UNPAID INTERNSHIPS IN THE ENTERTAINMENT INDUSTRY: THE NEED FOR A CLEAR AND PRACTICAL INTERN STANDARD AFTER THE BLACK SWAN LAWSUIT

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I. INTRODUCTION

We are in the midst of a "black swan" event. The term—which denotes an event that is rare, has an extreme impact, and is retrospective—came about after the discovery of Australia.[1] Before the discovery, people in the old world were convinced that all swans were white.[2] But once the first black swan was seen in Australia, the rare sight not only had a major impact on the world, but it also, in retrospect, seemed entirely explainable and predictable.[3] Four hundred years later, we are facing a similar phenomenon—only this time, it is with the legal standards governing unpaid internships, and, coincidently, the motion picture "Black Swan."

Internships are either paid or unpaid.[4] Those that are unpaid are usually accompanied by academic credit.[5] Until recently, unpaid internships had not been questioned.[6] They were standard industry practice, especially in the entertainment industry,[7] and very few people would have predicted their end. However, in retrospect, the issues being brought up today are both explainable and predictable. The laws pertaining to unpaid internships are not what they should be and are thus giving rise to questions and lawsuits. Instead of being written and developed specifically with internships in mind, the current laws are components of employment law that lawmakers are trying to mold and adapt in order to apply to internships.

In the United States, there is no specific federal law governing interns. However, the Fair Labor Standards Act (FLSA) carves out a distinction between who is an employee and who is not.[8] As such, interns are currently lumped into the "not an employee" category, which allows them to be unpaid. However, an internship may lend itself more to the characteristics of an employment relationship, therefore falling under the FLSA "employee" category. The circuit courts are split as to which standard to use to determine whether an intern is

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1. NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE, at xvii–xviii (2007).
2. *Id.* at xvii.
3. *Id.* at xvii-xviii.
4. Daniel Miller & John Horn, *Showbiz Interns in Legal Spotlight*, L.A. TIMES, Apr. 6, 2014, at A16.
5. *See* THE VAULT COLLEGE CAREER BIBLE 6 (2006).
6. *See* Miller & Horn, *supra* note 4, at A1, A16.
7. *Id.*; *see* Amanda Becker, *Unpaid Intern Lawsuit 'Trend' Is Likely To Expand, Legal Experts Say*, HUFFINGTON POST (June 14, 2013, 3:19 PM), http://www.huffingtonpost.com/2013/06/14/unpaid-intern-lawsuit_n_3443430.html.
8. Fair Labor Standards Act, 29 U.S.C. § 203(e)(1)-(5) (2012).

deemed an employee.[9] Some courts apply the six-factor test developed by the Department of Labor (DOL), while others apply alternate tests, such as the "primary benefit" test.[10]

In the United Kingdom, no specific law governs interns. However, the National Minimum Wage Act (NMWA) carves out a distinction between who is a "worker" and who is not.[11] Interns are exempt from receiving the National Minimum Wage (NMW); thus, they fall within the "not a worker" category.[12] In order to fall within the intern exemption, an intern has to fall within one of the five listed categories.[13]

The underlying problem with these current standards and laws is the lack of a definition for the term "intern."[14] Instead of a separate intern category, where the issues specific to internships can be addressed, the laws in both countries try to fit internships into their current employment frameworks, which were developed before internships even existed. This does a serious disservice to interns.

Due to the lack of a clear and practical definition of the term "intern," as well as the confusion over whether they have to be paid, unpaid interns have been filing an increasing number of lawsuits.[15] In 2013, a high profile case, *Glatt v. Fox Searchlight Pictures Inc.*, became the first case in the United States to hold that the plaintiffs, who were interns working on the motion picture "Black Swan," should have been paid because they were employees.[16] Since *Glatt* was decided, a

9. *See* Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184, 197-98 (2013).

10. *Id.*

11. National Minimum Wage Act, 1998, c. 39, § 54 (U.K.); *see* Alison Weatherhead, *Interns: To Pay or Not to Pay (The National Minimum Wage!)?*, EMP. L. BULL., Feb. 2012, at 2, 2 (U.K.).

12. c. 39, § 3 (U.K.).

13. *The National Minimum Wage*, GOV.UK, https://www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage (last updated Nov. 12, 2014) (explaining that one will not get the NMW if he or she is: (i) a student doing work experience as part of a higher or further education course; (ii) of compulsory school age; (iii) a volunteer or doing voluntary work; (iv) on a government or European programme; or (v) work shadowing) [hereinafter *The National Minimum Wage*].

14. Brief for American Council on Education, et al. as Amicus Curiae Supporting Neither Party, Glatt v. Fox Searchlight Pictures Inc., No. 13-4478 (2d Cir. Apr. 3, 2014) [hereinafter Brief For American Council on Education]; *see* Rosa Silverman, *Interns Should Report Employers Exploiting Them, Says PM*, TELEGRAPH (Sept. 16, 2013, 10:16 AM) (U.K.), *available at* http://www.telegraph.co.uk/finance/jobs/10312057/Interns-should-report-employers-exploiting-them-says-PM.html.

15. *The Internship: Generation i*, ECONOMIST, Sept. 6-12, 2014, at 61, 63.

16. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 538-39 (S.D.N.Y. 2013) *reconsideration in part granted*, No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013)

flood of unpaid interns have filed suit both in the United States[17] and abroad.[18] The companies sued so far include: The Hearst Corporation;[19] the "Charlie Rose Show";[20] Condé Nast;[21] Warner Music Group and its subsidiary, Atlantic Records;[22] NBCUniversal;[23] Viacom and MTV Networks;[24] Universal Music Group and its subsidiary, Bad Boy Entertainment;[25] Sony Corporation of America, its subsidiary, Sony Music, and Columbia Records, which is one of Sony Music's recording labels;[26] Alexander McQueen;[27] Marvel;[28] and CBS Broadcasting, along with the production company that produces "The Late Show with David Letterman."[29]

These lawsuits are alarming. Instead of resolving anything, they are making employers hesitant about hiring interns.[30] This is a problem because internships are far too important to be eliminated or even

motion to certify immediate appeal granted, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

17. Hilary Daninhirsch, *Litigation Consequences of Unpaid Internships*, INSIDE COUNS. (Apr. 14, 2014), http://www.insidecounsel.com/2014/04/14/litigation-consequences-of-unpaid-internships#; *see* Nona Willis Aronowitz, *Rallying Cry Against Unpaid Internships Grows*, CNBC (Sept. 3, 2013, 1:44 PM), http://www.cnbc.com/id/10100478.

18. Michelle Innis, *Australia Challenges Use of Unpaid Internships*, N.Y. TIMES, Nov. 10, 2014, at B4; Aleksandra Sagan, *Unpaid Internships Exploit 'Vulnerable Generation'*, CBCNEWS (July 2, 2013, 5:03 AM) (Can.), http://www.cbc.ca/news/canada/unpaid-internships-exploit-vulnerable-generation-1.1332839.

19. Class Action Complaint, Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013) (No. 12 Civ. 0793).

20. Class Action Complaint, Bickerton v. Rose, No. 650780/2012, (N.Y. Sup. Ct. June 28, 2013).

21. Class Action Complaint, Ballinger v. Advance Magazine Publishers, Inc., No. 13 Civ. 4036, (S.D.N.Y. June 13, 2013).

22. Class Action Complaint, Henry v. Warner Music Grp. Corp. at 3, No. 155527/2013 (N.Y. Sup. Ct. June 17, 2013), *removed*, No. 13 Civ. 5031, (S.D.N.Y. July 19, 2013).

23. Class Action Complaint, Moore v. NBCUniversal, Inc., No. 13 Civ. 4634 (S.D.N.Y. July 3, 2013).

24. Class Action Complaint, O'Jeda v. Viacom, Inc., No. 13 Civ. 5658 (S.D.N.Y. Aug. 13, 2013).

25. Class Action Complaint, Salaam v. Universal Music Grp., Inc., No. 13 Civ. 5822 (S.D.N.Y. Aug. 19, 2013).

26. Class Action Complaint at 4, Fields v. Sony Corp. of Am., No. 157200/2013 (N.Y. Sup. Ct. Aug.8, 2013), *removed*, No. 13 Civ. 06520, (S.D.N.Y. Sept. 16, 2013).

27. Libby Page, *Unpaid Intern Takes on British Fashion House Alexander McQueen*, GUARDIAN (Feb. 17, 2014) (U.K.), http://www.theguardian.com/education/2014/feb/17/unpaid-intern-alexander-mcqueen-court.

28. Class Action Complaint at 3, Jackson v. Marvel Entm't, LLC, No. 157644/2014 (N.Y. Sup. Ct. Aug. 4, 2014).

29. Class Action Complaint at 3, Musallam v. CBS Broad., Inc., No. 158662/2014 (N.Y. Sup. Ct. Sept. 4, 2014).

30. *See* Rachel Feintzeig & Melissa Korn, *Internships Go Under the Microscope*, WALL ST. J., Apr. 23, 2014, at B7; Lauren Weber, *Condé Nast to Cease Its Internship Program*, WALL ST. J., Oct. 24, 2013, at B3.

reduced in number or quality. The vast majority of students rely on mentorship opportunities, including internships, to obtain the skills necessary to succeed in their chosen field.[31] According to a 2014 survey of college seniors conducted by the National Association of Colleges and Employers (NACE), a recruiting and research group, "61 percent of graduating seniors had an internship or co-op experience."[32] Of these internships, 46.5% were unpaid.[33] Employers look for such experience when they consider candidates for full-time positions.[34] According to a 2015 NACE job outlook survey, 72.5% of employers prefer to hire candidates with relevant work experience, and 60% of employers prefer experience gained through an internship or co-op.[35] This is especially true in the entertainment industry, where it is nearly impossible to obtain a job without having participated in an internship.[36] In fact, unpaid internships are seen as a form of paying dues.[37] Because the majority of unpaid internships are offered by the entertainment industry,[38] most of the lawsuits regarding unpaid internships are brought against entertainment companies.

Lawsuits are not the solution, but neither is relying on the current structure of the FLSA and NMWA. Interns are not employees. Interns are not volunteers. And while the definition of "trainees" comes close to defining interns, interns are not "trainees" either. Interns are interns, and their rights need to be defined and protected separately.

Section II of this note looks into the current laws, along with the various tests for determining whether an intern is an employee, both in the United States and the United Kingdom. It also looks into some of the cases and events that have shaped the current debate regarding unpaid internships. Section III of this note looks at the harmful effects of lawsuits brought by former unpaid interns against companies in the entertainment industry. In order to prevent more lawsuits and their harmful effects, Section IV of this note proposes that there should be a definition for "interns" and a separate standard for determining when someone falls into this "intern" category. This standard

31. Feintzeig & Korn, *supra* note 30.

32. NAT'L ASS'N OF COLLEGES & EMP'RS, THE CLASS OF 2014 STUDENT SURVEY REPORT 6 (2014).

33. *Id.*

34. NAT'L ASS'N OF COLLEGES & EMP'RS, JOB OUTLOOK 2015, at 34 (2014).

35. *Id.* at 35.

36. *See* Miller & Horn, *supra* note 4 (explaining how internships foster crucial relationships that lead to better jobs); Page, *supra* note 27 ("Watson says she accepted the internship because she saw 'almost no other way into the fashion industry'").

37. Miller & Horn, *supra* note 4.

38. *Id.* at A16-A17.

should depart from the DOL standards, which are contrary to the interests of interns, and should be replaced with a clear and practical standard that is more aligned with the "primary benefit" test. The definition and standard can be applied in both the United States and the United Kingdom; however, if needed, they can be modified to fit the particular needs of each country.

II. Background

Unpaid internships have been a part of the entertainment industry for years[39] and have been an integral way for students to gain invaluable experience in the industry. It is widely understood that internships are crucial for breaking into the industry.[40] Employers look for such experience when they consider candidates for full-time positions, and most companies are more willing to hire a former intern than someone without internship experience.[41] In fact, 52% of graduates receiving job offers before graduation had participated in internships.[42] As noted by Rick Levy, partner and general counsel at ICM Partners, "There is a long, long tradition of intern programs being an integral part of careers in Hollywood."[43]

A. *The United States: FLSA and Glatt v. Fox Searchlight Pictures, Inc.*

In the United States, the FLSA defines the term "employ" as "to suffer or permit to work."[44] Generally, interns in the for-profit sector are considered employed and need to be paid.[45] However, the Supreme Court in *Walling v. Portland Terminal Co.* created a "trainee" exception by holding 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."[46]

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39. Eriq Gardner, *Hollywood Internships Under Fire After 'Black Swan' Ruling*, Hollywood Rep. (June 19, 2013), http://www.hollywoodreporter.com/thr-esq/black-swan-ruling-hollywood-internships-570702.

40. Miller & Horn, *supra* note 4.

41. *See* Job Outlook 2015, *supra* note 34.

42. The Class of 2014 Student Survey Report, *supra* note 32, at 6.

43. Eriq Gardner, *The Fallout From Those Intern Lawsuits*, Hollywood Rep., Nov. 14, 2014, at 38.

44. 29 U.S.C. § 203 (2012).

45. *See* U.S. Dep't of Labor Wage & Hour Div., Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf. [hereinafter DOL Six-Factor Test].

46. Walling v. Portland Terminal Co., 330 U.S. 148, 152-53 (1947).

Although the "trainee" exception exists, the circuit courts are divided over the proper test used to determine when this exception applies.[47] The Eleventh Circuit applies the "economic realities" test,[48] the Tenth Circuit applies the "totality of the circumstances" test,[49] and the Fourth and Sixth Circuits apply the "primary benefit" test.[50] The "primary benefit" test looks at whether "the internship's benefits to the intern outweigh the benefits to the engaging entity."[51] When adopting this test, the court in *Solis v. Laurelbrook Sanitarium* noted that, "by focusing on the benefits flowing to each party, the test readily captures the distinction the FLSA attempts to make between trainees and employees."[52] Additionally, the circuit courts differ in the amount of deference they give to the DOL's six-factor test.[53] While the Fourth and Sixth Circuits have outright rejected the DOL's six-factor test,[54] the Tenth and Eleventh Circuits, as well as the Southern District of New York, have adopted the DOL's six-factor test to varying degrees.[55]

In 2010, the DOL created a "DOL Intern Fact Sheet" to help determine whether interns in the for-profit sector fall within the "trainee" exception.[56] The fact sheet notes that "this exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of 'employ' is very broad."[57] The six factors, all of which must be met in order for an intern to be a "trainee,"[58] 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;

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47. Petition for Writ of Certiorari at i, Kaplan v. Code Blue Billing & Coding, Inc., 134 S. Ct. 618 (2013) (denying ceriorari) [hereinafter Petition for Writ of Certiorari].

48. Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 470 (11th Cir. 1982).

49. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993).

50. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011); McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989).

51. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013) *reconsideration in part granted*, No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013) *motion to certify immediate appeal granted*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

52. *Solis*, 642 F.3d at 529.

53. Petition for Writ of Certiorari, *supra* note 47.

54. *See Solis*, 642 F.3d at 525; *McLaughlin*, 877 F.2d at 1209–10 n.2.

55. Petition for Writ of Certiorari, *supra* note 47; Deborah C. Brown, *Internships and the FLSA*, 88 FLA. BUS. J., 53, 55 (2014) ("the 11th Circuit has given deference to the six-factor test").

56. DOL SIX-FACTOR TEST, *supra* note 45.

57. *Id.*

58. *Id.*

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.[59]

The United States Supreme Court has yet to weigh in on the question of paying interns. On November 12, 2013, the Court denied a petition for a writ of certiorari to a case arising out of the Eleventh Circuit.[60] Had the Court granted certiorari, it could have established which test is proper to determine when an intern is a "trainee."[61] However, since certiorari was denied, the proper test remains unclear.

Although the circuits are divided over which test to apply, every court has held in each case filed by unpaid interns claiming they should have been paid that the interns were not employees. However, this trend changed with the decision in *Glatt v. Fox Searchlight Pictures Inc.*, which was the first case to hold that the interns should have been paid because they were employees.[62]

Glatt was a class action lawsuit brought by unpaid interns who worked on motion pictures for Fox Searchlight Pictures, Inc. and its parent company, Fox Entertainment Group, Inc.[63] One plaintiff in particular, Eric Glatt, worked on the production of the motion picture "Black Swan."[64] Glatt also participated in a second internship, working on the post-production for the film.[65] The other plaintiffs worked on the production of films or worked at the studio's corporate offices.[66] Together, they claimed they were employees covered by the

59. *Id.*
60. Petition for Writ of Certiorari, *supra* note 47.
61. Kaplan v. Code Blue Billing & Coding, Inc., SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/kaplan-v-code-blue-billing-coding-inc (last visited Jan. 20, 2015).
62. Renee Choy Ohlendorf, *Employer Violates Labor Laws by Failing to Pay Interns*, A.B.A. (Oct. 4, 2013), https://apps.americanbar.org/litigation/litigationnews/top_stories/100413-employment-law-intern.html.
63. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 516 (S.D.N.Y. 2013) *reconsideration in part granted*, No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013) *motion to certify immediate appeal granted*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).
64. *Id.* at 522.
65. *Id.*
66. *Id.*

FLSA and, as such, should have been paid even though they knowingly participated in an unpaid internship program.[67]

After the court approved class certification, the court looked into whether the plaintiffs were "employees" covered by the FLSA.[68] Fox Searchlight argued that the proper test to determine whether the plaintiffs were covered by the "trainee" exception was the "primary benefit" test.[69] However, the court rejected this test because it was claimed to be "subjective and unpredictable."[70] After citing to Fox Searchlight's argument that the very same internship might be compensable as to one intern who took little from the experience while not being compensable to another intern who learned more, the court reasoned: "Under [the "primary benefit"] test, an employer could never know in advance whether it would be required to pay its interns. Such a standard is unmanageable."[71]

The *Glatt* court noted that the "primary benefit" test contradicts the United States Supreme Court's decision in *Walling v. Portland Terminal Co.* In *Walling,* the Supreme Court did not weigh the benefits to the trainees against those of the railroad, but relied on findings that the training program served *only* the trainees' interests and that the employer received "no 'immediate advantage' from any work done by the trainees."[72] Thus, the *Glatt* court instead called for following the DOL's six-factor test because those factors have support in *Walling.*[73] The *Glatt* court reasoned that the DOL factors are entitled to deference "[b]ecause they were promulgated by the agency charged with administering the FLSA and are a reasonable application of it."[74] Lastly, the court noted, a school's "decision to grant academic credit is not a determination that an unpaid internship complies with the [law]."[75]

Fox Searchlight has appealed the decision to the Second Circuit.[76] Because the vast majority of entertainment companies are headquartered within the jurisdiction of the Second Circuit, this decision will

67. *Id.*
68. *Id.* at 530-31.
69. *Id.* at 531.
70. *Id* at 532.
71. *Id.*
72. *Id.* at 531-32 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947)).
73. *Id.* at 532.
74. *Id.* (citing Wang v. Hearst Corp., 293 F.R.D. 489, 494 (S.D.N.Y. 2013)).
75. *Id.* at 537.
76. Miller & Horn, *supra* note 4.

have a profound influence on the future of internships in the industry.[77]

B. The United Kingdom: NMWA, Relevant Cases, and Reactions

Unpaid internships have become a global concern. Countries around the world, including the United Kingdom, Canada, and Australia, are facing similar issues because the legal status of interns remains unclear.[78]

The future of internships in the United Kingdom is of particular importance due to the country's large and highly competitive film and television industry.[79] Not only does the United Kingdom produce successful motion pictures,[80] it is also a destination of choice for international filmmaking.[81] As evidenced by the thirty-seven international blockbusters filmed in the country in 2013, foreign production companies are continually choosing to film in the United Kingdom.[82] Moreover, Warner Bros. took its investment in the United Kingdom's entertainment industry one step further by becoming the first Hollywood studio to have a permanent production base in Europe since MGM set up MGM London Films at Elstree Studios in the early 1940's.[83] Therefore, if any company, domestic or foreign, that is a part of the United Kingdom's prevalent entertainment industry is inter-

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77. Abigail Rubenstein, *2nd Circ. May Determine Fate of Internship Programs*, LAW360 (Dec. 2, 2013, 8:13 PM), http://www.law360.com/articles/492505/2nd-circ-may-determine-fate-of-internship-programs.

78. National Minimum Wage Act, 1998, c. 39 §§ 1, 3, 54 (U.K.); Innis, *supra* note 18; The Canadian Press, *Unpaid Internships on Their Way Out Thanks to Public Pressure: NDP's Andrew Cash*, HUFFINGTON POST CAN. (Oct. 8, 2014, 5:59 AM), http://www.huffingtonpost.ca/2014/08/08/unpaid-internships-canada_n_5662716.html.

79. *See* Alex Ritman, *U.K. 2013 Production Spend Rose, Number of Film Releases Hit High*, HOLLYWOOD REP. (July 24, 2014, 5:50 AM), http://www.hollywoodreporter.com/news/uk-2013-production-spend-rose-720878.

80. *Id.*

81. Hannah Ellis-Petersen, *Animation Tops Action as UK's Favourite Film Genre for First Time*, GUARDIAN (July 24, 2014, 1:33 PM), http://www.theguardian.com/film/2014/jul/24/animation-tops-uk-favourite-film-genre. *C.f.* GREGORY FREEMAN ET AL., WHAT IS THE COST OF RUN-AWAY PRODUCTION? JOBS, WAGES, ECONOMIC OUTPUT AND STATE TAX REVENUE AT RISK WHEN MOTION PICTURE PRODUCTIONS LEAVE CALIFORNIA, LOS ANGELES COUNTY ECONOMIC DEVELOPMENT CORPORATION (2005) (examining production location data and describing offshore tax credits and grants).

82. Matt Chorley, *Britain's £1 Billion Film Industry: How Osborne's Tax Break Has Got Hollywood's Finest Flocking to the UK*, DAILY MAIL (Jan. 31, 2014, 10:24 AM), http://www.dailymail.co.uk/news/article-2549556/Britains-1billion-film-industry-How-Osbornes-tax-break-Hollywoods-finest-flocking-UK.html?amp&.

83. Ali Jaafar, *Warner to Buy Leavesden Studios*, VARIETY (Jan. 27, 2010, 8:42 AM), http://variety.com/2010/biz/news/warner-to-buy-leavesden-studios-1118014349.

ested in hiring interns, the company needs to ensure that its internships comply with the United Kingdom's employment laws.

Similar to the United States, the United Kingdom lacks a legal definition for the term "intern."[84] Hazel Blears, the Labour MP for Salford and Eccles, noted this omission in the law and called for both a legal definition of the term "intern" along with a clarification of when interns should be covered by the NMWA.[85] Blears further commented, "The [NMWA] was drawn up in 1998 when there weren't interns in the UK . . . . Now there are thousands and it would be reasonably straightforward to give them a definition in law."[86]

Another similarity between the United States and the United Kingdom is that there is no single arrangement that is understood to constitute an internship. Internships come in all shapes and sizes and may change significantly from day-to-day.[87] Thus, the label attached to the employment relationship is not what is considered; instead, one has to consider what the arrangement is in practice.[88] In other words, it is not enough to merely call someone an "intern"; the "intern" must also meet the legal standards.

Under the NMWA, a person qualifies for the NMW if that person: (a) is a worker; (b) is working or ordinarily works in the United Kingdom under his or her contract; and (c) has ceased to be of compulsory school age.[89] When determining whether a person, including an intern, is a "worker," the government's "intent to reduce the chance of employers seeking to avoid paying [the NMW]" is taken into consideration.[90] Thus, the burden of proof is on the employer to rebut the presumption that the worker has to be paid the NMW.[91]

There are various exemptions to the NMWA. Under one such exemption, which involves work experience and internships,[92] one will not get the NMW if he or she is: (i) a student doing work experience as part of a higher or further education course; (ii) of compulsory school age; (iii) a volunteer or doing voluntary work; (iv) on a government or European programme; or (v) work shadowing.[93]

84. *See* Silverman, *supra* note 14.
85. *Id.*
86. *Id.*
87. Weatherhead, *supra* note 11, at 2.
88. *Id.*
89. National Minimum Wage Act, 1998, c. 39, § 1(2) (U.K.).
90. Weatherhead, *supra* note 11, at 2.
91. c. 39, § 28(1) (U.K.).
92. National Minimum Wage Regulations, 1999, S.I. 1999/584, reg. 12, ¶ 8 (U.K.).
93. *The National Minimum Wage*, *supra* note 13.

Unlike the United States, the United Kingdom has a Pay and Work Rights Helpline that individuals can call to receive help and advice on workers' rights under the NMWA.[94] The service is free, confidential, and available in over 100 languages.[95] Unpaid interns can also use the Pay and Work Rights Helpline to register anonymous complaints when they are not being paid the NMW.[96]

Interns are actively using the Pay and Work Rights Helpline and filing lawsuits.[97] In 2013, Her Majesty's Revenue & Customs (HMRC), based on allegations reported by interns, had at least 100 companies to investigate.[98] HMRC also forced nine companies, including Arcadia, which owns Topshop and other well-known British stores, to pay more than $300,000 in back wages to unpaid interns.[99] In addition to filing a claim to HMRC, Chris Jarvis, a former intern at Sony, also filed a lawsuit.[100] Although Sony claimed that Jarvis was a volunteer and therefore not entitled to the NMW, Sony settled the case for £4,600.[101] Jasmine Patel, who helped Jarvis with his case, stated,

> If someone is working set hours . . . and is adding value to the company so that if they were not doing the task someone else would have to be paid to do it, then it is more likely they will be defined as a worker in law, entitled to be paid.[102]

Alexander McQueen was also sued by a former intern, Rachel Watson, who claimed up to £6,415 in "lost wages."[103] In response to the lawsuit, which was filed four years after Watson's internship ended, a spokesperson for Alexander McQueen stated, "We had no idea until now that she had any concern about the time she spent at Alexander McQueen."[104]

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94. *Pay and Work Rights Hotline,* Gov.Uk, https://www.gov.uk/pay-and-work-rights-helpline (last visited Jan. 25, 2015).

95. *Id.*

96. John Wiener, *Brits Crack Down on Unpaid Internships*, Nation (June 2, 2013, 3:06 PM) (U.K.), http://www.thenation.com/blog/174626/brits-crack-down-unpaid-internships#.

97. *See, e.g.*, *HMRC to Investigate 100 Companies over Intern Allegations*, London Evening Standard (Apr. 12, 2013), http://www.standard.co.uk/business/business-news/hmrc-to-investigate-100-companies-over-intern-allegations-8569601.html [hereinafter *HMRC*]; James Legge, *Unpaid Intern Who Sued Sony Awarded £4,600*, Indep. (Sept. 2, 2013) (U.K.), http://www.independent.co.uk/news/uk/home-news/unpaid-intern-who-sued-sony-awarded-4600-8794347.html; Page, *supra* note 27.

98. *HMRC, supra* note 97.

99. Wiener, *supra* note 96.

100. Legge, *supra* note 97.

101. *Id.*

102. *Id.*

103. Page, *supra* note 27.

104. *Id.*

In addition to lawsuits and complaints, there are demands for new legislation.[105] One such proposed law calls for a ban on adverts (also known as advertisements) for unlawful unpaid internships.[106] Companies like Milkround, Reed.co.uk, Guardian News and Media, Monster, Gorkana and Targetjobs have not only expressed support for the legislation,[107] but they no longer allow adverts on their websites for unpaid internships that violate the NMWA.[108]

Deputy Prime Minister Nick Clegg, however, has opposed such legislation.[109] His spokesperson, while noting an interest in "bring[ing] an end to the 'who you know not what you know' culture," warned that "there are possible unintended consequences of legislating on this issue—it could actually force companies to stop advertising these valuable opportunities, forcing internships back on to a kind of 'black market' where the vacancies are filled by people with the best connections."[110]

There are also calls for legislation that will ban unpaid internships altogether.[111] The Labour Party's former Cabinet Minister, Alan Milburn, hopes that all unpaid internships will be illegal by 2020.[112] As a step towards that goal, the Labour Party has announced a proposal that would ban unpaid internships that last longer than four weeks.[113] The proposal is based on the Labour Party's belief that "thousands of highly able young people are 'locked out' of many professions because they cannot afford to work for nothing."[114]

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105. *E.g.*, Andrew Grice, *Labor to Limit Unpaid Internships to a Month to Stop Best Jobs Going to the Richest*, INDEP. (Dec. 15, 2014) (U.K.), http://www.independent.co.uk/news/uk/politics/labour-to-limit-unpaid-internships-to-a-month-to-stop-best-jobs-going-to-richest-9924590.html; Shiv Malik, *Nick Clegg Rejects Call for Ban on Unpaid Internship Adverts*, GUARDIAN (Sept. 2, 2013, 2:35 AM) (U.K.), http://www.theguardian.com/politics/2013/sep/02/nick-clegg-ban-unpaid-internship-adverts.

106. Malik, *supra* note 105.

107. *Id.*

108. *UK Job Boards Unite to Ban Adverts for Unpaid Internships!*, GRADUATE FOG (Sept. 2, 2013) (U.K.), http://graduatefog.co.uk/2013/2692/uk-job-boards-unite-to-ban-adverts-for-unpaid-internships.

109. *Id.*

110. Malik, *supra* note 105.

111. Guy Bentley, *UK Comes One Step Closer to Banning Unpaid Internships*, CITY A.M. (May 13, 2014, 3:53 PM) (U.K.), http://www.cityam.com/blog/1399992797/uk-comes-one-step-closer-banning-unpaid-internships.

112. Grice, *supra* note 105.

113. *Id.*

114. *Id.*

III. Unpaid Internships Should not Be Eliminated from the Entertainment Industry

Without a clear and practical intern standard, the law is so ambiguous that it has led to an exponential increase in lawsuits brought by former interns. But instead of helping, these lawsuits are hurting students. In the entertainment industry, unpaid internships were quite common. In the late 1990's, close to 100% of internships in the entertainment industry were unpaid.[115] This, however, is no longer the case.[116] Due to the lawsuits and lack of clarity in the law, companies, wanting to avoid lawsuits, have come up with two solutions: switch to paid internship programs or end their internship programs altogether. Neither solution is desirable for interns. But what is even more undesirable is legislation that will ban all unpaid internships.

A. *Switching to Paid Internship Programs*

Lawsuits are not the proper way to resolve this debate. Regardless of the courts' decisions, the threat of lawsuits is enough to decrease the number of internship positions offered because companies are unwilling to risk liability.[117]

Companies are so unwilling to deal with litigation that they would rather settle than have to defend against the claims. NBCUniversal and Viacom have both settled their lawsuits and begun to pay their interns.[118] The terms of Viacom's settlement have not yet been released, but NBCUniversal settled its lawsuit for $6.4 million.[119] Fox, despite appealing the District Court's decision in *Glatt*, has also switched to offering only paid internships.[120] The same results are occurring in the United Kingdom, where Alexander McQueen not only issued an apology after publishing an advert about an unpaid internship, but also began paying its interns after a former intern sued the fashion house.[121]

115. Dawn Gilbertson, *Glamour Internships With a Catch: There's No Pay*, N.Y. Times, Oct. 19, 1997, at BU16.

116. Miller & Horn, *supra* note 4.

117. Sarah Braun, *The Obama "Crackdown": Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. Rev. 281, 286 (2012).

118. Gardner, *supra* note 43; Eriq Gardner, *Viacom Settles Intern Class Action Lawsuit*, Hollywood Rep. (Jan. 5, 2015, 7:46 AM), http://www.hollywoodreporter.com.thr-esq/viacom-settles-intern-class-action-761106 [hereinafter *Viacom Settles*].

119. Gardner, *supra* note 43; *Viacom Settles*, *supra* note 118.

120. Miller & Horn, *supra* note 4.

121. Page, *supra* note 27.

While a decrease in unpaid internships is problematic, an outright ban on all unpaid internships would be devastating for students who want to participate in these vital programs. Such legislation is too severe and will not meet the interests of all interns. Although the Labour Party is justified in its concern for students who cannot afford to work without pay for longer than four weeks, an outright ban on unpaid internships is not the only way to ensure that paid internships are available for these students.

While the majority of internships in the entertainment industry were unpaid, paid internships are not a novel concept. Warner Bros., Paramount Pictures, Walt Disney Studios, and Sony Pictures Entertainment have long maintained paid internship programs.[122] Consequently, students who cannot afford to participate in unpaid internships still have the opportunity to participate in paid internships. The two types of internships are not mutually exclusive.

Although critics of unpaid internships will consider the switch to paid internships a victory for interns, in the end, interns lose more than they gain. They lose internship opportunities and they lose the freedom to choose to participate in an unpaid internship.[123] The transition from unpaid to paid internships will, and already has, reduced the number of internships offered by entertainment companies.[124] It may be difficult to believe, especially when looking at how much money movies gross, but entertainment companies do not have an endless supply of money.[125] Due to budgetary restrictions, many departments within a company are not able to afford an intern, and, of those departments that can, some can only afford to hire part-time interns. As a result, students who wish to intern in a particular department might not have the opportunity to do so anymore. Moreover, some students would rather receive academic credit than get paid. Because employers do not provide both monetary compensation and academic credit, students who planned on receiving academic credit for their internship can no longer do so. This forces interns to rearrange their class schedules and can even force them to graduate late if they can not make up the lost units in time. Lastly, and ironically, switching to paid internships relieves employers of their duties to provide an "educational" environment. Thus, paid interns can legally be

122. Miller & Horn, *supra* note 4.

123. *See* Feintzeig & Korn, *supra* note 30 (noting that there will be fiercer competition for the fewer internship positions available).

124. *Id.*

125. *See* Adam Davidson, *When You Wish Upon 'Ishtar'*, N.Y. TIMES, July 1, 2012, at MM16.

expected to make photocopies and complete other mundane tasks—the very things that interns in all these lawsuits were complaining about.

B. Eliminating Internship Programs

Some companies are not as generous as those willing to switch to paid internships. After being sued, Condé Nast, a major mass media company with brands such as *Vogue*, *Vanity Fair*, *GQ*, *W Magazine*, *Lucky Magazine*, and *The New Yorker*, ended its internship program altogether.[126] Condé Nast's decision is undoubtedly an industry game changer, and it may soon be joined by The Hearst Corporation.[127] The Hearst Corporation, which is one of the largest and most diversified media and information companies in the world, with numerous businesses including *Esquire Magazine* and A&E,[128] may also kill its internship program after it was sued by a former intern.[129] Similarly, the "Charlie Rose Show," after settling a lawsuit brought by its former unpaid interns for up to $250,000,[130] decided to cancel the show's internship program.[131] According to the settlement agreement, Mr. Rose and his production company "do not admit any liability or wrongdoing."[132] Instead, they agreed to settle "solely for the purpose of avoiding the costs and disruption of ongoing litigation and to settle all claims."[133]

A complete elimination of an internship program demonstrates the gravity of the repercussions of all these lawsuits. While it may be more difficult for a student to obtain an internship with entertainment companies that switch to paid internships, at least the opportunities still exist. But the same can no longer be said for students who hoped to break into the fashion and media industry[134] or intern at the "Char-

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126. Catherine Taibi, *Condé Nast Ends Internship Program After Lawsuits*, HUFFINGTON POST (Oct. 24, 2013, 10:24 AM), http://www.huffingtonpost.com/2013/10/23/conde-nast-ends-internship-program_n_4148954.html.

127. Dana Schuster & Kirsten Fleming, *Condé Nast Intern: 'I Cried Myself To Sleep'*, N.Y. POST (Nov. 21, 2013, 6:36 AM), http://nypost.com/2013/11/21/conde-nast-interns-speak-out-on-program-shutdown.

128. *About Us*, HEARST CORP., http://www.hearst.com/about (last visited Feb. 8, 2015).

129. Schuster & Fleming, *supra* note 127.

130. Steven Greenhouse, *PBS Show Settles Suit over Pay for Interns*, N.Y. TIMES, Dec. 21, 2012, at B3.

131. Susan Adams, *Why Condé Nast Felt It Had to Stop Using Interns*, FORBES (Oct. 24, 2013, 2:39 PM), http://www.forbes.com/sites/susanadams/2013/10/24/why-conde-nast-felt-it-had-to-stop-using-interns.

132. Greenhouse, *supra* note 130.

133. *Id.*

134. *See* Schuster & Fleming, *supra* note 127.

lie Rose Show." This is devastating news to many students, including Jenny Achiam, a former editorial intern at *Lucky Magazine*, who said, "It's a shame that the resources won't be available to other students in the future."[135] Achiam also noted, "It feels like the people who sued kind of ruined it for everyone else because . . . if you don't like your internship, you can cancel it. You can say, 'I'm sorry, I quit.' Not, 'Well, I'll stick it out and sue you.'"[136]

IV. Unpaid Internships Must Be Protected Through a Clear and Practical Intern Standard

Given the lack of a clear and practical standard that caters specifically to the needs and interests of interns, such a standard needs to be established. Anything less does a disservice to interns because they are being forced into categories that run counter to their needs and are out of touch with reality.

Ultimately, there needs to be a legal definition for the term "intern." This definition should fall somewhere in the middle of the spectrum between the terms "employee" and "volunteer." The definition should also take into careful consideration the distinct needs and interests of interns. With this definition, interns will no longer have to rely on laws that were developed without them in mind.

In addition to a legal definition, interns also need a clear and practical standard for determining when an intern can be unpaid. This standard should be more aligned with the "primary benefit" test than the DOL's six-factor test or the exemptions to the NMWA.

A. *The DOL's Six-Factor Test Is too Inflexible and Impractical to Provide an Effective Intern Standard*

The DOL's six-factor test is not flexible enough to effectively meet the needs and interests of interns. As Nancy J. Leppink, the DOL's Deputy Wage and Hour Administrator admitted, "There aren't going to be many instances where you can have an internship for a for-profit employer and not be paid and still be in compliance with the law."[137] By requiring that an intern must be paid unless every factor is met, the DOL's six-factor test becomes too rigid and nuanced to accommodate the almost infinite variety of internships un-

135. *Id.*

136. *Id.*

137. John R. Carrigan Jr., *Overworked, Underpaid, Illegal? Hollywood Interns Fight Back*, Hollywood Rep., (Oct. 24, 2012, 2:00 PM), http://www.hollywoodreporter.com/thr-esq/hollywood-interns-overworked-underpaid-illegal-382190.

dertaken by students.[138] All internships are different, and students partake in internships for distinct reasons. Therefore, an inflexible and non-subjective test is an inefficient way to provide a proper standard that applies to all internships. Furthermore, because the factors have never been clearly understood, consistently applied, subject to the administrative rulemaking process, or fully adopted by the courts, there is widespread uncertainty as to how employers are supposed to treat interns.[139] Lastly, the factors do not accurately reflect the reality of internships in the entertainment industry.

The first factor states, "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."[140] This is an unworkable criterion. The point of an internship is not to receive training that would be given in an educational environment. The point of an internship is to receive practical experience that supplements what can be taught in an educational environment. When applying this factor, the *Glatt* court added that "internships must provide something beyond on-the-job training that employees receive."[141] However, if an intern has hopes to become a future employee of the company, they will benefit even from on-the-job training. In fact, many college students believe that work experience alone is an educational component.[142] According to one college freshman, "experience is the best thing for me . . . . I appreciate that I can get involved in a field I might enjoy . . . it's a way to be in that arena, to be in that environment—just to see if it's something I like."[143] Thus, this requirement unnecessarily burdens companies to offer educational environments.[144] Companies are not educational institutions; thus, they should not be expected to act like educational institutions.[145] Instead, companies should be as realistic as possible and offer students the opportunity to see what working at the company is really like.

138. Brief for American Council on Education, *supra* note 14, at 9-10.

139. *Id.* at 4.

140. DOL SIX-FACTOR TEST, *supra* note 45.

141. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013) *reconsideration in part granted*, No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013) *motion to certify immediate appeal granted*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

142. Braun, *supra* note 117, at 299.

143. *Id.* at 299-300.

144. Gardner, *supra* note 43, at 39.

145. Braun, *supra* note 117, at 299.

The second factor states, "The internship experience is for the benefit of the intern."[146] The underlying purpose of this factor is satisfied more effectively under the "primary benefit" test. Under the DOL factors, the court in *Glatt* stated that the benefits Glatt and the other plaintiffs received were "incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them."[147] If this is the case, then not only are interns required to receive a benefit, but this benefit has to differ from the benefit the company's employees receive. This requirement is neither reasonable nor necessary. An internship is supposed to get the intern acquainted with the real work environment, not some artificial one. This is especially true in the entertainment industry, where students usually have the misconception that the industry is entirely glamorous.[148] Moreover, some interns find great benefit even in tasks that are incidental to working in the office like other employees. By taking into consideration all the benefits an intern may receive, as opposed to only ones that the DOL approves of, the "primary benefit" test does a better job of taking the benefit to the intern into consideration. Additionally, an internship is what an intern makes of it. Whether an internship is beneficial or not does not fall solely on the employer. It is also the intern's responsibility to put extra effort into the experience. For example, an intern who merely goes to work, does whatever is assigned, and then goes home is not going to receive much benefit. On the other hand, an intern who goes to work, does whatever is assigned, and also networks, asks questions, observes, and is engaged, is much more likely to receive a greater benefit from the internship. As such, it is not realistic to place the burden of making the internship beneficial entirely on the employer.

The third factor states, "The intern does not displace regular employees, but works under close supervision of existing staff."[149] This factor, while relevant to internships, is too severe. It is unlikely that any intern will never spend any time doing work that would not displace regular employees. On a practical level, this would make it too burdensome for the company to hire interns. While companies are willing to supervise interns and are already incentivized to ensure

146. DOL SIX-FACTOR TEST, *supra* note 45.

147. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 533 (S.D.N.Y. 2013) *reconsideration in part granted*, No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013) *motion to certify immediate appeal granted*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

148. Schuster & Fleming, *supra* note 127.

149. DOL SIX-FACTOR TEST, *supra* note 45.

their work is done correctly, companies cannot devote their entire time to supervising their interns. This factor may also create odd rules that would essentially ban interns from making any copies, answering the phone, or engaging in any activity that a regular employee would have to do. This factor, while inspired by good intentions, can lead to bad outcomes, which are less likely to occur if courts use the "primary benefit" test.

The fourth factor states, "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."[150] By applying this factor, an internship deteriorates into job shadowing,[151] which does a disservice to students because internships are not equivalent to, nor should they ever resemble, job shadowing. While job shadowing does offer benefits to students, it pales in comparison to the benefits students receive from internships.[152] It is one thing to observe like a fly on the wall; it is another to be engaged in the work environment and feel like a member of the production team. Internships are valuable because they provide hands-on experience,[153] and by requiring that an intern provide little or no advantage to the employer, this hands-on experience is eliminated and ultimately renders the experience worthless.[154] Additionally, this factor is unfair to employers. Entertainment companies, when taking on interns, have to devote time and resources to train their interns. As a student, an intern needs to learn and often gets in the way of the employees who are trying to do their job. Realistically, if the company were to get no benefit from the intern and even be impeded by the intern, the company would have no incentive to hire the intern in the first place. It is a basic business decision, and most companies would not be willing to engage in such a one-sided relationship. As one entertainment lawyer stated, "many employers agreed to hire interns because there is a strong mutual advantage to both worker and the employer."[155] Thus, this factor demonstrates how the DOL's six-factor test contradicts the reality that both the intern and the company need to benefit from the relationship. Conversely, the "primary benefit" test takes into account both the benefit to the company and the intern.

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150. *Id.*

151. Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER EDUC. (July 13, 2010), http://www.insidehighered.com/views/2010/07/13/aoun#ixzz2fUhBdQm7.

152. *Id.*

153. Braun, *supra* note 117, at 294.

154. *Id.* at 295.

155. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 3, 2010, at B1.

The fifth factor states, "The intern is not necessarily entitled to a job at the conclusion of the internship."[156] The Wage and Hour Division (WHD) of the DOL, which administers the FLSA, requires that unpaid internships "should not be used by the employer as a trial period for individuals seeking employment."[157] Again, this factor runs counter to the reality of internships because students enter into internships with the hopes of increasing their chances of obtaining full-time positions afterwards.[158] Although a job is rarely guaranteed, an internship is usually seen as an extensive long-term interview or audition process.[159] And when companies look to hire full-time employees, internships are given much more weight than attending a prestigious university and having perfect grades.[160] Thus, if employers are discouraged from offering jobs at the conclusion of an internship, it becomes counterintuitive for employers to devote their time and resources towards training an intern who they will not be able to hire. Likewise, the intern may have little incentive to complete the internship if it will eliminate his or her ability to get hired by the company.

Lastly, the sixth factor states, "The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship."[161] This factor does not have an actual effect on an internship because the FLSA does not allow anyone to waive his or her right to receive compensation.[162] Even if an intern agrees to not be compensated, the intern can still sue his or her employer, claiming he or she deserves compensation. This is exactly what happened in *Glatt* and the other unpaid internship cases because the plaintiffs all knew they were entering into unpaid internships. None of them were misled into thinking they were going to receive monetary compensation.

Due to the inflexible and impractical nature of the DOL's six-factor test, courts hearing future lawsuits should not adopt the *Glatt* decision. The DOL standards should not be applied to internships because they do not align with the purpose of internships. As the

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156. DOL SIX-FACTOR TEST, *supra* note 45.

157. *Id.*

158. Braun, *supra* note 117, at 296.

159. *Id.* at 284.

160. *See* Andrea Perera, *Paying Dues in Internships,* L.A. TIMES, (Apr. 22, 2002), http://articles.latimes.com/2002/apr/22/local/me-intern22.

161. DOL SIX-FACTOR TEST, *supra* note 45.

162. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 538-39 (S.D.N.Y. 2013) *reconsideration in part granted,* No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013) *motion to certify immediate appeal granted,* No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

United States Supreme Court noted, "while it may be possible for an entire industry to be in violation of the FLSA for a long time without the Labor Department noticing, the more plausible hypothesis is that the Department did not think the industry's practice was unlawful."[163]

B. The Exemptions to the NMWA Are too Arbitrary to Provide an Effective Intern Standard

The exemptions to the NMWA are too arbitrary to effectively meet the needs of interns. The first exemption, "a student doing work experience as part of a higher or further education course"[164] would only apply if a student's school requires internship experience. Thus, it restricts the opportunities of students whose schools do not have such requirements. Such a distinction is arbitrary and unfair. If unpaid internships are legal for certain students merely because their school requires them, then unpaid internships should be legal for all students.

The next exemption applies to students "of compulsory school age."[165] This exemption is also arbitrary because there is no reason why a student attending compulsory school should be allowed to be unpaid while a student attending college or graduate school should not.

The last three exemptions do not apply to internships in the entertainment industry. Interns are not volunteers, entertainment companies are not part of the government, and interns are not supposed to engage in mere work shadowing.

C. A Clear and Practical Intern Standard that Is Aligned with the "Primary Benefit" Test Will Provide the Most Effective Intern Standard

The "primary benefit" test is a proper standard to use to determine whether an intern can be unpaid. The "primary benefit" test, which looks at whether "the internship's benefits to the intern outweigh the benefits to the engaging entity,"[166] is flexible, clear, and practical enough to take the interests of interns into consideration.

163. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168, (2012) (quoting Yi v. Sterling Collision Centers, Inc., 480 F.3d 505, 510-11 (7th Cir. 2007)).

164. *The National Minimum Wage*, *supra* note 13.

165. *Id.*

166. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013) *reconsideration in part granted*, No. 11 Civ. 6784 (WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013) *motion to certify immediate appeal granted*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

While the court in *Glatt* criticized the "primary benefit" test for being subjective, the subjective nature of the test makes it more applicable to the wide variety of internships. Every internship is different, and students intern for different reasons. Therefore, the standard must meet the needs of all interns, including those that see a greater overall benefit in being an intern over getting paid. One of the most important underlying benefits of an internship, especially in the entertainment industry, is that it gets the intern's foot in the door.[167] Regardless of what the intern actually did, future employers view them differently because they have worked in the industry.[168] The intern now has relevant experience, which, in the entertainment industry, is priceless.[169] They not only claim to be interested in entertainment, but they have demonstrated this interest by completing an internship. As Melvin Mar, a former unpaid intern who went on to work at DreamWorks and Scott Rudin Productions noted, he owes a lot of the lessons he learned as a humble Hollywood gofer; even his responsibility to fetch matzo ball soup every day during his internship was beneficial to him.[170]

Due to the flexibility of the "primary benefit" test, unpaid internships can continue to exist in the entertainment industry. So long as the benefit to the intern outweighs the benefit to the company, the intern can be unpaid. And because the benefits interns receive from internships are invaluable and arguably much larger than the benefits the companies get from the work done by interns, interns who prefer unpaid internships will not be precluded from participating in unpaid internships. Conversely, the "primary benefit" test also protects interns because if the benefit to the company does outweigh the benefit to the intern, then the company will be required to pay the intern. The "primary benefit" test will not eliminate paid internship opportunities, which are just as important as unpaid internships.

Additionally, the "primary benefit" test provides clarity for companies. Through the use of the test, companies can continue to offer educationally valid internships without facing significant and unpredictable liability.[171] This will decrease the need for companies to eliminate their unpaid internship opportunities in order to avoid litigation. Furthermore, with a clear and flexible standard, companies will not

167. Miller & Horn, *supra* note 4.

168. *See id.*

169. *See id.*

170. *Id.*

171. Brief for American Council on Education, *supra* note 14, at 14.

only continue to offer unpaid internships, they will also have the flexibility to offer internships with a variety of experiential learning opportunities.[172]

Lastly, the "primary benefit" test takes into account the realities of the entertainment industry. Unlike the DOL six-factor test, which restricts an employer from deriving any immediate advantage from the activities of their intern, the "primary benefit" test acknowledges the reality that the employer may, and usually does, receive a benefit as well.

V. Conclusion

Unpaid internships should not be eliminated from the entertainment industry. They are far too valuable to students. Thus, these recent lawsuits brought by unpaid interns against their former employers are causing more harm than good. Due to the lawsuits, many companies are hesitant to offer internships out of fear of liability.[173] Consequently, fewer internships are offered and fewer students have the opportunity to gain the experience they need in order to break into the industry.

The current laws do not work. While there are differing tests and standards, the underlying problem is the same: there is no legal definition for the term "intern."[174] Instead, there are two categories on either side of the spectrum: "employee" and "not an employee." Trying to fit interns into either of these categories is the root of the problem. Interns are not employees. But, at the same time, they are not volunteers or "trainees" either. Strictly adhering to the DOL's six-factor test runs counter to the purpose and fails to take into account the benefits of unpaid internships. It also leads to rulings like *Glatt*, which has already reduced the number of unpaid internships offered by entertainment companies. Additional similar rulings may eliminate them altogether. This will reduce the opportunities future interns will have to gain experience in the entertainment industry.

In order to curtail the surge of lawsuits filed by unpaid interns, there needs to be a legal definition for the term "intern." In addition to the definition, there needs to be a clear and practical standard that governs when an intern can be unpaid. The DOL's six-factor test and the exemptions to the NMWA do not meet the needs and interests of interns to be effective standards. Instead, the standard should be

172. *Id.* at 13-14.
173. Feintzeig & Korn, *supra* note 30.
174. Brief for American Council on Education, *supra* note 14, at 7.

more aligned with the "primary benefit" test, which is flexible, clear, and practical enough to best fit the individual needs of interns. The new definition and the "primary benefit" test will both provide clarity for companies and ensure that opportunities to participate in internships will not be eliminated.

Although we are in the midst of a Black Swan event, we do not have to see the end of unpaid internships. Instead of eliminating a tradition that has helped countless students achieve their dreams, we need to work together to create a solution that benefits everyone and effectively meets everyone's needs.