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TOPIC:

STRUCTURING ON-CAMPUS INTERNSHIPS UNDER THE FAIR LABOR STANDARDS ACT

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INTRODUCTION:

On-campus internships offered by colleges and universities can provide students opportunities for learning and may provide competitive advantages to students who are entering the job market, in the form of valuable training and work experience. Federal and state laws, however, strictly limit when unpaid work is permissible. Although the status of interns under federal wage and hour laws is not a new issue,^[3] a flurry of recent lawsuits and court decisions has focused on unpaid internships under the Fair Labor Standards Act (FLSA), typically in the class action context against for-profit companies. For instance, the Second Circuit recently addressed the issue in *Glatt v. Fox Searchlight Pictures, Inc.*,^[4] which involved three unpaid interns who brought class action claims seeking minimum wage and overtime compensation under the FLSA and New York labor law.^[5] Courts in the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have addressed similar class claims.^[6] Although less common, courts have also recently considered FLSA claims by students and other unpaid workers against non-profit and public colleges and universities, where “volunteer” work can be permissible if certain requirements are met.

Although colleges and universities also frequently deal with the issue of off-campus internships and clinical placements, this article is focused on the specific context of on-campus internships, which present unique issues.

This Note will briefly examine the Department of Labor (DOL) criteria for unpaid internships, as set forth in its April 2010 “Fact Sheet” on “Internship Programs Under the [FLSA]”;^[7] discuss the growing case law that undermines, and in some cases rejects, the DOL criteria; and consider the extent to which the DOL criteria are relevant to on-campus internships at public and non-profit colleges and universities, including whether an organization may offer unpaid internships on the basis of the FLSA’s volunteer exemption. This Note will also highlight state law considerations for unpaid internships and discuss issues associated with payments to interns who are not classified as employees, such as stipends below minimum wage or expense reimbursements, under the FLSA and tax laws. Finally, this Note will offer practical advice regarding various provisions to include in unpaid internship materials (including unpaid internship agreements).

DISCUSSION:

I. Fair Labor Standards Act

The FLSA establishes a national minimum wage (currently \$7.25 per hour) for all covered employees and mandates payment of overtime compensation at a rate of not less than one-and-one-half times the employee’s regular rate of pay for work exceeding 40 hours in a week.^[8]

These FLSA requirements apply to all covered employees unless the employee qualifies for a specific exemption. Thus, the first consideration for an unpaid internship is whether individuals performing services as interns are “covered employees” under the FLSA and subject to its requirements. The FLSA defines an “employee” to include “any individual employed by an employer,” and it defines the verb “employ” to mean “suffer or permit to work.”^[9] The Supreme Court has noted the “striking breadth” of this definition, and colleges and universities would be well advised to do so also.^[10]

As discussed below, if a student qualifies as a “non-employee” intern, the FLSA’s minimum wage and overtime requirements do not apply. Under the FLSA, an individual cannot “volunteer” services to for-profit private sector employers; on the other hand, in some circumstances, individuals *can* volunteer services to public sector and non-profit employers. As a result, the DOL and courts have applied different standards when considering unpaid interns in the for-profit sector.

A. The U.S. Department of Labor Criteria for Non-Employee Status of Interns

1. For-Profit Companies

For for-profit employers, the DOL has established a test to be used for determining whether or not “trainees” or students are employees covered by the FLSA. In its April 2010 “Fact Sheet” on “Internship Programs Under the [FLSA],” the DOL stated that:

Whether trainees or students are employees of an employer under the FLSA will depend upon all of the circumstances surrounding their activities on the premises of the employer. ***If all of the following criteria apply***, the trainees or students are not employees within the meaning of the Act:

- (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees or students;
- (3) the trainees or students do not displace regular employees, but work under their close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his operations may actually be impeded;
- (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) the employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.[\[11\]](#)

These factors are also known as the “*Walling* factors” in reference to *Walling v. Portland Terminal Co.*,[\[12\]](#) because the DOL cited *Walling* as the basis for its test. But, while the Supreme Court in *Walling* considered a number of factors relevant to determining whether trainees were employees under the FLSA, it did not expressly set forth any “test” identified as such.

2. Public Sector and Non-Profit Institutions

It remains unclear whether the DOL would apply its “*Walling* factors” to evaluate an internship at a public or non-profit college or university. However, the DOL has recognized that it is generally permissible for interns to volunteer their time in the public sector and for non-profit charitable institutions.

The FLSA expressly recognizes a “volunteer exemption” in the public sector, if certain requirements are met. Specifically, the FLSA’s volunteer exemption provides: “The term ‘employee’ does not include any individual who volunteers to perform services for a public agency . . . if--(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency.”[\[13\]](#) In addition, the DOL has promulgated regulations providing that, to qualify as a “volunteer” a person must, among other requirements, have a “civic, charitable, or humanitarian purpose.”[\[14\]](#) As discussed in Section I.B.3 below, courts differ on how to evaluate whether or not a volunteer has such a purpose. Some courts look to the volunteer’s subjective intentions, whereas other courts evaluate objective facts to make the determination. If the foregoing requirements are met, unpaid student interns in the public and non-profit sector may qualify as volunteers under these standards.

As to public and non-profit employers, in its April 2010 Fact Sheet, the DOL stated its enforcement position on unpaid interns in general terms: “Unpaid internships in the public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. [The DOL Wage and Hour Division] is reviewing the need for additional guidance on internships in the public and non-profit sectors.”[\[15\]](#) More than six years later, no additional guidance has been issued. Thus, it is an open question

whether the DOL would apply these factors, or perhaps different factors entirely, to on-campus internships offered by a public or non-profit college or university.

In its more recent August 2015 “Fact Sheet” regarding “Non-Profit Organizations and the [FLSA],” the DOL expounded on volunteerism for non-profits, stating that “[t]he FLSA allows individuals to freely . . . volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations . . . and not be covered by the FLSA . . . if the individual volunteers freely for public service, religious or humanitarian objectives, and without contemplation or receipt of compensation.”^[16] The August 2015 Fact Sheet does limit volunteering for non-profit organizations, however, stating that: (a) “[i]ndividuals generally may not . . . volunteer in commercial activities run by a non-profit organization such as a gift shop”; (b) “[t]ypically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees”; and (c) “paid employees of a non-profit organization cannot volunteer to provide the same type of services to their non-profit organization that they are employed to provide.”^[17]

While the DOL has not directly addressed the criteria it would apply to evaluate an internship at a public or non-profit college or university, its existing guidance suggests that it would not apply exactly the same factors it applies in the for-profit context. Nevertheless, since the DOL’s position is unclear, public and non-profit institutions should proceed carefully, looking to case law in the relevant jurisdiction, as discussed below, to determine how much weight should be given to the DOL’s criteria.

B. Recent Case Law Addressing Unpaid Internships

1. Judicial Approaches to Unpaid Intern Status

Courts differ on whether the DOL’s test is entitled to controlling weight in determining employee status in a training context. Some courts have said that the test warrants “substantial deference,”^[18] while others have rejected it altogether.^[19]

Recently, several courts have taken a more Solomonian approach and determined the DOL’s factors to be relevant but not dispositive to the inquiry.^[20] For instance, in *Solis v. Laurelbrook Sanitarium and School*, involving a nonprofit private school, the Sixth Circuit rejected the DOL’s rigid test and adopted a more flexible “primary benefit” test.^[21] Specifically, the court held “that the 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.*”^[22] Going even further, the Second Circuit in *Glatt*, in the context of a for-profit company, rejected the DOL requirements that the internship benefit the students without conferring to the employer an immediate advantage and replaced them with the more general “primary beneficiary test,” which is evaluated through the lens of other considerations.^[23] *Glatt* identified the following seven *non-exhaustive* considerations for determining the primary beneficiary of the internship, and in turn, whether interns are “employees” of a for-profit company under the FLSA:

- (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

- (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.^[24]

There is overlap between the seven *Glatt* considerations and the six DOL criteria. Both consider whether the parties agree the interns are not entitled to payment, whether the training is similar to that which would be provided in a vocational school or educational environment, whether the interns displace regular employees, and whether the interns are entitled to a paid job upon conclusion of the internship.^[25] Except for these commonalities, however, *Glatt* substantively departs from the DOL criteria and is more favorable to unpaid internships. First, *Glatt* focuses on internship logistics and structure, including whether the internship is tied to the intern's formal education program by providing academic credit, whether it accommodates the intern's academic commitments and calendar, and whether it is limited in duration to the period of time providing beneficial learning.^[26] Accordingly, *Glatt* signals that employers should build internships around the needs and educational commitments of the interns to help avoid application of the FLSA.

Notably, *Glatt* was decided in the context of a for-profit company and the court expressly limited its discussion to "internships at for-profit employers."^[27] Thus, the *Glatt* factors are not directly applicable to public or not-for-profit institutions. However, as discussed in more detail in Section I.B.2 below, *Solis* was decided in the not-for-profit context.^[28] Thus, the primary benefit test might still be applied to not-for-profit institutions in other jurisdictions, and courts adopting the primary benefit test may elect to adopt or give considerable weight to the *Glatt* factors given *Glatt*'s momentum in federal courts throughout the country.

The approach from *Solis* and *Glatt* has already gained momentum within other circuits, having been adopted by the Eleventh Circuit and federal district courts in Illinois and California.^[29] These other courts have criticized the DOL test as "too rigid,"^[30] "not . . . persuasive,"^[31] and "not a proper distillation of [*Walling v. Portland Terminal*],"^[32] which "requires a flexible approach that considers the totality of the circumstances."^[33] They have also found that the "*Glatt* factors shed substantial light on the pertinent 'economic realities' of the [internship or clinical] relationship."^[34] Finally, the Eleventh Circuit in *Schumann* pointed to the Supreme Court's decision in [*Walling v. Portland Terminal*] as the original source of the primary

beneficiary test, noting that “we prefer to take our guidance on this issue directly from *Portland Terminal* and not from the DOL’s interpretation of it.”[\[35\]](#)

In *Schumann*, the Eleventh Circuit considered whether students in a program to become registered nurse anesthetists participating in a clinical curriculum that was a prerequisite to obtaining their master’s degrees were employees of a for-profit college offering the clinical curriculum.[\[36\]](#) The court declined to rule on whether the students were employees under the FLSA, but instead vacated the district court’s entry of summary judgment for the defendants, which had been premised upon the DOL criteria, and remanded the case back to the district court to reassess the facts in light of the primary beneficiary test.[\[37\]](#) On remand, the district court denied both parties’ motions for summary judgment and held that defendants’ “for-profit status” is an “appropriate additional factor[] for the jury to consider when evaluating Plaintiffs’ employment status under the FLSA” because defendants’ “focus on making a profit provides . . . a greater incentive to elevate shareholders’ financial interests over students’ educational experience, particularly where the entity running the internship program also owns (and receives distributions from) the for-profit institution supplying the student interns.”[\[38\]](#) *Schumann* is notable for its application of the primary beneficiary test in the Eleventh Circuit generally. However, it is also particularly notable for medical or health science institutions offering clinical curriculums or similar internships or rotations, because of the court’s willingness to consider the possibility that such clinical rotations may be subject to FLSA requirements, at least in the for-profit context. *Schumann* is also significant because the court found that interns may be considered employees during *a portion* of their internship program if the intern participates in a bona fide internship that primarily benefits the intern, but the employer also takes unfair advantage of their status as interns to require more than “could fairly be expected to be a part of the internship.”[\[39\]](#)

2. Cases Against Non-Profit Educational Institutions

While courts and agencies have recognized a distinction between internships in for-profit companies and those in public or non-profit charitable organizations, there are few court decisions involving FLSA wage claims brought against public or non-profit educational institutions by enrolled students performing on-campus internships.[\[40\]](#) As discussed above, the DOL’s April 2010 Fact Sheet expressly recognizes that interns can volunteer their time to a public or non-profit organization without expectation of compensation and without being considered employees.

To date, FLSA litigation by interns against non-profit colleges has focused primarily on athletic departments, and most cases have settled without directly addressing the relevance of the institutions’ non-profit status.[\[41\]](#) In *Summa v. Hofstra University*,[\[42\]](#) the magistrate judge issued a decision in 2010 granting the plaintiff’s motion for conditional certification of a FLSA collective action against Hofstra University, and the case settled shortly thereafter. While the magistrate judge’s decision did not decide the issue of whether the undergraduate assistants receiving stipends alleged to be below minimum wage were “employees” under the FLSA, the decision implied that Hofstra would be required to demonstrate that “all six [DOL] factors” were met.[\[43\]](#) This dicta is inconsistent with the Second Circuit’s subsequent ruling in *Glatt*. Similarly, in *Kozik v. Hamilton*, an “Intern in Intercollegiate/Assistant Football Coach” for Hamilton College filed a purported class action complaint against the non-profit college, alleging that it misclassified its non-student athletic department interns as exempt under the FLSA and New York labor law and failed to pay such interns minimum wage and overtime for hours worked over forty per week.[\[44\]](#) The case settled on a confidential basis without the court ever addressing the relevance of the college’s non-profit status.[\[45\]](#)

As discussed in Section I.B.1 above, in *Solis v. Laurelbrook Sanitarium and School*, the Sixth Circuit rejected the DOL’s rigid test and adopted the more flexible “primary benefit” test.^[46] Notably, the court described Laurelbrook as a non-profit organization that runs a boarding school for students in grades 9 through 12, an elementary school for children of staff members, and a nursing home. Following a philosophy of the Seventh-Day Adventist Church that a child’s education should have a practical training component, the boarding school students were required to gain practical experience through unpaid service in the school’s kitchen and housekeeping departments and in the nursing home. Applying the “primary benefit” test, the court concluded that the Laurelbrook students were not employees for purposes of the FLSA, in part because “receiving a well-rounded education—one that includes hands-on, practical training—is a tenet of the Seventh-Day Adventist Church,” and “Laurelbrook provides students with the opportunity to obtain such an education in an environment consistent with their beliefs.”^[47] Notably absent from the court’s opinion was any discussion of Laurelbrook’s status as a non-profit organization.^[48]

3. Cases Against Public Educational Institutions

As discussed above, the DOL regulations provide that, to qualify as a “volunteer” a person must, among other requirements, “have a civic, charitable, or humanitarian purpose.”^[49] If the foregoing requirements are met, unpaid student interns in the public and non-profit sector may qualify as volunteers under these standards.

Public educational institutions have not been a common focus of FLSA claims by unpaid student interns. However, recent court decisions have addressed the question of whether a public sector volunteer was providing services for “a civic, charitable, or humanitarian purpose.” In *Brown v. New York City Department of Education*, the Second Circuit held that a New York City school volunteer (non-student) was motivated by civic, charitable, or humanitarian reasons, even though he also hoped to build his resume.^[50] The court relied on the plaintiff’s own admission that “at least one of his goals . . . was ‘civic, charitable, or humanitarian’” and rejected plaintiff’s argument that a person must act *solely* for civic, charitable, or humanitarian purposes to qualify as a volunteer under the DOL regulations.^[51]

On the other hand, in *Vlad-Berindan v. New York City Metropolitan Transportation Authority*, the district court considered an FLSA claim brought by a student intern against the MTA, a city transportation agency. Although the court was not considering an internship involving a public educational institution, the issue of the volunteer exemption being applied to a public agency was directly before the court.^[52] In deciding the agency’s motion to dismiss, the Court held that the intern did not meet the requirements for the volunteer exemption, because she was completing the internship for academic credit and did not otherwise allege that she had any civic, charitable, or humanitarian motive for volunteering. However, the court held that *Glatt* may be applied to public sector interns who do not fall within the volunteer exemption. Applying the *Glatt* factors, the court dismissed the plaintiff’s FLSA claim.

Courts differ on how to evaluate whether or not a volunteer has a civic, charitable, or humanitarian purpose for volunteering. The court in *Brown* adopted a subjective standard, looking to evidence regarding the volunteer’s personal motivations behind volunteering.^[53] In contrast, the court in *Vlad-Berindan* applied both the subjective standard and an objective

standard, which evaluates objective facts instead of personal motivations.[54] Yet other case law has applied only the objective standard.[55]

C. Takeaways from Case Law

For institutions structuring internship programs, the growing momentum of the primary beneficiary test as applied in *Solis*, *Glatt*, and *Schumann*, among other cases, signals increased flexibility. Institutions may take some comfort in these rulings as a bellwether for future judicial interpretation of FLSA coverage principles in the context of unpaid internships. However, it is imperative that institutions consider and follow the law of the applicable jurisdiction. Schools with campuses only in the Second, Sixth, and Eleventh Circuits should follow the primary beneficiary test because those three circuits have expressly adopted it in place of the DOL test. But as discussed above, courts in other circuits may take a different approach. When in doubt, colleges and universities with low tolerance for risk may wish to require that all six DOL factors be met given the DOL's aggressive stance on the issue,[56] and may require that all six DOL factors be met, at least until there is favorable applicable case law.

A second key takeaway from recent case law comes from the *Glatt* court's decision to vacate the district court's order certifying the plaintiff class, finding that "an intern's employment status is a highly context-specific inquiry" not conducive to class action treatment.[57] Although *Glatt* does not entirely foreclose the possibility of future class action lawsuits—not in the Second Circuit and certainly not elsewhere—it again offers some comfort to institutions offering unpaid internships that are concerned about the recent tide of intern class action suits under the FLSA.

Third, there are several key takeaways from *Glatt*'s non-exclusive considerations, specifically with regard to how they depart from the DOL six-factor test.[58] Unlike the DOL criteria, the first *Glatt* consideration specifically warns against *implied* promises of compensation, cautioning employers against any behavior giving rise to the intern's *belief* that compensation will be earned.[59] And, pursuant to the seventh *Glatt* factor, employers should likewise avoid the *implication* that the intern is entitled to a paid job at the internship's end, even though *Glatt* does not make specific reference to implied promises in this factor.

In addition, the second, third, fourth, and fifth *Glatt* considerations all highlight the importance of structuring the internship program around the needs of interns in order to avoid application of the FLSA. Indeed, the second consideration urges employers to offer training to interns that is comparable to training they receive in an educational environment. The third consideration encourages integration of the internship with course requirements or academic credit.[60] The fourth consideration favors internship programs that track the intern's academic calendar and do not prevent the intern from satisfying academic commitments.[61] Under the fifth *Glatt* consideration, employers are cautioned to establish an internship duration that is necessary to meet the student's educational goals in participating in the internship. Lengthy internships that exceed the amount of time needed for the student's beneficial learning are disfavored under *Glatt*.

II. State Labor Laws

In addition to the FLSA, colleges and universities offering student internships must consider any applicable state labor laws. For instance, the New York State Minimum Wage Act and Wage Orders contain minimum wage and overtime requirements similar to the FLSA that are applicable to employees. The New York Department of Labor ("NYDOL") has issued an opinion letter providing guidance on internships in not-for-profit organizations, setting forth an 11-factor

test.[62] However, with respect to on-campus internships offered by not-for-profit educational organizations, the NYDOL has issued a “fact sheet” indicating that it will generally consider students in such internships to be exempt from statutory requirements, provided the student is currently enrolled and certain requirements are met.[63] Notably, the institution offering the unpaid internship must keep records containing the student classification, the start date of the work, and the nature of the work performed.[64]

Likewise, the Illinois Minimum Wage Law establishes its own minimum wage and overtime requirements that are similar to those in the FLSA.[65] Unlike under New York law, however, neither Illinois courts, the Illinois Department of Labor, nor the Illinois Administrative Code offer employers specific guidance or requirements for unpaid internships under the Illinois Minimum Wage Law.[66] Thus, Illinois colleges and universities complying with federal law are likely to also be in compliance with state law.[67]

This Note does not address the laws of all fifty states as it relates to unpaid internships. Although some states are likely similar to Illinois without additional burdens beyond the FLSA, it is important to consider whether any such additional state requirements may exist.

Finally, aside from state wage and hour laws, other state or local employment laws may apply to unpaid interns, dependent on the jurisdiction. For example, the use of unpaid interns may implicate workers’ compensation laws. In some states, interns are covered as “employees” regardless of their payment status. However, in some of these states, such as New York, student interns providing non-manual services to a religious, charitable or educational institution are exempt from mandatory coverage.

III. Federal Tax Implications

Sometimes unpaid internships—that is, internships for which the interns do not receive wages—come with some other kind of benefit or non-wage payment that is not intended as compensation for services, such as in the form of expense reimbursement, a volunteer stipend, or tuition reduction. To the extent a college or university offers such a payment or benefit as part of an unpaid internship, it is also important to consider the tax implications of doing so. The IRS does not generally exempt payments made to interns from income tax withholding. The first question is whether the remuneration is being paid as taxable compensation for services. Certain payments to student interns, such as expense reimbursements or volunteer stipends paid by public or non-profit institutions, may not be considered compensation for services if applicable requirements are met. This is a fact-based inquiry and beyond the scope of this Note.

Certain payments to an enrolled student may be considered a “qualified scholarship,” if used for tuition or other qualifying educational purposes, and therefore excludable from a student’s gross income under Internal Revenue Code (“Code”) Section 117(a). However, payments are *not excludable from gross income if “any amount received . . . represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction . . .”*[68] Accordingly, when a scholarship requires the student to perform services, institutions should make sure to comply with federal tax requirements.[69]

IV. Practical Considerations for Structuring Unpaid Internships

Because the law governing unpaid interns is murky and not uniform across all jurisdictions, counsel should advise college and university administrators on structuring internship programs. As a preliminary matter, such guidance should provide specific direction as to whether unpaid internships on campus are permitted, and if so, under what circumstances. Where a college or university does permit an unpaid internship, it is recommended that the institutions require that such arrangements be supported by a written unpaid internship agreement between the intern and the institution that clearly documents the agreement of the parties in terms that accord with the DOL test or the *Glatt* factors, whichever is applicable.

The unpaid internship agreement is a valuable tool for documenting important aspects of the internship, such as the logistics and substance of internship programs and how they complement the interns' needs and educational commitments—including the internship's duration, its schedule, and educational benefits. The following is a checklist of important provisions and information to include in the unpaid internship agreement:

- ✓ First and foremost, the internship agreement should include language explicitly stating that the intern will not receive any compensation for the internship nor will the intern be entitled to any type of employment after the internship has concluded.
 - Both the DOL test and the *Glatt* factors take into consideration whether the intern expects compensation for services (either expressly or implied) and whether the intern will receive employment after the internship. In order to comply with both tests, this language should be included to set expectations at the outset of the internship.
 - Certain payments to student interns, such as expense reimbursements or nominal volunteer stipends paid by public or non-profit institutions, may not be considered compensation for services if applicable requirements are met. This is a fact-based inquiry, beyond the scope of this Note. However, the agreement should clearly state that any such payments are not payments for services.
- ✓ The internship agreement should also have a description of the intern's purpose and responsibilities, including a description of any training that will be provided to the intern. The institution may also provide a statement explaining how the internship is related to the coursework of the intern's degree program, how the internship will help advance the intern's understanding in that field, and a description of what, if any, academic credit the student is receiving. If applicable, the documentation should also identify the intern's faculty advisor along with contact information.
 - Under the DOL test, the internship must provide training similar to that given in a vocational school or academic institution. Under the *Glatt* test, the court will examine the extent to which the internship provides training that would be similar to that which would be given in an educational environment. To highlight this factor in the agreement, the institution should consider the educational value of each task the intern will perform and identify how those tasks relate to the intern's degree program. The institution should also consider directly addressing any specific degree program requirements the intern will be fulfilling through the internship. Referencing the role of a faculty advisor in the agreement also

demonstrates the institution's efforts to ensure that the intern's responsibilities are related to the degree program.

- ✓ A statement that the internship is primarily for the benefit of the intern and not the institution. The statement should also explain that the intern will not be displacing or performing the job duties of any employees. The institution may also describe how the intern's responsibilities will complement the institution's pre-existing workforce.
 - As stated in the DOL test and the *Glatt* factors, the internship must be primarily for the benefit of the intern. While the DOL test takes a more stringent view on this factor (providing that the institution will derive no immediate benefit from the intern), it is important to establish that the internship is for the benefit of the intern. If the institution has any standard documentation for its internship program (such as a syllabus, program outline, etc.), it should be referenced in the agreement to demonstrate the institution's efforts to structure the internship program around the needs of its interns. The unpaid internship agreement should also document any other benefits the internship program will provide the intern.
- ✓ The agreement should identify the intern's supervisor(s) (usually the person/people the intern will be shadowing during the internship) and may establish one person as the intern's primary point of contact within the institution.
 - Under the DOL test, the intern must work under close supervision of regular employees. By identifying the specific employees that will be responsible for supervising the intern, the institution can more readily determine what tasks the intern is completing and ensure that the intern is not performing the work of the institution's regular employees.
 - Although unrelated to FLSA concerns, internship materials should also make clear how interns are to report misconduct, discrimination, harassment, or other problems with their supervisor or work group. Consider whether the channels are the same or different for students reporting discrimination or harassment in academic or residential contexts.
- ✓ An established timeframe for when the internship will begin and end.
 - Under *Glatt*, the court will consider the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning, and the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. Ideally, the internship should correspond with the academic calendar and not impede an intern from completing other academic responsibilities (such as final examinations), with those accommodations preferably reflected in the internship agreement. Furthermore, the internship agreement should specify a limited duration, designed to ensure a beneficial learning experience (for example, one or two semesters measured by the intern's academic calendar).
- ✓ Finally, the agreement should specify the scope of the internship and expressly acknowledge that the internship is not subject to minimum wage and overtime laws. The

institution should be able to articulate the rationale supporting such determination, and the rationale should be documented in internal filings, though it need not be included as an express term of the agreement.

CONCLUSION:

Recent federal circuit case law signals that the DOL six-factor test is losing favor for determining whether internships are subject to the FLSA requirements of minimum wage and overtime pay, but the determination still varies by jurisdiction. Some follow the more flexible primary beneficiary test typified by *Glatt*, requiring only that the intern derive the primary benefit of the internship, while others still follow or give deference to the DOL six-factor test, which therefore continues to serve as a useful baseline. These variations and those of various state minimum wage laws require understanding the applicable jurisdiction to structure a compliant unpaid internship program. Regardless of the test, however, unpaid internships should be tailored to the educational needs and schedule of the intern to the greatest extent possible.

RESOURCES:

Julie M. Capell, [Drafting Effective Unpaid Internship Agreements](#), LAW360, Jan. 13, 2016.

Seth F. Gilbertson & Stefan Eilts, [Internship and Externship Programs Under the Fair Labor Standards Act](#), NACUANOTES, May 24, 2011.

Jon Steingart, [Student Interns May Be Employees Under FLSA](#), BloombergBNA, Sept. 15, 2015.

ENDNOTES:

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[3] U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010) [hereinafter Fact Sheet #71], <https://www.dol.gov/whd/regs/compliance/whdfs71.pdf>. The DOL's April 2010 Fact Sheet #71 was the subject of a May 2011 NACUANOTE evaluating the status of internship and externship programs at the time. See Seth F. Gilbertson & Stefan Eilts, *Internship and Externship Programs Under the Fair Labor Standards Act*, NACUANOTES, Vol. 9, Iss. 11 (May 24, 2011), <http://www.nacua.org/docs/default-source/legacy-doc/nacuanotes/internships.pdf?sfvrsn=4>.

[4] 811 F.3d 528 (2d Cir. 2015).

[5] See *id.* at 531-33.

[6] See, e.g., *Schumann v. Collier Anesthesia, PA*, 803 F.3d 1199 (11th Cir. 2015); *Petroski v. H&R Block Enters., LLC*, 750 F.3d 976, 980–82 (8th Cir. 2014); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *Hollins v. Regency Corp.*, No. 13 C 07686, 2015 U.S. Dist. LEXIS 145813 (N.D. Ill. Oct. 27, 2015); *Benjamin v. B&H Educ., Inc.*, No. 13-CV-04993 VC, 2015 U.S. Dist. LEXIS 144351 (N.D. Cal. Oct. 16, 2015); see also Tess Hoffman, *Calvin Klein, PVH Facing Newest Unpaid Intern Class Action*, LAW360, Oct. 22, 2014, <https://www.law360.com/articles/589154/calvin-klein-pvh-facing-newest-unpaid-intern-class-action> (discussing unpaid intern class action suits brought against Calvin Klein, Inc. and its parent company, Columbia Recordings Corp., Sirius XM Radio, and Coach, Inc.).

[7] See Fact Sheet #71, *supra* note 3.

[8] See 29 U.S.C. § 207 (2012). In addition to back pay, employers ignoring FLSA or other minimum wage laws may be required to pay liquidated damages and attorney's fees, as well as the costs of sanctions by federal and state agencies.

[9] 29 U.S.C. § 203(e), (g); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

[10] *Nationwide Mut.*, 503 U.S. at 326 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)).

[11] U.S. DEPT. OF LABOR, EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA), WH Pub. 1297, at 4–5 (emphasis added); see also Fact Sheet #71, *supra* note **Error! Bookmark not defined.**

[12] 330 U.S. 148 (1947).

[13] 29 U.S.C. § 203(e)(4)(A).

[14] 29 C.F.R. § 553.101(a); see also *id.* § 553.101(c), (d).

[15] See Fact Sheet #71, *supra* note 3, at 2.

[16] U.S. DEP'T OF LABOR, FACT SHEET #14A: NON-PROFIT ORGANIZATIONS AND THE FAIR LABOR STANDARDS ACT (FLSA) 2 (Aug. 2015) [hereinafter Fact Sheet #14A].

[17] *Id.*

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

[19] See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2015); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 & n.2 (4th Cir. 1989).

[20] See, e.g., *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518, 525–29 (6th Cir. 2011); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993); *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 99 (C.D. Cal. 2010).

[21] *Solis*, 642 F.3d at 529. As discussed in Section I.B.2 below, the court described Laurelbrook as a non-profit organization, but its opinion contains no discussion of its non-profit status.

[22] *Id.* (emphasis added).

[23] *Glatt*, 811 F.3d at 536.

[24] *Id.* at 536-37.

[25] Compare *id.* with Fact Sheet #71, *supra* note **Error! Bookmark not defined.**

[26] *Glatt*, 811 F.3d at 537.

[27] *Id.* at 534, 536 n.2.

[28] See *infra* Section I.B.2.

[29] See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1202 (11th Cir. 2015); *Benjamin v. B&H Educ., Inc.*, No. 13-CV-04993 VC, 2015 U.S. Dist. LEXIS 144351, at *3 (N.D. Cal. Oct. 16, 2015); *Hollins v. Regency Corp.*, No. 13 C 07686, 2015 U.S. Dist. LEXIS 145813, at *16 (N.D. Ill. Oct. 27, 2015).

[30] *Schumann*, 803 F.3d at 1209.

[31] *Berger v. National Collegiate Athletic Ass'n*, No. 1:14-cv-1710-WTL-MJD, 2016 U.S. Dist. LEXIS 18194, at *12 (S.D. Ind. Feb. 16, 2016).

[32] *Ortega v. Denver Inst. L.L.C.*, No. 14-cv-01351-MEH, 2015 U.S. Dist. LEXIS 101427, at *31 (D. Colo. July 30, 2015) (considering the six *Walling* factors but noting, “No single factor is controlling; the test ‘requires consideration of all the circumstances’” (quoting *Glatt*, 811 F.3d at 532)).

[33] *Berger*, 2016 U.S. Dist. LEXIS, at *37.

[34] *Hollins*, 2015 U.S. Dist. LEXIS 145813, at *22.

[35] In reasoning as such, *Schumann* relied on the “Supreme Court’s language describing the program at issue in that case as having ‘most greatly benefit[ed]’ the trainee.” 803 F.3d at 1203–05, 1209.

[36] *Id.* at 1201–03.

[37] *Id.* at 1210–15.

[38] *Schumann*, Case No: 2:12-cv-347-FtM-29CM, 2016 BL 358717, at *16 (M.D. Fla. Oct. 27, 2016).

[39] *Id.* at 1215.

[40] See, e.g., *Berger*, 2016 U.S. Dist. LEXIS 18194, at *38 (concluding “the factors used in the trainee and private-sector intern context fail to capture the nature of the relationship between the Plaintiffs, as student athletes, and Penn”).

[41] See *Summa v. Hofstra Univ.*, 715 F. Supp. 2d 378 (E.D.N.Y. 2010) (involving named plaintiff who was an undergraduate assistant, serving as manager for the football team, who allegedly received a stipend below minimum wage); *Kozik v. Hamilton Coll.*, No. 6:12-cv-01870 (N.D.N.Y. Dec. 20, 2012), ECF No. 1 (non-student interns in Athletics Department); see also *Berger*, No. 1:14-cv-1710-WTL-MJD, 2016 U.S. Dist. LEXIS 18194, at *38 (rejecting application of DOL’s factors to student-athletes’ FLSA claims against NCAA and colleges).

[42] *Summa*, 715 F. Supp. 2d 378.

[43] *Id.* at 389.

[44] *Kozik*, No. 6:12-cv-01870, ECF No. 1, at ¶¶ 3–5.

[45] *Kozik*, No. 6:12-cv-01870, ECF No. 45, at 1.

[46] *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518, 525–29 (6th Cir. 2011).

[47] *Id.* at 529–32.

[48] *See id.*

[49] 29 C.F.R. § 553.101(a); *see also id.* § 553.101(c), (d).

[50] *Brown v. N.Y.C. Dep't of Educ.*, 755 F.3d 154, 162 (2d Cir. 2014) (citing *Cleveland v. City of Elmendorf, Tex.*, 388 F.3d 522, 528-29 (5th Cir. 2004)).

[51] *See id.*

[52] *Vlad-Berindan v. N.Y.C. Metro. Transp. Auth.*, 2016 U.S. Dist. LEXIS 43613 (S.D.N.Y. Mar. 31, 2016).

[53] *Brown*, 755 F.3d at 162–64.

[54] *Vlad-Berindan*, 2016 U.S. Dist. LEXIS 43613, at *15–16.

[55] *See id.* (discussing *Cleveland*, 388 F.3d at 528-29).

[56] In 2010, the DOL warned that “there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.” *See* Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 3, 2010, at B1 (quoting Nancy J. Leppink, then acting director of the DOL’s wage and hour division).

[57] *Glatt*, 811 F.3d at 539.

[58] This Note does not seek to provide exhaustive guidance on meeting the DOL six-factor test. For such detailed guidance, readers are encouraged to reference the May 2011 NACUANOTE referenced above. *See* Gilbertson & Elts, *supra* note 3.

[59] *See* Julie M. Capell, *Drafting Effective Unpaid Internship Agreements*, LAW360, Jan. 13, 2016, <https://www.law360.com/articles/745648/drafting-effective-unpaid-internship-agreements> .

[60] *See id.*

[61] For institutions of higher education offering internships to their students, this factor should not be difficult to satisfy given the aligned calendars of the student and the institution.

[62] *See* N.Y. Dept. of Labor Op. RO-09-0189 (Dec. 21, 2010).

[63] *See* N.Y. DEPT. OF LABOR, FACT SHEET: WAGE REQUIREMENTS FOR INTERNS IN NOT-FOR-PROFIT BUSINESSES, <https://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf> (last visited Feb. 7, 2017).

[64] *See id.*

[65] *See* 48 ILL. COMP. STAT. §§ 105/2, 105/4a.

[66] Illinois law allows for institutions to employ “student learners”—students who receive course credit for participating in school-approved work study programs—to be paid at a sub-minimum wage rates under certain circumstances, *see* ILL. ADMIN. CODE tit. 56, § 210.640, but such student learner programs are outside the scope of this Note.

[67] *See Hollins v. Regency Corp.*, No. 13 C 07686, 2015 U.S. Dist. LEXIS 145813, at *3 n.3 (N.D. Ill. Oct. 27, 2015) (noting plaintiff’s concession that her “Illinois Minimum Wage Law claim will rise or fall with

their FLSA claim”).

[68] IRC § 117(c) (emphasis added).

[69] One potential exception to this general rule is the Student FICA Exemption or safe harbor rules under the Revenue Procedure 2005-11, which is available if the payment recipient: (a) is at least a half-time graduate student; (b) is not a full-time employee of the University; (c) is not a “professional employee”; and (d) does not receive certain specified employment benefits. See IRS Rev. Bull. 2005-2 (Jan. 10, 2005).

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