antalik's classes. Writing for a unanimous court, Judge Walker[29] found the text of the FLSA "unhelpful[]."[30] The FLSA defines an "employee" as "any individual employed by an employer,"[31] and "[e]mploy" as "to suffer or permit to work."[32] The panel also disagreed with the district court's view of the *Portland Terminal* decision as creating a "narrow" exception. It found that "[n]othing in the Supreme Court's decision suggests . . . that the facts on which it relied would have the same relevance in every workplace."[33] It also rejected the plaintiffs' reading of *Portland Terminal* as creating an "immediate advantage" test, where "interns will be considered employees whenever the employer receives an immediate advantage from the interns' work."[34] Further, the *Glatt* court declined to

---

[23] The record was unclear on whether Glatt received formal training, but Footman did not (criterion 1); both received only "incidental" benefits from their internship (criterion 2); both displaced regular employees (criterion 3); and Fox derived an immediate advantage from both interns' work (criterion 4). *Id.* at 532–33.

[24] "There is no evidence Glatt or Footman [thought that they] were entitled to jobs at the end of their internships" (criterion 5) or thought that they were entitled to wages during them (criterion 6). *Id.* at 534.

[25] *Id.*

[26] *Id.* (quoting FED R. CIV. P. 23(b)(3)). The court also found that the party seeking class certification met Rule 23's requirements for numerosity and typicality. *See id.* at 534–37.

[27] *Id.* at 535–37.

[28] *Id.* at 538 (quoting 29 U.S.C. § 216(b) (2012)).

[29] Judge Walker was joined by Judges Jacobs and Wesley.

[30] *Glatt*, 791 F.3d at 381.

[31] 29 U.S.C. § 203(e)(1).

[32] *Id.* § 203(g).

[33] *Glatt*, 791 F.3d at 384–85.

[34] *Id.* at 383.

defer to the DOL fact sheet, which it perceived as "essentially a distillation of the facts discussed in *Portland Terminal*."[35]

In place of the DOL's criteria, the court announced an alternative test governing unpaid internships: the "primary beneficiary" test.[36] Under this test, an employment relationship is created when the "tangible and intangible benefits provided to the intern" are less "than the intern's contribution to the employer's operation."[37] The test, by the court's estimation, has two central features: First, it focuses on what the intern obtained in exchange for his or her work.[38] Second, it examines the "economic reality" between the two parties.[39] To determine the primary beneficiary, the Second Circuit proposed a "nonexhaustive" list of factors directed at the extent to which the internship is structured to promote the intern's education.[40] The court instructed that no individual factor from the list is dispositive, and all relevant circumstances should be weighed and balanced.[41] The court then remanded the case to the district court to decide whether Glatt and Footman were employees under the new test.[42]

Next, the *Glatt* panel turned to the question of class certification. Contrary to the district court's assessment, the court found that Antalik failed to establish predominance.[43] Because the primary beneficiary test was "a highly individualized inquiry," the common evidence Antalik offered would not help answer numerous relevant questions, including what type of training individual interns received and whether "a given internship" was connected to an academic program.[44]

---

[35] *Id.* According to the Second Circuit, the fact sheet was not entitled to any special deference because "an agency has no special competence . . . in interpreting a judicial decision." *Id.* (quoting New York v. Shalala, 119 F.3d 175, 180 (2d Cir. 1997)). The court also declined to give the fact sheet even persuasive deference because its test was "too rigid for [Second Circuit] precedent to withstand" and "attempt[ed] to fit *Portland Terminal*'s particular facts to all workplaces." *Id.*

[36] *See id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 384.

[40] *Id.* The factors are the extent to which the internship (1) includes an understanding there will be no compensation; (2) "provides training that would be similar to that which would be given in an educational environment"; (3) "is tied to the intern's formal education"; (4) "accommodates the intern's academic commitments by corresponding to the academic calendar"; (5) has a duration "limited to the period in which the internship provides the intern with beneficial learning"; (6) is composed of work that "complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern"; and (7) includes an understanding that the intern is not entitled "to a paid job at the conclusion of the internship." *Id.*

[41] *Id.*

[42] *Id.* at 385.

[43] *Id.* at 386–87.

[44] *Id.* at 386. Even assuming Antalik did prove that Fox had a policy of replacing paid employees with interns, she would not, on that evidence, prove that an individual internship constituted an employment relationship. *Id.*

Thus, the Second Circuit vacated the New York class certification.[45] Applying similar logic to the conditional national certification, the Second Circuit reiterated that the plaintiffs' common proof could not answer the primary beneficiary test's individualized questions, even at this early stage in the certification process.[46] Consequently, the plaintiffs were not "similarly situated" and the court vacated the proposed national class action.[47]

Based on the language in *Portland Terminal* and the mixed interpretations of its "trainee" exception in other jurisdictions, the *Glatt* court's choice of the primary beneficiary test is defensible. However, the FLSA was designed to create a unified set of guarantees, remedies, and protections to increase employment and ensure a "minimum standard of living."[48] There is a problem of fit between the FLSA and the open-ended, case-specific primary beneficiary test.[49] First, the reasoning underlying the primary beneficiary test runs contrary to 29 U.S.C. § 214's provision enabling employers to pay "apprentices" and "learners" a subminimum wage, subject to securing a waiver from the relevant agency. Second, the test's case-by-case analysis precludes the use of the class action provision specifically included in the FLSA. Finally, the fact that the outcome of the primary beneficiary test may be uncertain ex ante could make it difficult for interns with legitimate claims to prevail under specific provisions of the law. Adopting a narrower standard, such as the "no immediate advantage" standard advanced by the plaintiffs, would have avoided many of these problems.

The primary basis for the *Glatt* court's opinion is *Portland Terminal*. *Portland Terminal* created a "trainee" exception to the FLSA's definition of "employee" through two important moves. First, the Court sidestepped the implications of the 29 U.S.C. § 214 "apprentice" and "learner" provision for trainees by asserting that "[w]ithout doubt the [a]ct covers . . . [apprentices and] learners if they are employed to work for an employer for compensation"[50] but holding that the act "only relates to learners who are *in 'employment.'*"[51] Second, for the trainees who were not promised compensation, *Portland Terminal*

---

[45] *Id.* at 387.

[46] *Id.* at 387–88. The Second Circuit uses a "two-step process for certifying FLSA collective actions. At step one, the district court permits a notice to be sent to potential opt-in plaintiffs if the named plaintiffs make a modest factual showing . . . . At step two, with the benefit of additional factual development, the district court determines whether . . . the opt-in plaintiffs are in fact similarly situated to the named plaintiffs." *Id.* at 387 (internal citations omitted) (citing Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010)).

[47] *Id.* at 387–88.

[48] *See* 29 U.S.C. § 202 (2012).

[49] Many of these problems would also exist under both the traditional DOL fact sheet and the district court's totality-of-circumstances balancing test.

[50] Walling v. Portland Terminal Co., 330 U.S. 148, 151 (1947).

[51] *Id.* at 152 (emphasis added).

found that, while the definition of employee was broad, it could not extend to cover all individuals who "work for their own advantage on the premises of another."[52] But the Court did not articulate exactly how far this "trainee" exception extended. A person who worked "solely" for his own benefit, where the employer received no "immediate advantage," was clearly not an employee after *Portland Terminal*. But the opinion left open the possibility that a worker's actions could accrue some benefit to the employer.[53]

Lower courts have diverged on the scope of *Portland Terminal*'s exception. In particular, courts are divided on the deference owed to the DOL guidance's distillation of *Portland Terminal*.[54] The Fifth Circuit has accorded the DOL guidance "substantial deference" and focused on whether there was an immediate benefit to the employer.[55] The Tenth Circuit has given the guidance only *Skidmore* deference, adopting a balancing test based on the sheet's factors and focusing on the relative benefit to the parties.[56] Finally, a number of courts, especially recently, have rejected the DOL's guidance outright, adopting a primary beneficiary test without a finite list of factors.[57] For the last group, much of their move to the primary beneficiary test appears motivated by the application of *Portland Terminal* to new contexts — students employed by their schools and unpaid interns — and the recognition that there is little in *Portland Terminal* to suggest the same types of facts should be relevant in all cases.[58] Viewed in light of this mixed precedent, the primary beneficiary test seems a logical solution, even if it is a clear expansion from *Portland Terminal*'s "sole beneficiary" and "immediate advantage" language.

But the consequence of adopting the primary beneficiary test instead of an "immediate advantage" test is a threshold determination of who is an "employee" that fits uneasily with the rest of the FLSA. Most important is the question of compensation. Chapter 29 U.S.C. § 214 was designed to ensure that employers were not forced to pay

---

[52] *Id.*

[53] *See id.* at 152–53.

[54] The DOL has issued separate informal guidance for trainees and for interns that use essentially the same criteria. *See Glatt*, 791 F.3d at 382.

[55] *See* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983).

[56] *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–29 (10th Cir. 1993); *see also* Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1006–10 (N.D. Cal. 2010).

[57] *See, e.g.*, Schumann v. Collier Anesthesia, P.A., No. 14-13169, 2015 WL 5297260, at *8 (11th Cir. Sept. 11, 2015); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011); McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 (4th Cir. 1989).

[58] *See Solis*, 642 F.3d at 529 ("The [primary beneficiary] test is pitched at an appropriate level of generality to enable it to reach non-employer-based training relationships . . . ."); *see also Schumann*, 2015 WL 5297260, at *8 ("[T]he training involved in *Portland Terminal* was not a universal requirement for a particular type of educational degree . . . .").

beginners (who were learning) the same as experienced workers[59] and, relatedly, to ensure that minimum wage laws did not eliminate training and employment opportunities for beginners.[60] In other words, the FLSA contemplated a world in which most individuals would be paid a full wage, but those who benefited from their employment relationships through learning[61] and who provided less advantage to their employers[62] were entitled to a subminimum wage. *Portland Terminal* held that not all individuals who qualify as "learners" or "apprentices" under 29 U.S.C. § 214 need qualify as employees under the FLSA.[63] Thus, even a narrow "immediate advantage" test would have put some interns outside of the FLSA's definition of employee. But the primary beneficiary test is premised on the very need for learning and limited value to the employer that justified the inclusion of the § 214 subminimum wage allowances in the first place. Thus, it threatens to swallow § 214, which is already in limited use.[64] What employer would want to secure a waiver and compensate interns, when he or she could simply not pay them at all?

Second, the primary beneficiary test makes it more difficult for interns to vindicate their class action claims. Class actions are widely acknowledged as providing an important vehicle for those with limited means or lower-value damages to achieve relief. The adoption of the "case-specific" primary beneficiary test essentially precludes for all unpaid interns — no matter how meritorious their claims — the availability of the § 216(b) opt-in collective action. The Second Circuit has adopted a two-step certification process in FLSA class actions. Even at the first step of FLSA certification, requiring only a "modest factual showing that [the plaintiffs] were victims of a common policy or

---

[59] *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. & Labor and the H.R. Comm. on Labor*, 75th Cong. 481 (1937) [hereinafter *Joint Hearing*] (statement of E.H. Lane, The Lane Company) (discussing how the average beginner is an expense rather than an asset and should not be compensated as much as an experienced worker).

[60] *See* 29 U.S.C. § 214 (2012) (beginning each of its three substantive requirements with: "The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall . . .").

[61] *See Joint Hearing*, *supra* note 59, at 860 (statement of William F. Patterson, Executive Secretary, National Committee on Apprentice Training) (discussing how apprenticeships are a means of providing training so apprentices can be absorbed into skilled occupations).

[62] *See supra* note 59 and accompanying text; *see also Joint Hearing*, *supra* note 59, at 455 (statement of John M. Keating, Attorney) ("By 'learner' regulations I refer to the practice of permitting a manufacturer to pay part of his help a subnormal wage under the pretext that they are inexperienced.").

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

[64] *See* Employment of Student-Learners, 62 Fed. Reg. 64,956, 64,956–57 (Dec. 9, 1997) (codified at 29 C.F.R. pt. 520) (explaining the dramatic decrease in certificate applications, which is due in part to the elimination of a subminimum wage for apprentices and the adoption of a high subminimum wage for learners).

plan,"[65] the court found that the need to "consider individual aspects of the intern's experience" prevented certification.[66] While the *Glatt* opinion ostensibly preserved the possibility of certification in other cases, an unpublished Second Circuit opinion shows that door is essentially closed.[67] An "immediate advantage" test would likely have provided more common questions that a class action could have answered. For example, the replacement of paid employees with unpaid interns would strongly, if not conclusively, imply that the employer received an immediate advantage from the unpaid interns. As the *Glatt* court readily admitted,[68] the primary beneficiary test functionally prevents unpaid interns from using a remedy explicitly provided for in the FLSA.

Finally, the FLSA also includes a number of protections and guarantees, including 29 U.S.C. § 215's antiretaliation provision. Section 215(a)(3) bans discharging *employees* for filing an action under the FLSA, to encourage them to file claims.[69] The primary beneficiary test involves a case-by-case inquiry in which any number of unenumerated factors might be relevant. Uncertainty about the outcome of this test could discourage interns with legitimate claims from filing for fear they will be fired with impunity. A narrow "immediate beneficiary" test, by contrast, would provide more certainty and could limit retaliation.

The FLSA adopted a framework of guarantees, requirements, and remedies to achieve the law's fundamental aim: to increase employment and guarantee all workers a "minimum standard of living necessary for health, efficiency, and general well-being."[70] The primary beneficiary test for determining employee status makes sense in the context of precedent. However, consideration of the test's interaction with particular provisions of the FLSA suggests that such a broad and open-ended threshold test for interns fits poorly with the statute's scheme.[71]

---

[65] *Glatt*, 791 F.3d at 387.

[66] *Id.* at 388.

[67] *See* Wang v. Hearst Corp., No. 13-4480-CV, 2015 WL 4033091, at *2 (2d Cir. July 2, 2015) ("Irrespective of the type of evidence used to answer them, these questions are individual in nature and will require individual analysis.").

[68] *See Glatt*, 791 F.3d at 387–88.

[69] *See* 29 U.S.C. § 215(a)(3) (2012); Greathouse v. JHS Sec. Inc., 784 F.3d 105, 115 (2d Cir. 2015); *see also, e.g.*, Freeman v. Key Largo Volunteer Fire & Rescue Dep't, Inc., 494 F. App'x 940, 944 (11th Cir. 2012).

[70] *See* 29 U.S.C. § 202.

[71] Notably, there is also an ongoing debate about the test for when an individual qualifies as an employee as opposed to an independent contractor. Increased certainty in the independent contractor–employee distinction may well be desirable, but this question falls outside the scope of this comment.