SHOULD CLASS BE DISMISSED? THE ADVANTAGES OF A ONE-STEP CLASS CERTIFICATION PROCESS IN UNPAID INTERN FLSA LAWSUITS

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INTRODUCTION

While a great deal of scholarship has examined the legal status of unpaid interns,[1] only recently have interns, themselves, sought the legal remedy of back pay compensation for their unpaid labor. Since September of 2011,[2] former interns have filed more than thirty high-

1 In recent years, several scholars and journalists have considered the legal status of student interns—examining whether interns are "employees," under the Fair Labor Standards Act, 29 U.S.C. § 206—and thereby entitled to minimum wage and overtime protections. *See, e.g.*, ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY (2011) ("Chapter 4: A Lawsuit Waiting to Happen" discusses the legal status of student interns at length, focusing on the core legal issues surrounding pay and workplace rights in private-sector internships); David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1998); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002); Andrew Mark Bennett, Comment, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293 (2011); Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 7, 2012, at A1; Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 3, 2010, at B1. Some have even proposed new standards to be adopted by the Fair Labor Standards Act. *See* Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2010). This Note will not specifically discuss internships in the legal profession. For a specific discussion, see Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 452 (2013).

2 The recent influx of intern lawsuits arguably stems from the considerable rise of internships, especially unpaid, that took place during the Great Recession and in its aftermath. Ross Eisenbrey, *Lack of Government Data on Internships Leaves Policymakers in the Dark*, ECON. POL'Y INST. (May 23, 2012), http://www.epi.org/publication/lack-government-data-internships; Mark S. Goldstein, *It's the Time of the Season (to Examine Your Unpaid Internship Program)*, FORBES (May 19, 2014, 12:09 PM), http://www.forbes.com/sites/theemploymentbeat/2014/05/19/its-the-time-of-the-season-to-examine-your-unpaid-internship-program ("Propelled by a soft job market, lawsuits brought by unpaid interns, alleging that their respective 'employers' should have paid them, have become exceedingly popular . . . ."). The Great Recession is the common description of the ongoing, marked global economic decline that began in December 2007 and

profile lawsuits[3] across the country, contending that they should have been paid as employees under the Fair Labor Standards Act (FLSA).[4] In so doing, many have sought class certification under the FLSA's collective action procedure, which permits the aggregation of hundreds of claims, requiring only that the employee class members be "similarly situated."[5]

The FLSA does not provide a means for determining whether class members are "similarly situated" for an FLSA collective action certification,[6] though it does specify that the class should be opt-in[7]—

took a particularly sharp downward turn in September 2008. *See, e.g.*, Catherine Rampell, *'Great Recession': A Brief Etymology*, N.Y. TIMES ECONOMIX BLOG (Mar. 11, 2009, 5:39 PM), http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology.

3 Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PROPUBLICA, http://projects.propublica.org/graphics/intern-suits (last updated Apr. 15, 2014).

4 Section 216(b) of the FLSA grants employees a private right of action and provides for recovery of damages equal to "the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages" plus recovery of attorney's fees and costs. 29 U.S.C. § 216(b) (2012). Interns have also brought claims under state law, applying Rule 23 of the Federal Rules of Civil Procedure, which permits members of a class to sue as representatives on behalf of all members of the class, but imposes more rigorous demands for affirmative evidence of the substantial similarity among members of the class. FED. R. CIV. P. 23. However, Rule 23 class certification is largely outside of the scope of this Note, as the FLSA has its own guidelines for employee collective actions. For a comparison of the two, see Sam J. Smith & Christine M. Jalbert, *Certification–216(b) Collective Actions v. Rule 23 Class Actions & Enterprise Coverage Under the FLSA*, A.B.A. SEC. LAB. & EMP. L. (Nov. 2011) [hereinafter *216(b) v. Rule 23*], *available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/084.authcheckdam.pdf. Unpaid interns have also filed sexual harassment claims, seeking protection under employee protection law (Title VII of the Civil Rights Act of 1964); however, this Note will not address these cases. For further discussion, see Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95 (2000); Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998); Blair Hickman & Christie Thompson, *How Unpaid Interns Aren't Protected Against Sexual Harassment*, PROPUBLICA (Aug. 9, 2013, 9:00 AM), http://www.propublica.org/article/how-unpaid-interns-arent-protected-against-sexual-harassment.

5 Section 216(b) of the FLSA provides a private cause of action against an employer "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To obtain 216(b) collective action certification, a plaintiff need only show some identifiable factual or legal nexus that binds together the class members' various claims in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA. Though the "similarly situated" standard set out in 29 U.S.C. § 216(b) applies only to employees, a number of judges in recent cases have applied this test to determine class certifications of interns. However, the question of whether unpaid inters are, in fact, employees has been the subject of extensive scholarly discussion. *See* Ortner, *supra* note 4 (proposing that unpaid interns should be acknowledged as employees covered by Title VII of the Civil Rights Act of 1964); Yamada, *supra* note 1 (examining the legal and policy implications of student internships, particularly with regard to employment rights).

6 Marc E. Bernstein & Alexander W. Wood, *Flaws of the 2-Step FLSA Certification Process*, LAW360 (Oct. 18, 2012, 5:36 PM), *available at* http://www.paulhastings.com/docs/default-source/PDFs/2303.pdf.

7 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which

unlike the more common opt-out class certified pursuant to Rule 23 of the Federal Rules of Civil Procedure.[8] To assess similarity of a potential class, district courts have developed a two-step ad-hoc test, which some have coined the "approve now and worry later" process.[9] First, the court grants a plaintiff conditional certification, based on a "modest factual showing" that members of the proposed collective action are similarly situated.[10] The plaintiff's representative then issues notice to potential members of the class, and a court-designated opt-in period begins.[11] Once the opt-in period is over—but still in the first step—extensive discovery takes place. The second part of the two-step test then requires the court to apply a more stringent evaluation to determine whether to certify or decertify the class.[12] Only after the two-step process and court-issued certification is the class able to address the merits of its claim.[13] However, as this test is court-made,[14] it is neither codified in the FLSA nor documented anywhere in the FLSA's legislative history or extensive regulations.[15] Furthermore, the U.S. Supreme Court has never addressed, much less sanctioned, this more-lenient court-favored standard.[16]

As courts designed this test with employees—not interns—in mind, it is especially problematic when applied to unpaid interns, who are hesitant to join an opt-in class for fear of blacklisting themselves

such action is brought."). Furthermore, in an FLSA collective action, issuing notice of the pending action to all potential class members is not statutorily required. *Fair Labor Standards Act Class Actions*, CURTIN LAW ROBERSON DUNIGAN & SALANS, http://www.curtin-law.com/latest-newsletters/employment-law/fair-labor-standards-act-class-actions (last visited Oct. 22, 2014) ("Thus, it is possible for potential class members to never hear of a pending collective action in which their rights could be avenged. In such cases, however, no due-process rights are impinged because the collective action does not foreclose the unaware class member's rights to file his or her own independent action.").

8 Under Rule 23(a), plaintiffs must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). This requirement protects the due-process interests of unnamed class members, as any Rule 23 class action judgment binds all members of the class (unless they opt out). Lane v. Page, 272 F.R.D. 558, 571 (D.N.M. 2011) (citing Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996) (characterizing adequacy of representation as a constitutional requirement)); Lile v. Simmons, 143 F. Supp. 2d 1267, 1277 (D. Kan. 2001) ("Due process requires that the Court 'stringently' apply the competent representation requirement because class members are bound by the judgment (unless they opt out), even though they may not actually be aware of the proceedings.").

9 Bernstein & Wood, *supra* note 6 (claiming that the courts' "approve now and worry later" two-step class certification process is unworkable).

10 *See, e.g.*, Dominguez v. Don Pedro Rest., No. 2:06 cv 241, 2007 WL 271567, at *4 (N.D. Ind. Jan. 25, 2007); Trezvant v. Fid. Emp'r Servs. Corp., 434 F. Supp. 2d 40, 43 (D. Mass. 2006); Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997).

11 *See, e.g.*, Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995).

12 *See, e.g.*, Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009); Rawls v. Augustine Home Health Care, Inc., 244 F.R.D. 298, 300 (D. Md. 2007).

13 *See, e.g.*, *Mooney*, 54 F.3d at 1213–14.

14 Bernstein & Wood, *supra* note 6.

15 *Id.*

16 *Id.*

from the very industries they strive to enter.[17] The problem is that, independently, each intern is unlikely to be entitled to more than a few months' worth of back pay,[18] which is certainly not enough to justify the time and financial demands of a lawsuit challenging some of the nation's corporate and media behemoths who are running the internship programs and are often equipped with top legal teams and substantial budgets. However, if left unchallenged, the question of whether these unpaid interns are, in fact, employees denied fair wages under the FLSA will go unresolved.[19] While these concerns may also apply to low-wage and part-time employees, the FLSA protects such individuals under its anti-retaliation provision.[20] This provision states that an employer may not discharge, or otherwise discriminate against, employees who bring any FLSA action.[21] These individuals, who generally are ongoing employees of the defendant,[22] do not need to worry about losing their jobs or benefits because they opt-in to an FLSA class. Interns,[23] on the other hand, are not salaried employees working

17 Video Report: *Interns Who Sued Now Can't Find Jobs*, CNN MONEY (Nov. 18, 2013), http://money.cnn.com/video/news/2013/11/18/n-asher-interns-sue-companies-job-prospects.cnnmoney (discussing the widespread intern fear of the professional stigma associated with joining a lawsuit class).

18 Jack L. Newhouse, *Unpaid Intern Lawsuits May Reduce Job Opportunities*, FORBES (Sept. 24, 2013, 6:28AM), http://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities ("For instance, a New York based employer that hired one unpaid intern to work 35 hours per week for eight weeks is required to pay that intern at least $2,030. If that employer hires one intern each year, then over a six-year period the employer would be liable for back wages totaling $12,180. . . . [However, if] 40 interns worked 35 hours per week for eight weeks, then the employer would be liable for back wages totaling $487,200.").

19 A large-scale determination of whether interns are employees entitled to minimum wages would encourage increased scrutiny of the internship practice, and perhaps more stringent enforcement of the Department of Labor's Fact Sheet No. 71. S*ee infra* Part I.D. However, the stakes are greater than just the need for future regulation, as many (though not all) former interns are likely entitled to back-pay wages. For sample descriptions of intern responsibilities and lawsuits, see *infra* Parts III.A–B.

20 Section 215(a)(3) of the FLSA states that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3) (2012); *see also* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET NO. 77A: PROHIBITING RETALIATION UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2011) [hereinafter FACT SHEET NO. 77A], *available at* http://www.dol.gov/whd/regs/compliance/whdfs77a.htm.

21 29 U.S.C. § 215(a)(3).

22 *See generally* Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535 (2001); Janice M. Graham, *Employee's Protection Under § 15(a)(3) of Fair Labor Standards Act (29 U.S.C.A. § 215(a)(3))*, 101 A.L.R. FED. 220 (1991).

23 Interns are not the only workers who are not protected by anti-retaliation laws. *See* Andy Fitzgerald, *The Era of the Permatemp: Blame the Economy, Not Workers*, {YOUNG}IST (Apr. 14, 2014), http://youngist.org/the-era-of-the-permatemp/#.U7DZnf0-Pue ("[T]he ballooning contingent labor force. . . . include[s] seasonal employees, temporary contractors, freelancers, and interns, none of whom can expect their job to be 'permanent'. For millions of Americans, this is the new normal—no job security, no benefits: it's where the devaluation of labor actively meets

for the defendant at the time they would opt-in to a FLSA class[24] and, therefore, do not enjoy the same protections that existing employees do.[25] No part of the FLSA anti-retaliation provision prohibits employer discrimination against *applicants* because those applicants brought an FLSA claim.[26] Because interns are often seeking employment in the very field in which they interned,[27] they will be especially wary of any actions that may compromise their ability to secure future employment.[28]

Interns need a more effective one-step certification test to avoid the procedural hurdles that hinder a court ruling on whether an internship program qualified for a student-trainee exemption or denied employees fair wages under the FLSA.[29] Such rulings will help employers determine how to proceed with using intern labor, while still complying with minimum wage laws. Because the court-made two-step process is not codified in the FLSA, courts should instead implement a one-step opt-in test for intern class certification. Such a test already exists, and has been

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exploitation."). While this Note's proposed class certification standard could arguably apply to these other contingent employee groups, such a discussion is outside the scope of this Note.

24 *See* discussion *infra* Part II. *See generally* PERLIN, *supra* note 1; Yamada, *supra* note 1.

25 *See* Fitzgerald, *supra* note 23 ("[W]ithout the protections of permanent employment, contingent workers aren't in a position to organize and agitate for improved compensation. Without those protections, or the protections of organizing with other workers, many won't speak out against their own exploitation.").

26 *See* 29 U.S.C. § 215(a)(3). While the Supreme Court has not ruled on the matter, in 2011, the Fourth Circuit held that the FLSA did not protect job applicants from retaliation; rather its coverage was limited only to an employer's current and former employees. Dellinger v. Sci. Applications Int'l Corp., 649 F.3d 226 (4th Cir. 2011). However, in that case, the Department of Labor (DOL) and the Equal Employment Opportunities Commission (EEOC) submitted an amicus brief in support of the applicant, asserting that the FLSA's anti-retaliation provisions extended to job applicants. Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as Amici Curiae, *Dellinger*, 649 F.3d 226 (No. 10-1499), 2011 WL 4006536, at *15. The DOL expressed concern that (1) applicants could be "blacklisted" and remain unemployed indefinitely if the anti-retaliation laws didn't apply to them, and (2) to deny applicants such protection could have "a chilling effect" on individuals' willingness to exercise their FLSA rights. *Id.*; *see also* Bethany C. McCurdy, *FLSA Anti-Retaliation Provisions and Job Applicants*, GONZALEZ SAGGIO & HARLAN (Sept. 21, 2011), http://www.gshllp.com/60-second-memos/the-fair-labor-standards-act-anti-retaliation-provisions-and-job-applicants-the-fourth-circuit-court-of-appeals-says-not-applicable.

27 PERLIN, *supra* note 1, at 23.

28 *See* Steven Greenhouse, *Interns, Unpaid by a Studio, File Suit*, N.Y. TIMES, Sept. 29, 2011, at B3 ("'Unpaid interns are usually too scared to speak out and to bring such a lawsuit because they are frightened it will hurt their chances of finding future jobs in their industr[ies].'" (citing Adam Klein, a lawyer for some of the intern plaintiffs)); *Interns Who Sued Now Can't Find Jobs*, *supra* note 17. Note that as all lawsuits are publically available, even individuals who are protected by anti-retaliation provisions could be subject to "applicant discrimination." However, while a proposal for private arbitration would ameliorate this problem, it would hinder the much-needed public decisions that will help guide employers to know when they must pay their intern laborers. Such a discussion is, therefore, outside the scope of this Note.

29 *See, e.g.*, Rachael Levy, *Advice to Unpaid Interns: You're Being Exploited and Won't Get a Job*, QUARTZ (Oct. 26, 2012), http://qz.com/19986/my-advice-to-unpaid-interns-youre-being-exploited-and-wont-get-a-job ("Only when young people refuse en masse to work for free will there ever be the political will to compensate them.").

successful, in the U.S. Court of Federal Claims.[30] Adapting this streamlined test, as this Note proposes, would better serve the purposes of the FLSA in intern class action lawsuits. If implemented, the new test would have courts consider eight factors[31] to determine the substantial similarity and certification merits of the intern class. This proposed test takes into account (1) the processes for class action certification required in FLSA wage and overtime lawsuits, (2) the equitable purposes of class actions, (3) the history of unpaid internships and how the current economy has vastly strayed from the facts of the Supreme Court's seminal *Walling v. Portland Terminal Co.* decision,[32] and (4) the policy arguments against the exploitation of the unpaid internship framework.

This Note examines class certification in FLSA lawsuits seeking employee compensation for unpaid intern labor. Part I explains the history of internships, the modern exploitation of the unpaid internship system, and the legal and policy implications of the current "intern economy."[33] It then discusses the "intern rights movement,"[34] the wave

30 The U.S. Court of Federal Claims is a U.S. federal court that hears monetary claims against the U.S. government. *See generally* U.S. CT. OF FED. CLAIMS, http://www.uscfc.uscourts.gov (last visited Oct. 22, 2014). This eight-factor test was proposed in *Quinault Allottee Ass'n & Individual Allottees v. United States*, 453 F.2d 1272 (1972), and clarified in *Berkley v. United States*, 45 Fed. Cl. 224, 230 (1999). *See infra* Part V.B.

31 This Note's proposed test suggests courts consider whether (i) the members constitute a large but manageable class, (ii) there is a question of law common to the entire class, (iii) the common legal issue is a predominant one that overrides any separate factual issues affecting the individual members, (iv) the claims of the present plaintiffs are typical of the claims of the class, (v) the employer has acted on grounds generally applicable to the whole class, (vi) the claims are so small that they are unlikely to be pursued other than through this class action, (vii) the current plaintiffs will fairly and adequately protect the interests of the class without a conflict of interest, and (viii) the prosecution of individual actions by members of the class would create a risk of inconsistent adjudications. *See infra* Part V.B.

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

33 *See* Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, THE BAFFLER, no. 9, 2007, at 51–58, *available at* http://www.thebaffler.com/salvos/internment-camp (discussing the exploitation of unpaid interns and restructuring of the labor market by unpaid internships); David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, NE. U. L.J. (forthcoming 2014) (manuscript at 2) (describing the intern economy as "an intermediate stage between classroom education and full-time employment that has become a staple for many young—and not so young—people seeking to enter certain skilled occupations"). Others have described such workers as "members of the permanent intern underclass: educated members of the millennial generation who are locked out of the traditional career ladder and are having to settle for two, three[,] and sometimes more internships after graduating college, all with no end in sight." Alex Williams, *For Interns, All Work and No Payoff: Millennials Feel Trapped in a Cycle of Internships with Little Pay and No Job Offers*, N.Y. TIMES, Feb. 14, 2014, at ST1. The general consensus seems to be that, for young people entering the marketplace, internships are the new normal. *Id.*

34 Yamada, *supra* note 33 ("[T]he intern rights movement [has emerged to] challeng[e] the widespread practice of unpaid internships and the overall status of interns in today's labor market. . . . [It] has both fueled legal challenges to unpaid internships and engaged in organizing activities and social media outreach surrounding internship practices and the intern economy.");

of unpaid intern lawsuits that surged between 2011 and 2014,[35] and the provisions of the FLSA and the Department of Labor's Fact Sheet No. 71,[36] under which the interns filed suit. Part II explores the court-made test to determine FLSA class "substantial similarity" certification. In Part III, this Note looks to two unpaid intern FLSA suits[37] that yielded conflicting certification decisions, and Part IV assesses the problems with applying the FLSA's two-step process to such intern cases. Part V then examines the special demands of an unpaid intern class, proposes a more suitable test to be applied in intern-specific cases, and then walks through the application of this Note's proposed test.

I. THE FAIR LABOR STANDARDS ACT AND THE RISE OF UNPAID INTERNSHIPS

Touted by President Franklin Roosevelt as the most important piece of New Deal legislation since the Social Security Act,[38] the Fair Labor Standards Act of 1938 (FLSA)[39] dramatically changed the employment landscape by establishing the first—though very moderate[40]—minimum and overtime wage standard.[41] It was not until the 1947 case, *Walling v. Portland Terminal Co.*,[42] that the U.S. Supreme Court set forth a "student-trainee exception," which indicated that trainees who worked for seven or eight days without pay during the "course of practical training" were not "employees" under the FLSA, as their work did not provide the company with any "immediate advantages."[43] Although the FLSA sought to ensure that all employees

see also Ross Perlin, *Unpaid Interns: Silent No More*, N.Y. TIMES (July 21, 2013), http://www.nytimes.com/2013/07/21/jobs/unpaid-interns-silent-no-more.html.

35 For a visual overview of the 2011–2014 lawsuits, see Suen & Brandeisky, *supra* note 3.

36 WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET NO. 71], *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.htm.

37 Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 CIV. 6784(WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *and motion to certify appeal granted*, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013); Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013), *motion to certify appeal granted*, No. 12 CV 793(HB), 2013 WL 3326650 (S.D.N.Y. June 27, 2013).

38 Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, 123 MONTHLY LAB. REV. 32 (2000), *available at* http://www.bls.gov/opub/mlr/2000/12/art3full.pdf.

39 Pub. L. No. 75-728, 52 Stat. 1069 (1938) (codified at 29 U.S.C. §§ 201–219 (2012)).

40 *See* Jonathon Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22 (1978).

41 *Id.* (citing a 1937 message from President Roosevelt urging Congress to pass the FLSA as America should be able to give "all our able-bodied working men and women a fair day's pay for a fair day's work").

42 330 U.S. 148 (1947).

43 *Id.* at 149, 153.

were compensated a prescribed minimum wage, the *Walling* Court reasoned that it could not define "employee" to include individuals who agree to work, for their own benefit, on the premises and under the aid and instruction of another.[44] To find to the contrary would "penalize" the employer for providing such free training.[45]

A. *The History of Unpaid Internships*

Until World War II, the term "internship" referred almost exclusively to hands-on apprenticeships in the medical profession.[46] However, after the *Walling* decision confirmed the legality of unpaid general training, the term's scope began to shift, moving into the realms of public administration, politics, journalism, teaching, social work, and psychology.[47] Additionally, many schools sought to modernize their curricula in the 1960s, for the first time affording students the opportunity to work (and, presumably, learn) outside the classroom while still earning university-level course credit.[48] Studies reported that in 1981, approximately 3% of college graduates had held an internship position; by 1991, that figure had multiplied to approximately 33%.[49] In 2008, studies revealed that approximately 83% of college graduates had held internship positions, with experts estimating that up to half of those positions were not paid.[50] While there is no official record of exactly how many interns there are today, conservative estimates suggest that one to two million students intern annually in the United States. This is a conservative estimate, as it excludes internships taken by students in high school, community college, and graduate programs, as well as those taken after graduation or during mid-life career changes.[51]

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44 *Id.* at 152.

45 *Id.* at 153.

46 PERLIN, *supra* note 1, at 30–31; Thomas Goetz, *To Serve Them All My Days: Are Internships Education or Exploitation?*, VILLAGE VOICE, Jan. 17, 1995, at SS6 ("Internships, once the province of law or medical students, have become imperative for any college student hoping to head into their prospective field.").

47 PERLIN, *supra* note 1, at xiv, 34.

48 *Id.*

49 Dawn Gilbertson, *Earning It; Glamorous Internships with a Catch: There's No Pay*, N.Y. TIMES (Oct. 19, 1997), http://www.nytimes.com/1997/10/19/business/earning-it-glamorous-internships-with-a-catch-there-s-no-pay.html (quoting figures from the National Society of Experiential Education).

50 *See* Greenhouse, *The Unpaid Intern, Legal or Not*, *supra* note 1.

51 PERLIN, *supra* note 1, at 27; *see also* Nona Willis Aronowitz, *The Interns Are Getting Younger: High Schoolers Hit the Workplace*, NBC NEWS (Mar. 10, 2014, 4:56 AM), http://www.nbcnews.com/news/education/interns-are-getting-younger-high-schoolers-hit-workplace-n45146 ("With a disappointing job market, a sky-high youth unemployment rate, and an increasingly competitive college admissions process, high school internships are considered a way to beat the odds."); Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME (Apr. 12, 2010), http://content.time.com/time/magazine/article/0,9171,1977130,00.html ("[M]ore

To date, instead of wages, many companies promise interns opportunities to gain experience,[52] enhance resumes, make industry contacts, and "get a foot in the door."[53]

B. *The Early Appeal and Benefits of Unpaid Internships*

Vast praise accompanied the integration of internships into the workplace. The news media extolled the experiential education, invaluable training, beneficial credentials, and low-risk career sampling that internships offered to students and recent graduates.[54] Colleges and universities embraced the cheap credit system[55]—many hosting

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and more college graduates and even middle-aged professionals are willing to work for free in hopes that it will help them land a paying gig.").

52 Ezra H. Stoller & Lily C. Sugrue, *Unpaid Internships: A Priceless Experience?*, HARV. CRIMSON (Apr. 3, 2014), http://www.thecrimson.com/article/2014/4/3/unpaid-internships-experience ("In the world of unpaid internships, experience has emerged as a de facto form of currency.").

53 PERLIN, *supra* note 1, at 23; Curiale, *supra* note 1, at 1534. This practice does not only extend to interns, resulting in what some have coined the "post-employment economy"—a term for the new economic status quo, where employees (often temps or interns) are unpaid or seriously underpaid for work that is typical of a salaried employee. *See generally* Sarah Kendzior, *Managed Expectations in the Post-Employment Economy*, AL JAZEERA, http://www.aljazeera.com/indepth/opinion/2013/03/201331116423560886.html (last updated Mar. 12, 2013, 7:36 AM).

54 Glenn C. Altschuler, *College Prep; A Tryout for the Real World*, N.Y. TIMES (Apr. 14, 2002), http://www.nytimes.com/2002/04/14/education/college-prep-a-tryout-for-the-real-world.html?src=pm&pagewanted=1 ("Internships have become as much a part of a college education as large lecture courses, small dormitory rooms and all-nighters."); Gilbertson, *supra* note 49 ("Interns can gain invaluable training and good credentials, and . . . the businesses gain free labor and a first peek at workers who are about to graduate."); Steven Ginsberg, *Soar Spot: Why Internships Are Increasingly Crucial; Workers Gain Experience and Contacts, While Employers Get a Chance to Try Before Letting Someone Fly*, WASH. POST, June 1, 1997, at H4 ("With companies looking for better-trained employees, [internships] have become almost a requisite of success."); *Learning; Internship Smarts*, BOSTON HERALD, June 13, 1999, (Magazine) ("Internships have become increasingly critical because many organizations, whether museums or Fortune 500 companies, now see them as the first stage in recruiting.").

55 Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. TIMES (N.Y. Ed.), Apr. 3, 2011, at WK11 ("Charging students tuition to work in unpaid positions might be justifiable . . . if the college plays a central role in securing the internship and making it a substantive academic experience. But more often, internships are a cheap way for universities to provide credit—cheaper than paying for faculty members, classrooms[,] and equipment."); Malcolm Harris, *The Unpaid Internship for Credit Must End*, AL JAZEERA AM. (Nov. 14, 2013, 6:00 AM), http://america.aljazeera.com/opinions/2013/11/unpaid-internshipscollegecredit.html ("Since outsourcing the actual teaching to employers saves money—it is cheaper to certify than instruct—American universities have jumped on the intern bandwagon."); Rachele Kanigel, *Will Lawsuits Prompt Media Companies to Pay Student Interns?*, PBS MEDIASHIFT (Feb. 13, 2013), http://www.pbs.org/mediashift/2013/02/will-lawsuits-prompt-media-companies-to-pay-student-interns044 ("'The schools are complicit with the employers providing unpaid internships . . . . They're making money doing it . . . . These schools are not providing the facility for classes. The professors don't teach or give grades—all they do is make sure you completed the internship. These schools are charging students for nothing.'" (quoting Adam Klein, an attorney for many of the intern plaintiffs); *see also* Editorial, *Good Steps Against Unpaid Internships*, N.Y. TIMES (N.Y. Ed.), Mar. 10, 2014, at A20 ("[Academic credit for unpaid internships] mostly

internship databases, providing position descriptions, application instructions, and deadlines to assist their students in securing positions.[56] Some professionals have posited that internships are "a rite of corporate passage" and the primary vehicle for breaking into the professional world.[57] By 2010, internships had become so commonplace that specialized businesses emerged to place interns with employers, for a fee.[58]

As the practice becomes more pervasive, the "internship" definition remains ambiguous—spanning the gamut of structured, professional, and educational, to manual, menial, and slavish.[59] The learning or training component emphasized by the *Walling* Court has wavered, usually only enforced if required by universities for course credit—as employers' bottom lines are productivity, not intern development.[60]

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function[s] as a fig leaf for employers, who [can] pretend that the credit somehow justifie[s] not paying for a student's work.").

56 *See, e.g.*, *Dartmouth College's Online Internship Database*, DARTMOUTH C., http://www.dartmouth.edu/~csrc/jobs (last visited Oct. 22, 2014); *Ithaca College's Online Internship Database*, ITHACA C., https://www.ithaca.edu/rhp/internships/intern_db (last visited Oct. 7, 2014); *Michigan State University's Online Internship Database*, MICH. ST. U., http://ns.msu.edu/index.php/students/career/internships (last visited Oct. 22, 2014); *The New School's Online Internship Database*, NEW SCH., http://www.newschool.edu/lang/internships.aspx (last visited Oct. 22, 2014); *see also* Altschuler, *supra* note 54 ("Guidebooks like the 2002 edition of 'The Internship Bible' (Princeton Review) and 'Internships 2002' (Peterson's (Guides) are other sources, providing descriptions, application instructions and deadlines. Organizations may also list positions on their Web sites.").

57 Gilbertson, *supra* note 49 (citing Samer Hamadeh, co-founder and CEO of Vault.com and author of THE INTERNSHIP BIBLE, who explained, "[t]his is the way you break into the work world in America").

58 Such companies charge to assist customers with their internship search. *See* Sue Shellenbarger, *Do You Want an Internship? It'll Cost You*, WALL ST. J., Jan. 28, 2009, at D1; Christopher Zara, *Paying a Fee to Work for Free: Pricey Intern Placement Services Raise Eyebrows Among Fair Wage Advocates*, INT'L BUS. TIMES (Sept. 12, 2014, 11:37 AM), http://www.ibtimes.com/paying-fee-work-free-pricey-intern-placement-services-raise-eyebrows-among-fair-wage-1686392; *see also* Sara Lipka, *Dream Internships and Dubious Academic Credit for Sale: $9,500*, CHRON. HIGHER EDUC. (July 18, 2008), http://chronicle.com/article/Dream-InternshipsDubio/14058 (describing the University of Dreams, a company that sells course credit for as much as $9500). This trend has fueled one of the internship movement's key arguments: that unpaid internship opportunities are only available to wealthy individuals who can handle expenses while working for free. *See* discussion *infra* note 74; *see also* Perlin, *supra* note 55 ("[T]he internship boom gives the well-to-do a foot in the door while consigning the less well-off to dead-end temporary jobs.").

59 PERLIN, *supra* note 1, at 23–25; *see also* Anya Kamenetz, Op-Ed., *Take This Internship and Shove It*, N.Y. TIMES (May 30, 2006), http://www.nytimes.com/2006/05/30/opinion/30 kamenetz.html. For a tongue-in-cheek visual description of a modern internship, see http://graphics8.nytimes.com/images/2006/05/30/opinion/Intern450.jpg, which accompanies the Kamenetz article.

60 PERLIN, *supra* note 1, at 25; *see, e.g.*, Fitzgerald, *supra* note 23 ("[T]here's a reason employers don't tell interns [that they have no intentions of ever bringing them onboard as permanent full-time employees] . . . . because the 22-22-22 model [which references modern employers' desire to hire a 22-year-old willing to work 22-hour days for $22,000 a year] . . . is better for the bottom line."); Kathleen Madigan, *Unionizing College Football Highlights Nexus of*

C. *Modern Exploitation of the Internship System*

Prodded by the cheap labor demands of the Great Recession,[61] many employers have embraced the informal and unregulated practice of taking on interns to service their own needs,[62] seldom providing focused training, mentoring, or pay,[63] and often requiring internships as prerequisites for full-time employment.[64] Supporters, including universities,[65] see the positions as valuable opportunities to get industry training and develop career contacts.[66] Other supporters argue that

Quarterback, McDonald's Worker and Unpaid Intern, WALL ST. J. (Mar. 28, 2014, 1:07 PM), http://blogs.wsj.com/economics/2014/03/28/unionizing-college-football-highlights-nexus-of-quaterback-mcdonalds-worker-and-unpaid-intern ("[L]ow-pay/no-pay jobs contribute heavily to lucrative bottom lines."). This is one of the most challenged aspects of the DOL's FACT SHEET NO. 71. *See* discussion *infra* note 83.

61 *See* Rampell, *supra* note 2; *see also* Elaine R. Smith, *Drawing Boundaries Around Internships*, N.Y. TIMES (Feb 24, 2014), http://www.nytimes.com/2014/02/24/world/americas/drawing-boundaries-around-internships.html (citing lead Canadian economist, Angella MacEwen, who asserts that the injustices of unpaid internships are a symptom of broader problems: "'Employers are able to exploit youth because the [economic] situation is so dire that people are literally willing to work for free to get into the . . . labor market[.]'").

62 PERLIN, *supra* note 1, at xiii.

63 It has become common for profit-making businesses to ignore the minimum wage and overtime wage laws and employ young workers without compensating them, without paying Social Security taxes, unemployment taxes, or worker's compensation premiums. *See* Ross Eisenbrey, *Unpaid Internships: A Scourge on the Labor Market*, ECON. POL'Y INST. BLOG (Feb. 7, 2012, 2:54 PM), http://www.epi.org/blog/unpaid-internships-scourge-labor-market. However, it should be emphasized that not all companies take advantage in this way, as some do in fact provide guided, structured, educational programs that provide interns with pertinent education and real-world experience. The DOL's *Fact Sheet No. 71* (discussed *supra* in Part I.D) strives to protect such positions, while otherwise enforcing the FLSA.

64 PERLIN, INTERN NATION, *supra* note 1 at xiv; Ross Perlin, Op-Ed., *Today's Internships Are a Racket, Not an Opportunity*, N.Y.TIMES, http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/todays-internships-are-a-racket-not-an-opportunity (last updated Feb. 6, 2012, 12:04 PM) ("Lucrative and influential professions—politics, media and entertainment, to name a few—now virtually require a period of unpaid work . . . .").

65 In 2010, after the DOL issued its six-part test to ensure that internships comply with existing employment regulations, discussed *supra* Part I.D, thirteen university presidents cosigned a letter to then-Secretary Hilda Solis, requesting that the DOL reconsider undertaking the regulation of internships, which the universities viewed as "an approach to learning that is viewed as a huge success by educators, employers, and students alike." *See* Letter from University Presidents, to the Hon. Hilda L. Solis, Sec'y of Labor (Apr. 28, 2010), *available at* http://chronicle.com/items/biz/pdf/FINAL_US%20Department%20of%20Labor%20letter.pdf (published by *The Chronicle of Higher Education*). Some schools claim that they scrutinize employers during a pre-internship screening process, in order to ensure that their students receive an educational training experience. *See* Kanigel, *supra* note 55. Others point out that "the cases where the interns are making headway in court are the ones where colleges are removed from the process," not "the truly educational internships (at least in theory) that colleges help arrange for their students." Allie Grasgreen, *Unpaid Internships Not Dead Yet*, INSIDE HIGHER ED (Aug. 2, 2013), http://www.insidehighered.com/news/2013/08/02/officials-skeptical-unpaid-intern-lawsuits-will-affect-higher-education#ixzz2ppaV6Ayt.

66 Jim Snyder & Christie Smythe, *Sleeping-Giant Issue of Unpaid U.S. Interns Gets Scrutiny*, BLOOMBERG (June 27, 2013, 12:00 AM), http://www.bloomberg.com/news/2013-06-27/sleeping-giant-issue-of-unpaid-interns-gets-scrutiny.html; *see also* Anya Kamenetz, *Time for Illegal*

unpaid positions are legal because of individuals' rights to contract and freely associate.[67] For critics, unpaid internships are an exploitation of the labor system[68] and a way for employers to take advantage of eager job seekers.[69] Some critics suggest that the internship culture may be better described as "wage theft"[70]—explaining that unpaid internships

Internships to Come out of the Shadows, HUFFINGTON POST (June 16, 2010, 5:12 AM), http://www.huffingtonpost.com/anya-kamenetz/time-for-illegal-internsh_b_540457.html.

67 *See* John Stossel, *Interview with an Unpaid Intern*, FOX BUS. (Nov. 17, 2011), http://www.foxbusiness.com/on-air/stossel/blog/2011/11/17/interview-unpaid-intern ("If [an] unpaid student intern and employer come to an agreement, both expect to benefit . . . . The student is no indentured servant. If the employer 'exploits' the student, the student can quit. The contract ought to be nobody's business but theirs.").

68 Phoebe Maltz Bovy, *The 3 Big Myths Propping up Unpaid Internships*, WEEK (Feb. 24, 2014), http://theweek.com/article/index/256773/the-3-big-myths-propping-up-unpaid-internships ("Some entry-level jobs, we hear, are too glamorous to pay. We learn that most young people, while eager, just aren't prepared for the workforce. We are led to believe that the economy is still too weak to hire them; businesses *want* to pay, but budgets simply have no room. These three givens are actually myths, understandably embraced by employers, yet, more mysteriously, accepted as fact by the rest of us."); Fitzgerald, *supra* note 23 ("Work that previously came with an assumption of a 'career path' and institutional support—the aforementioned benefits include sick days, maternity leave, and paid holidays—are fictions for the legion of hourly workers."); Kendzior, *supra* note 53 ("The problem . . . . is that corporations making record earnings will not allocate their budgets to provide menial compensation to the workers who make them a success."); *see also* Susan Adams, *Employers Should Pay Their Interns. Here's Why*, FORBES (June 9, 2014, 10:39 AM) http://www.forbes.com/sites/susanadams/2014/06/09/employers-should-pay-their-interns-heres-why ("Just because a job is instructive doesn't mean it's not a job."); Eleanor Robertson, *Sorry, but Internships Are Not 'Opportunities' until You Pay Us*, THE GUARDIAN (Apr. 22, 2014, 6:51 PM), http://www.theguardian.com/commentisfree/2014/apr/23/sorry-but-internships-are-not-opportunities-until-you-pay-us ("The ridiculous rhetoric around internships as 'opportunities' rather than exploitation is . . . . low-level brainwashing, and it stops [interns] from being able to recognise and articulate the raw deal [they've] been handed.").

69 *See* Yamada, *supra* note 1; Greenhouse, *The Unpaid Intern, Legal or Not*, *supra* note 1 ("With job openings scarce for young people, the number of unpaid internships has climbed in recent years, leading federal and state regulators to worry that more employers are illegally using such internships for free labor."); Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME (Apr. 12, 2010), http://content.time.com/time/magazine/article/0,9171,1977130,00.html ("[I]n the Great Recession, with the unemployment rate hovering near 10%, job-search sites like CareerBuilder and Monster.com are reporting increases in the number of postings for internships."); *see also* Wang v. Hearst Corp., 293 F.R.D. 489, 491 (S.D.N.Y. 2013) ("Since 2008, Hearst worked to reduce costs by decreasing its headcount and expenses at the magazines as a response to the recession, and internal emails within Harper's Bazaar and Marie Claire instructed the staff to use interns rather than paid messengers to save costs." (citation omitted)); Harris, *supra* note 55 ("[E]mployers commonly use internships as a way to skirt minimum-wage laws."); Linda Federico-O'Murchu, *Unpaid Interns Pose New Challenge for Job Seekers*, CNBC (Nov. 17, 2013, 9:00 AM), http://www.cnbc.com/id/101199651 ("Employers know they can fill vacant positions with a virtually unlimited supply of bright, hard-working young helpers . . . ."); Ross Perlin, Black Swan *Event: The Beginning of the End of Unpaid Internships*, TIME (June 13, 2013), http://business.time.com/2013/06/13/black-swan-event-the-beginning-of-the-end-of-unpaid-internships/#ixzz2ff4bm1Qx ("Unscrupulous employers quietly drove a truck through the Walling loophole; schools made it official with academic credit and internship fairs; government looked the other way; and desperate young people have [had] to play along.").

70 Perlin, *supra* note 69; *see also* Bovy, *supra* note 68 ("Once there's a workforce prepared to do a particular job unpaid, it becomes one for which it would be unrealistic to expect payment. If a company can get workers with unpaid experience to provide further unpaid labor, 'entry-level' gets redefined accordingly. And once having unpaid staff becomes normal, funds go elsewhere—

are increasingly crowding out paid internships and replacing regular paid positions altogether, thereby turning entry-level jobs into an "endangered species."[71]

The implications of "wage theft" are only further exacerbated by the high tuition rates that students often pay per college credit,[72] which many companies require to avoid legal ramifications.[73] This "pay-to-play" system not only exploits interns, but also excludes poor and working-class participation in numerous fields.[74] One law firm

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either to a company's expansion or to staying afloat."); Federico-O'Murchu, *supra* note 69 (noting that some economists claim that intern labor may actually be harming the economy at large: without wages, interns have no buying power, cannot pay taxes or contribute to Social Security, and drain the resources of parents who may be financially weakened by the recession themselves); Fitzgerald, *supra* note 23 ("These workers are neither saving, nor spending at levels that many economists and economic observers claim creates more (and allegedly better) jobs."); Kendzior, *supra* note 53 ("In many industries—including policy, entertainment, and business—interns do the same jobs as salaried employees and are paid nothing or next to nothing.").

71 Paul Solman & Ross Perlin, *Will Work for Free: How Unpaid Internships Cheapen Workers of All Ages*, PBS NEWSHOUR, (Sept. 26, 2013), http://www.pbs.org/newshour/businessdesk/2013/09/will-work-for-free-how-unpaid.html; *see also* PERLIN, *supra* note 1, at xviii ("In a time of chronic high unemployment, internships are replacing untold numbers of full-time jobs . . . ."); Federico-O'Murchu, *supra* note 69 ("In numbers up to 2 million, the increasingly dominant presence of unpaid or low-paid interns in the workforce is taking much-needed entry level jobs away from salaried employees.").

72 Credit-hour tuitions vary: in-state tuition may, conservatively, range from $190 to $250 per credit, while private and Ivy League tuitions may reach $900 to $1200. Sylvia Cochran, *Calculating the Cost per Credit Hour*, BRIGHT HUB (MAY 13, 2011), http://www.brighthub.com/education/college/articles/83976.aspx; *see also* Perlin, *supra* note 55 (explaining that in order to meet employers' credit requirements, many interns have had to pay for the opportunity to work for free, and providing examples of one student who paid the University of Pennsylvania $2700 in order to intern with NBC Universal and another who paid New York University $1600 to intern with "The Daily Show").

73 Sara Lipka, *Would You Like Credit with That Internship?*, CHRON. HIGHER EDUC. (May 9, 2010), http://chronicle.com/article/Would-You-Like-Credit-With/65434 ("Companies often see academic credit as substitute compensation that qualifies interns as legally unpaid trainees and keeps them on their colleges' liability insurance. Advertisements specify: 'Candidates must be able to receive academic credit.'"); *see* Kanigel, *supra* note 55 (interviewing Adam Klein, an attorney for many of the intern plaintiffs, who says media companies skirt the law by claiming to provide valuable training and requiring the interns to obtain college credit. However, Klein rejects this run-around, explaining that every intern his firm has spoken with "'does productive work, replaces other employees, [and] is basically a low-level clerical gopher. They're entitled to a minimum wage rate.'"); *cf.* Greenhouse, *The Unpaid Intern, Legal or Not*, *supra* note 1 ("[F]ederal regulators say that receiving college credit does not necessarily free companies from paying interns, especially when the internship involves little training and mainly benefits the employer," and citing Nancy J. Leppink, director of the DOL's wage and hour division, who speculates that "[i]f you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law").

74 Richard V. Reeves, Op-Ed., *The Glass-Floor Problem*, N.Y. TIMES OPINIONATOR (Sept. 29, 2013, 9:02 PM), http://opinionator.blogs.nytimes.com/2013/09/29/the-glass-floor-problem ("As [these internships] are unpaid, they automatically favor the affluent."). The "pay-to-play" system encompasses all intern expenses, sometimes including hundreds or thousands of dollars on transportation, tuition for college credit, and pricey summer apartments. *See* Perlin, *supra* note 69 ("Most people simply can't afford to work for free . . . and you just can't pay the rent with on-the-job experience, CV-line items[,] and letters of recommendation."); *see also* Andrea Perera, *Paying*

representing a number of former unpaid interns[75] explains that the widespread practice curtails employment opportunities, fosters class divisions between those who can afford to work for free and those who cannot,[76] and "indirectly contributes to rising unemployment."[77] Studies have also shown that women are seventy-seven percent more likely to take unpaid internships than their male counterparts.[78] Some believe that employers, schools,[79] government agencies, parents, and interns themselves[80] are all "complicit in the devalu[ation] of work, the

Dues in Internships, L.A. TIMES, Apr. 22, 2002, at B4; Gabriel Arana, *The Unbearable Whiteness of Liberal Media*, AM. PROSPECT (May 12, 2014), http://prospect.org/article/unbearable-whiteness-liberal-media ("There's a straightforward reason for the dearth of [socio-economically diverse] intern applications: Those who can afford to rely on mom and dad for a summer or a semester tend to be well-off and white."); Kanigel, *supra* note 55 (suggesting unpaid internships are a barrier to the profession for poor and minority students); Andy Maguire, *Do Unpaid Internships Hurt Social Mobility*, FORBES (June 12, 2014, 10:03 AM), http://www.forbes.com/sites/quora/2014/06/12/do-unpaid-internships-harm-social-mobility ("Internships are probably the #1 way to engage in career-building as a student, so if members of a socio-economic group are often excluded without merit, it directly impacts social mobility.").

75 *Current Cases*, UNPAID INTERNS LAWSUIT AN OUTTEN & GOLDEN LLP WEBSITE, http://www.unpaidinternslawsuit.com/current-cases (last visited Oct. 22, 2014); *see also* Keenan Mayo, *Why Interns Are Suing 'Saturday Night Live,' Hollywood, and Other Dream Employers*, BLOOMBERG BUSINESSWEEK (July 12, 2013), http://www.businessweek.com/articles/2013-07-12/why-interns-are-suing-saturday-night-live-hollywood-and-other-dream-employers; Snyder & Smythe, *supra* note 66.

76 *See* Zara, *supra* note 58 ("[O]ne of the longest-running criticisms of unpaid internships [is] that they establish a patently unfair playing field that permeates the competitive industries and closes the door to all but a privileged few."). An example of this inequality is the rising trend of companies auctioning internships to raise money for charities. *See* Danielle Kurtzleben, *Need an Internship? Try Bidding for It*, U.S. NEWS & WORLD REP. (June 6, 2013, 11:15 AM) http://www.usnews.com/news/articles/2013/06/06/need-an-internship-try-bidding-for-it (noting that some companies have offered unpaid internships at auction for as much as $50,000); Libby Page, *Auctioning Unpaid Internships for Charity Is Wrong*, GUARDIAN (May 8, 2014, 6:38 AM), http://www.theguardian.com/voluntary-sector-network/2014/may/08/auctioning-glamorous-unpaid-internships-charity.

77 UNPAID INTERNS LAWSUIT AN OUTTEN & GOLDEN LLP WEBSITE, http://www.unpaidinternslawsuit.com (last visited Oct. 22, 2014).

78 PHIL GARDNER, THE DEBATE OVER UNPAID COLLEGE INTERNSHIPS 6 (Intern Bridge, Inc. 2011), *available at* http://www.ceri.msu.edu/wp-content/uploads/2010/01/Intern-Bridge-Unpaid-College-Internship-Report-FINAL.pdf. This may be, in part, because female-dominated fields—such as education, social sciences, health sciences, arts, and humanities—are most likely to offer unpaid internships. Colin Schultz, *The Unpaid Intern Economy Rides on the Backs of Young Women*, SMITHSONIAN (May 22, 2014), http://www.smithsonianmag.com/smart-news/unpaid-intern-economy-rides-backs-young-women-1-180951540/?no-ist; *see also* Madeleine Schwartz, *Opportunity Costs: The True Price of Internships*, DISSENT (Winter 2013) http://www.dissentmagazine.org/article/opportunity-costs-the-true-price-of-internships ("Compliant, silent[,] and mostly female, these interns have become the happy housewives of the working world.").

79 Harris, *supra* note 55 ("The common practice of granting class credit for completed internships has contributed to the dramatic increase of unpaid internships.").

80 *See, e.g.*, Williams, *supra* note 33 ("'There is a culture of internships . . . whereby it is completely normal for young people to think that working unpaid is just part of the process . . . . Nobody even questions it.'" (citing Alec Dudson, founder of *Intern* magazine)).

exacerbation of social inequality, and the disillusionment of young people" that occur in the workplace as a result of the intern boom.[81]

D. *The Department of Labor's Fact Sheet No. 71*

In 2010, to address the changing definition of "internship," and ensure compliance with minimum wage protections, the Wage and Hour Division of the U.S. Department of Labor supplemented *Walling*'s student-trainee exception with its Fact Sheet No. 71, which offered a six-criteria test to further distinguish interns from employees entitled to compensation under the FLSA.[82] Under Fact Sheet No. 71, an employer must meet *all six* of the following criteria in order to be exempt from the requirement to pay interns minimum or overtime wages.[83]

> (1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) The internship experience is for the benefit of the intern; (3) The intern does not displace regular employees, but works under close supervision of existing staff; (4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded; (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[84]

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81 PERLIN, *supra* note 1, at xv; *see also* Perlin, *supra* note 55.

82 FACT SHEET NO. 71, *supra* note 36; *see also* Natalie Bacon, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet No. 71,"* 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67 (2011) (analyzing the policy behind and future implications of Fact Sheet No. 71).

83 FACT SHEET NO. 71, *supra* note 36. In evaluating intern classes, the courts have generally looked to Fact Sheet No. 71 as a flexible "totality of the circumstances" or "primary benefit" test. The Second Circuit Court of Appeal's upcoming appeal ruling will likely clarify whether and how much deference courts should give to Fact Sheet No. 71. However, in April of 2014, the DOL itself submitted an amicus brief to the Second Circuit, urging the court to adopt a stricter "all-or-nothing" interpretation of Fact Sheet No. 71 in its rulings—so if an unpaid internship violates just one or two parts of the six-part test, a for-profit employer can be liable for back wages. Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, Wang v. Hearst Corp., No. 13-4480 (2d Cir. Apr. 4, 2014), *available at* http://www.propublica.org/documents/item/1104356-labor-department-amicus-brief-in-hearst-case.html; *see also* Kara Brandeisky, *Labor Department Intervenes on Behalf of Hearst Interns*, PROPUBLICA (Apr. 8, 2014, 9:00 AM), http://www.propublica.org/article/labor-department-intervenes-on-behalf-of-hearst-interns.

84 FACT SHEET NO. 71, *supra* note 36. It is important to note that the strict criteria under Fact Sheet No. 71 only apply to for-profit firms and do not apply to non-profit firms or government organizations, where such individuals are considered "volunteers." *See* 29 U.S.C. § 203(4)(A) (2012).

While the issuance of Fact Sheet No. 71 did not change the laws governing interns,[85] it did suggest an effort by the Department of Labor to enforce minimum wage requirements with a more tangible legal test for internship criteria.[86] More importantly, it appeared to prompt extensive questioning of the formerly unchallenged legality of unpaid positions.[87] Since its release, students have successfully petitioned college career centers to abstain from posting unpaid positions,[88] and

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85 Within the terms of Fact Sheet No. 71, the DOL itself indicates that "[t]his publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations." FACT SHEET NO. 71, *supra* note 36. Some critics demand further revisions, as the six points derive from *Walling* in 1947, when many apprenticeships were for blue-collar production work. *See* Bacon, *supra* note 82; Greenhouse, *The Unpaid Intern, Legal or Not*, *supra* note 1.

86 *See* Greenhouse, *The Unpaid Intern, Legal or Not*, *supra* note 1. However, due to limited government resources, the DOL has relied on complaints—primarily from unpaid interns—rather than proactive investigations of employers. This has lead to criticism that in the three years following its issuance of Fact Sheet No. 71, the DOL had only cited eleven for-profit companies for failing to pay interns minimum wage. *See* Kara Brandeisky & Jeremy B. Merrill, *How the Labor Department Has Let Companies Off the Hook for Unpaid Internships*, PROPUBLICA (Apr. 9, 2014, 3:00 PM), http://www.propublica.org/article/how-the-labor-department-let-companies-off-hook-for-unpaid-internships.

87 Snyder & Smythe, *supra* note 66 ("'I knew I was being taken advantage of . . . I just didn't think there was anything I could do about it.'" (citing Eric Glatt, the first unpaid intern plaintiff, who only filed suit after learning about Fact Sheet No. 71)). Many other interns shared Glatt's preconceptions of an intern's rights. *See* Greenhouse, *The Unpaid Intern, Legal or Not*, *supra* note 1 ("'It would have been nice to be paid, but at this point, it's so expected of me to do this for free . . . . If you want to be in the music industry that's the way it works. If you want to get your foot in the door somehow, this is the easiest way to do it. You suck it up.'" (quoting a New York University senior and unpaid intern)). In its 2014 amicus brief to *Wang v. Hearst Corp.*, the DOL sought to clarify the question of whether unpaid interns are, in fact, employees.

> Nothing in the FLSA or in *Portland Terminal* suggests that for-profit employers should be permitted to circumvent their obligation to compensate individuals who are performing productive work by categorizing entry-level or temporary workers as interns or trainees. In fact, the Supreme Court made the opposite observation in *Portland Terminal*, stating that it is "[w]ithout doubt the [FLSA] covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation." *Portland Terminal*, 330 U.S. at 151 (citing 29 U.S.C. 214(a)). Thus, the Department's test excludes from the protections of the FLSA only those trainees or interns who are receiving bona fide training that is for their own benefit, and who receive the training under such close supervision that their efforts do not provide the employer with the productive work that it receives from its regular employees.

Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, *supra* note 83, at 24 (footnote omitted).

88 In 2013, New York University students drafted a petition in efforts to have the campus career center remove illegal unpaid internship postings from its database. *See* Susannah Griffee, *Students Fight Back Against Illegal Unpaid Internships*, USA TODAY (May 13, 2013, 4:58 PM), http://www.usatoday.com/story/news/nation/2013/05/09/students-fight-unpaid-internships/2145033; Perlin, *supra* note 34. In response, in February of 2014, N.Y.U. tightened its unpaid internship policies by instructing prospective employers to affirmatively indicate compliance with the DOL's guidelines prior to posting positions on New York University's job site. E-mail from James M. Devitt, Deputy Dir. of Media Relations, N.Y.U., to Amanda Zamora, Senior Editor, ProPublica (Feb. 12, 2014, 2:05 PM), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/1017607/nyu-on-internships-oversight.pdf; *Good Steps Against Unpaid*

"fair pay" and "intern rights" campaigns have organized protests to draw attention to the labor issues at hand.[89] Universities have begun to offer stipends to students participating in unpaid internships,[90] and experts have proposed implementing a cooperative education system, in which students alternate between tightly-integrated classroom time and paid work experience.[91] But none of these efforts have provoked such widespread attention as has the influx of class action lawsuits filed by the interns themselves.[92]

Before examining some of the intern lawsuits, it is important to understand the FLSA parameters under which the interns have filed suit and the FLSA's specific class action certification procedures currently implemented by the courts.

II. THE FLSA'S CLASS CERTIFICATION STANDARD

Under 29 U.S.C. § 216(b), the FLSA provides employees with a private cause of action to recover damages equal to "the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages" plus recovery of attorney's fees and costs.[93] Such an action against an employer can be raised "by any one or more employees for and in behalf of himself or themselves and other employees similarly

Internships, *supra* note 55; Zach Schonfeld, *Internships Where You Do Real Work for Free Are Illegal, but Colleges Haven't Treated Them That Way*, NEWSWEEK, http://www.newsweek.com/internships-where-you-work-free-are-illegal-colleges-havent-treated-them-way-229349 (last updated Feb. 18, 2014, 10:32 PM). Also in February of 2014, Columbia University ceased to provide credit for internships in efforts to encourage employers to properly compensate interns. Christian Zhang, *CSA Announces Changes to Course Withdrawal, Internship Policies*, COLUM. DAILY SPECTATOR (Feb. 21, 2014, 11:20 AM), http://spectrum.columbiaspectator.com/news/csa-announces-changes-to-course-withdrawal-internship-policies.

89 *See* FAIR PAY CAMPAIGN, http://www.fairpaycampaign.com (American campaign to end unpaid internships); INTERN AWARE, http://www.internaware.org (British campaign for fair, paid internships); INTERN LABOR RIGHTS, http://www.internlaborrights.com (American nonprofit that aims to raise awareness to the exploitation of unpaid laborers); *see also* Perlin, *supra* note 34.

90 *See Summer Internship*, CUNY GRADUATE SCH. OF JOURNALISM, http://www.journalism.cuny.edu/academics/summer-internship/#.UmxUqxb6JKs (last visited Oct. 22, 2014) ("What makes our internship program unique is that we guarantee all students will receive a minimum of $3,000 for [their] summer [internship]."). However, critics argue that schools shouldn't have to shoulder the burden of sponsoring internships with for-profit companies—especially city schools, where, ultimately, it is the taxpayers who are subsidizing labor for private companies. *See* Kanigel, *supra* note 55.

91 Perlin, *supra* note 55.

92 *See* Steven Greenhouse, *Former Intern at 'Charlie Rose' Sues, Alleging Wage Law Violations*, N.Y. TIMES (Mar. 14, 2012, 12:31 PM), http://mediadecoder.blogs.nytimes.com/2012/03/14/former-intern-at-charlie-rose-sues-alleging-wage-law-violations ("'More and more unpaid interns are standing up for their right to earn a wage for their work.'" (citing Elizabeth Wagoner, a lawyer representing intern plaintiffs)).

93 29 U.S.C. § 216(b) (2012).

situated" to recover equitable relief as expressly granted by the FLSA.[94] Unlike class actions under Rule 23,[95] collective actions under the FLSA require putative class members to opt-in to the case.[96]

A. *How to Certify a Class Under the FLSA*

While the FLSA specifies that class members must be "similarly situated" to be certified as an FLSA collective action,[97] it neither provides a definition, nor prescribes a method for making that determination,[98] thereby leaving the decision to certify a Section 216(b) opt-in class completely within the discretion of the district courts.[99] Courts have developed a two-step test to determine whether plaintiffs and potential opt-ins are similarly situated so as to proceed to trial collectively.[100]

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94 *Id.*

95 Under Rule 23(a), plaintiffs must demonstrate that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4); *see also 216(b) v. Rule 23*, *supra* note 4 ("Because class members are bound by any judgment in a Rule 23 class action unless they opt out, this requirement protects the due-process interests of unnamed class members." (citations omitted)).

96 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

97 *Id.*

98 O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009). *See generally* Bernstein & Wood, *supra* note 6.

99 Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001); *216(b) v. Rule 23*, *supra* note 4, at 2.

100 *See* Nobles v. State Farm Mut. Auto. Ins. Co., No. 2:10–cv–04175–NKL, 2011 WL 3794021, at *9 (W.D. Mo. Aug. 25, 2011) ("[A] majority of the district courts in the Eighth Circuit use the two-step analysis adopted in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995)." (citations omitted)); Trezvant v. Fid. Emp'r Servs. Corp., 434 F. Supp. 2d 40, 43 (D. Mass. 2008) (explaining the majority of courts addressing this issue in the First Circuit have adopted the "two-tier" approach); Basco v. Wal-Mart Stores, Inc., No. Civ.A. 00-3184, 2004 WL 1497709, at *4 (E.D. La. July 2, 2004) ("Given the direction of the Tenth and Eleventh Circuits and the great weight of district court authority, a consensus has been reached on how section 216(b) cases should be evaluated. It is clear that the two-step ad hoc approach is the preferred method for making the similarly situated analysis and that the similarly situated standard does not incorporate Rule 23 requirements." (citing David Bergen and Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129, 134 (2003))); Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (noting that the majority of courts prefer this approach); *see also Hipp*, 252 F.3d at 1219 (finding the two-tiered approach to certification of § 216(b) opt-in classes to be an effective tool for district courts to use); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102, 1105 (10th Cir. 2001) (discussing three different approaches district courts have used to determine whether potential plaintiffs are "similarly situated" and finding that the two-stage approach is arguably the best of the three approaches because it is not tied to the Rule 23 standards).

1. The Notice and Conditional Certification Stage

In the first step—known as the notice or conditional certification stage—the court must determine (1) whether notice of the action should be issued to potential opt-in class members,[101] and (2) whether the action should initially proceed as a collective action.[102] At this stage, the court bases such a determination on the plaintiffs' ability to make a preliminary showing that the plaintiffs and the members of the proposed class are "similarly situated."[103] To do so, the plaintiffs need only make a "modest factual showing"[104] that they and the putative class members are "similar, not identical."[105] Courts have generally found employees to be similarly situated when they either (1) have similar—not identical—job duties and pay provisions,[106] or (2) when they are governed by a single decision, policy, practice, or plan.[107]

In the first stage, courts typically apply a "fairly lenient standard" that usually results in conditional certification.[108] Once conditional certification is granted, the plaintiffs' representatives give potential class members notice of the action and the opportunity to opt-in.[109] Then, the case proceeds through discovery as a collective action.[110]

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101 In *Hoffman-LaRoche Inc. v. Sperling*, the Supreme Court held that district courts may authorize and facilitate notice in pending § 216(b) collective actions. 493 U.S. 165, 169–70 (1989).

102 *See, e.g.*, Laroque v. Domino's Pizza, LLC, 557 F. Supp. 2d 346, 352 (E.D.N.Y. 2008); White v. MPW Indus. Servs., Inc., 236 F.R.D. 363, 366 (E.D. Tenn. 2006); *see also* Felix De Asencio v. Tyson Foods, Inc., 130 F. Supp. 2d 660, 662–63 (E.D. Pa. 2001), *rev'd on other grounds*, 342 F.3d 301 (3d Cir. 2003).

103 *See, e.g.*, Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995), *overruled on other grounds by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Bouaphakeo v. Tyson Foods, Inc., 564 F. Supp. 2d 870, 892 (N.D. Iowa 2008); Quinteros v. Sparkle Cleaning, Inc., 532 F. Supp. 2d 762, 772 n.6 (D. Md. 2008).

104 *See, e.g.*, Dominguez v. Don Pedro Rest., No. 2:06 cv 241, 2007 WL 271567, at *4 (N.D. Ind. Jan. 25, 2007); Trezvant, 434 F. Supp. 2d at 43; Hoffmann v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997). However, a "modest factual showing" may not require more than substantial allegations, supported by discovery, that plaintiffs and putative members of the proposed collective action are similarly situated. Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009) (citing *Thiessen*, 267 F.3d at 1102).

105 *See, e.g.*, Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546–47 (6th Cir. 2006); Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996); Pendlebury v. Starbucks Coffee Co., 518 F. Supp. 2d 1345, 1362 (S.D. Fla. 2007).

106 *216(b) v. Rule 23*, *supra* note 4, at 4; *see also* Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1259–60 (11th Cir. 2008).

107 *Thiessen*, 267 F.3d at 1102.

108 *216(b) v. Rule 23*, *supra* note 4, at 5; *see also Lewis*, 669 F. Supp. 2d at 1127 (citing Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002)).

109 Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995). In an FLSA collective action, issuing notice of the pending action to all potential class members is not statutorily required. *See Fair Labor Standards Act Class Actions*, *supra* note 7 (discussing how due-process rights are not infringed because of lack of notice).

110 *Mooney*, 54 F.3d at 1214; *216(b) v. Rule 23*, *supra* note 4, at 5.

2. The Motion for Decertification Stage

The second step of collective action certification typically occurs at the close of discovery, upon the defendant's filing of a motion for decertification.[111] Here, the court must determine whether the conditional class should be decertified—thereby ending the action—or whether the conditional class should be certified and proceed to trial as a collective action.[112] More stringent than the first-stage analysis,[113] this second-stage analysis suggests that courts consider three factors: "(1) the disparity or similarity of the factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant and whether those may be asserted collectively or individually as to each plaintiff, and (3) fairness and procedural considerations."[114]

For the first factor, plaintiffs must demonstrate that their "factual claims and employment backgrounds are sufficiently similar to warrant collective treatment"[115] with "'meaningful identifiable facts or legal nexus that bind the claims.'"[116] Courts generally consider—to the extent relevant—the class members' job duties, geographic locations, employer supervision, and compensation, and may also consider any common employer policy, practice, or plan in purported violation of the FLSA.[117]

For the second factor, the more an employer's defenses are general and applicable to the entire class, the more certification is warranted; conversely, the more an employer's defenses are individualized to each plaintiff, the more decertification is warranted.[118] Put another way, decertification is improper if claims can be verified with common proof and representative evidence;[119] however, decertification is likely if courts must conduct detailed inquiries into each plaintiff's claims based on the employer's individualized defenses.[120]

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111 *Lewis*, 669 F. Supp. 2d at 1127 (citing *Thiessen*, 267 F.3d at 1102).

112 *Mooney*, 54 F.3d at 1214.

113 *Lewis*, 669 F. Supp. 2d at 1127, Rawls v. Augustine Home Health Care, Inc., 244 F.R.D. 298, 300 (D. Md. 2007). The first step only requires that the plaintiffs establish that they and the opt-ins are "similarly situated." *See supra* Part II.A.1. However, as in the first stage, plaintiffs need only establish that they and the opt-ins are "similarly," not "identically" situated. *216(b) v. Rule 23*, *supra* note 4, at 5.

114 *216(b) v. Rule 23*, *supra* note 4, at 6; *see also, e.g.*, *Lewis*, 669 F. Supp. 2d at 1127; *Rawls*, 244 F.R.D. at 300; Nerland v. Caribou Coffee Co., 564 F. Supp. 2d 1010, 1018 (D. Minn. 2007).

115 THE FAIR LABOR STANDARDS ACT 19–154 (Ellen C. Kearns et al. eds., 2d ed. 2010).

116 Falcon v. Starbucks Corp., 580 F. Supp. 2d 528, 535 (S.D. Tex. 2008) (quoting Simmons v. T-Mobile USA, Inc., No. H-06-1820, 2007 WL 210008, at *8 (S.D. Tex. Jan. 24, 2007)).

117 *Rawls*, 244 F.R.D. at 300; Reyes v. Texas EZPawn, L.P., No. V-03-128, 2007 WL 101808, at *2 (S.D. Tex. Jan. 8, 2007); Smith v. Micron Elecs., Inc., No. CV–01–244–S–BLW, 2005 WL 5336571, at *2 (D. Idaho Feb. 4, 2005).

118 *Rawls*, 244 F.R.D. at 300.

119 Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1264 (11th Cir. 2008).

120 *See, e.g.*, King v. West Corp., No. 8:04CV318, 2006 WL 118577, at *15 (D. Neb. Jan. 13, 2006).

For the third factor, courts assess whether it is fair to both parties—and whether it is procedurally feasible—to adjudicate the action collectively, "keeping in mind § 216(b)'s primary [equitable] objectives of (1) lowering the burden on individual plaintiffs by pooling resources, and (2) promoting judicial efficiency by resolving in one proceeding common issues of law and fact arising from the same cause of action."[121] Where employees are not similarly situated, courts have decertified the class, so as to ensure that employers do not have to defend their positions with representative proof.[122] However, as the FLSA is a remedial statute that should be broadly interpreted,[123] courts have held that close calls regarding collective treatment should favor certification.[124]

III. LAWSUITS IN RESPONSE TO EXPLOITATION OF THE UNPAID INTERN

Unpaid interns have filed a number of lawsuits—some resulting in victories for the interns,[125] some in victories for the employers,[126] and others in settlement.[127] In other instances, companies have made preemptive efforts to curtail future lawsuits—some by beginning to pay

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121 *216(b) v. Rule 23*, *supra* note 4, at 7 (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)); Nerland v. Caribou Coffee Co., 564 F. Supp. 1010, 1025 (D. Minn. 2007).

122 Johnson v. Big Lots Stores, Inc., 561 F. Supp. 2d 567, 587 (E.D. La. 2008).

123 The Supreme Court has stated that because the FLSA is a piece of "remedial and humanitarian" legislation, it "must not be interpreted or applied in a narrow, grudging manner." Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944), *superseded by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified as amended at 29 U.S.C. §§ 251–262 (2012)).

124 *Morgan*, 551 F.3d at 1265, Falcon v. Starbucks Corp., 580 F. Supp. 2d. 528, 541 (S.D. Tex. 2008); *216(b) v. Rule 23*, *supra* note 4, at 7.

125 Perlin, *supra* note 69.

126 Arguably *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013), *infra* Part III.B, where class certification was denied, but the plaintiff could continue the suit on her own.

127 A number of intern employers—including Charlie Rose, Inc., Condé Nast, Elite Model Management Corporation, and NBC—have settled the class action lawsuits brought against them by unpaid interns. *See NBCUniversal to Settle Suit Over Unpaid Interns*, N.Y. TIMES, Oct. 25, 2014, at B2 (discussing $6.4 million settlement with unpaid interns who worked on *Saturday Night Live*); Amanda Becker, *PBS' Charlie Rose Settles with Unpaid Interns as Lawsuits Spread*, REUTERS, July 1, 2013, *available at* http://www.reuters.com/article/2013/07/01/entertainment-us-interns-lawsuit-charlie-idUSBRE9601E820130701 (discussing a roughly $110,000 settlement paid to unpaid interns who worked on the *Charlie Rose Show*); Michael Lipkin, *Elite Modeling Reaches Largest-Ever Unpaid Intern Settlement*, LAW360 (Jan. 13, 2014, 6:01 PM) http://www.law360.com/articles/500826/elite-modeling-reaches-largest-ever-unpaid-intern-settlement (discussing $450,000 settlement between the model agency and unpaid interns); Mica Rosenberg, *Condé Nast Agrees to $5.8 Mln Settlement in Suit Over Intern Pay*, REUTERS, Nov. 13, 2014, *available at* http://www.reuters.com/article/2014/11/13/condenast-interns-idUSL2N0T31S020141113 (discussing a $5.8 million settlement between the magazine publisher and its unpaid and underpaid interns).

their interns,[128] others by canceling their intern programs altogether.[129] These corporate policy changes, as well as frenzied media buzz and new local legislation,[130] indicate that, at the very least, the actions have

128 *The Nation* magazine announced in August of 2013 that it would pay its interns minimum wage after its interns wrote a letter to the editor to protest their $150 weekly stipend. Rebecca Greenfield, *Interns at* The Nation *Decline to Sue, Write a Letter, Get Better Pay*, ATLANTIC WIRE (Aug. 2, 2013, 12:29 PM), http://www.theatlanticwire.com/national/2013/08/dont-want-sue-intern-pay-write-letter-instead/67922. Additionally, Gawker Media, Slate, VICE, Mother Jones, and Viacom Inc. have all changed their policies to pay interns, as did NBC News, whose parent NBC Universal was sued over its unpaid internship program at MSNBC and *Saturday Night Live*. Claire Zillman, *Condé Nast Will Regret Cutting Its Internship Program*, CNN MONEY (Oct. 24, 2013, 11:06 AM), http://management.fortune.cnn.com/2013/10/24/conde-nast-internships. After a controversy over the seeming discrepancy between *The New York Times*' editorial criticisms of unpaid internships and the company's practice of hosting unpaid internships, itself, in March of 2014, *The New York Times* announced that it, too, would pay its interns New York's minimum wage. John Surico, *NY Times Raises Intern Pay to Minimum Wage*, GOTHAMIST (Mar. 25, 2014, 3:43 PM), http://gothamist.com/2014/03/25/the_nytimes_to_listen_to_itself_and.php. *See generally* WHO PAYS INTERNS?, http://whopaysinterns.tumblr.com (last visited Oct. 22, 2014).

129 Following the intern back-pay lawsuits, Fox Searchlight terminated its internship program in 2010, and as of June of 2013, *The Charlie Rose Show* had terminated its internship program as well. Eriq Gardner, *Hollywood Interns' Lawyer: Cases Will Open Jobs to Less Privileged*, HOLLYWOOD REP. (July 17, 2013, 8:23 AM), http://www.hollywoodreporter.com/thr-esq/hollywood-interns-lawyer-cases-will-587641; Eric Hornbeck, *Charlie Rose Settlement with Unpaid Interns Approved*, LAW360 (June 28, 2013, 3:30 PM), http://www.law360.com/articles/454097/charlie-rose-settlement-with-unpaid-interns-approved. Also, in October of 2013, magazine publishing house Condé Nast terminated its internship program. This decision was also likely in response to a lawsuit filed in June of 2013 by two former interns who claimed they had been paid below minimum wage for internships with *W Magazine* and *The New Yorker*. *See* Cara Buckley, *Sued Over Pay, Condé Nast Ends Internship Program*, N.Y. TIMES, Oct. 24, 2013, at A23; Erik Maza, *Condé Nast Discontinuing Internship Program*, WOMEN'S WEAR DAILY (Oct. 23, 2013), http://www.wwd.com/media-news/fashion-memopad/internships-ending-7242603.

130 In March of 2014, the New York City Council passed a bill to extend workplace rights to interns, both paid and unpaid. The legislation protects interns from sexual harassment, as well as employer discrimination on the basis of age, race, creed, sexual orientation, or citizenship status. Emily Ngo, *NYC Council Passes Bill to Extend Workplace Rights to Interns*, NEWSDAY, http://www.newsday.com/news/new-york/nyc-council-passes-bill-to-extend-workplace-rights-to-interns-1.7514396 (last updated Mar. 26, 2014, 8:48 PM). However, the new protections apply only to unpaid interns in positions that meet the DOL's six-part test—a rarity among unpaid internships, which this Note discusses *supra* in Part I.C and I.D. *See* Michael M. Grynbaum, *De Blasio Signs Bill Giving Unpaid Interns the Right to Sue for Discrimination*, N.Y. TIMES, Apr. 16, 2014, at A21; Michelle Chen, *New York City Now Protects Interns Against Sexual Harassment—But with One Major Loophole*, NATION (Apr. 25, 2014, 3:14 PM), http://www.thenation.com/blog/179540/new-york-city-now-protects-interns-against-sexual-harassment-one-major-loophole; Kayla Epstein, *New York City Council Passes Bill to Protect Unpaid Interns' Rights*, GUARDIAN (Mar. 29, 2014, 1:42 PM), http://www.theguardian.com/world/2014/mar/29/unpaid-intern-rights-new-york-city-de-blasio. Illinois, Oregon, and Washington D.C. have each enacted similar legislation that specifically protects unpaid workers from sexual harassment, and in January of 2014, California introduced similar legislation that is still in committee. Blair Hickman, *Interns Are Now Protected Against Sexual Harassment in NYC*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/03/28/interns-sexual-harassment-nyc_n_5051510.html (last updated Mar. 28, 2014, 3:59 PM); Zach Schonfeld, *Illinois Is Now One of the Only States Protecting Interns from Sexual Harassment*, NEWSWEEK, http://www.newsweek.com/illinois-now-one-only-states-protecting-interns-sexual-harassment-268576 (last updated Sept. 5, 2014, 11:12 AM).

provoked introspection among employers.[131]

An examination of the first, and most prominent, intern class action lawsuits—*Glatt v. Fox Searchlight Pictures Inc.*[132] and *Wang v. Hearst Corp.*[133]—highlights the ambiguities of the existing FLSA certification standard, and the need for a uniform certification standard, as applied to intern cases.

A. Glatt v. Fox Searchlight Pictures Inc.

In 2010, Eric Glatt left his job on Wall Street to pursue a career in film.[134] At forty-one, with two master's degrees, a certificate in film editing, and substantial career experience under his belt, he took an accounting internship[135] on the set of the movie *Black Swan*,[136] where he worked hundreds of hours in total—as many as fifty hours a week[137]—filing paperwork, reviewing personnel files for *Black Swan* staff and crew members, drawing up purchase orders, making spreadsheets, and running errands.[138] The position did not offer any training, did not promise a fulltime job upon completion, and did not pay Glatt for his work[139]—not even the minimum wage of $7.25 an hour.[140] *Black Swan*,

131 *See, e.g.*, Williams, *supra* note 33 ("[S]uch lawsuits have sent a chill through the Intern Industrial Complex, affecting undergraduates and postgraduates alike as companies scramble to adjust to the new legal landscape."); *see also* Nona Willis Aronowitz, *Rallying Cry Against Unpaid Internships Grows*, CNBC (Sept. 3 2013, 1:44 PM), http://www.cnbc.com/id/101004784 (interviewing Juno Turner, an attorney at the firm that worked on the *Fox Searchlight* lawsuit, who claims that "'[m]any [employers] are taking a hard look at their [internship] programs and seeing what changes need to be made in order to comply with the law'").

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

133 Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013), *motion to certify appeal granted*, No. 12 CV 793(HB), 2013 WL 3326650 (S.D.N.Y. June 27, 2013).

134 Prior to his internship with Fox Searchlight, Glatt made $95,000 a year, working for the insurer American International Group Inc. in New York. *See* Greenhouse, *supra* note 28; Daniel Miller & John Horn, *Lawsuit Challenges a Hollywood Pillar: Unpaid Internships*, L.A. TIMES (Apr. 6, 2014), http://articles.latimes.com/2014/apr/06/business/la-fi-ct-hollywood-interns-unpaid-internships; Snyder & Smythe, *supra* note 66.

135 Greenhouse, *supra* note 28. Glatt worked from December 2009 through August 2010, plus a single day in October 2009. Class Action Complaint at 12, *Glatt*, No. 11CV6784 (S.D.N.Y. Sept. 28, 2013) [hereinafter Glatt Complaint].

136 BLACK SWAN (Fox Searchlight Pictures 2010).

137 Glatt Complaint, *supra* note 135, at 12.

138 *Id.* at 3, 13–14; *see also* Miller & Horn, *supra* note 134 (citing errands as trivial as fetching hypoallergenic pillows and scented candles); Perlin, *supra* note 69; Snyder & Smythe, *supra* note 66.

139 Glatt Complaint, *supra* note 135, at 1.

140 This represents both the New York and federal minimum wage values at the time of Glatt's employment. *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968 to 2013*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/state/stateMinWage His.htm (last updated Dec. 2013); *Federal Minimum Wage Will Increase to $7.25 on July 24*, U.S.

however, went on to make more than $300 million[141] for Fox Searchlight Pictures, Inc., which enjoys annual revenues of $35 billion.[142]

In September of 2011, upon reading the Department of Labor's newly released Fact Sheet No. 71, Glatt filed suit—the first of its kind[143]—along with fellow unpaid intern, Alexander Footman,[144] against Fox Searchlight Pictures, Inc. (Fox Searchlight), and its parent company, Fox Entertainment Group (FEG) (collectively "Fox"). They filed in the U.S. District Court for the Southern District of New York,[145] as their claims involved matters of national or interstate interest.[146] The interns brought wage claims under the FLSA, pursuant to 29 U.S.C. § 216(b),[147] asserting that they were employees within the meaning of 29 U.S.C. § 203(g).[148] The Plaintiffs asserted that the Fox internships (1) were not structured for the interns' benefit, (2) displaced regular workers, and (3) derived immediate advantages to the employer.[149] The interns claimed "that they were asked to perform routine errands and other [clerical and administrative] tasks"—such as answering phones, tracking purchase orders, making photocopies and deliveries, and taking lunch orders[150]—that did not meet three of Fact Sheet No. 71's six criteria.[151] Furthermore, because the Defendants organized and operated one centralized unpaid internship program, and because the class members had all been unlawfully deprived pay for work that required

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DEP'T OF LAB. (July 16, 2009), http://www.dol.gov/opa/media/press/esa/esa20090821.htm; *see* Perlin, *supra* note 69.

141 Greenhouse, *supra* note 28 ("'Black Swan[] had more than $300 million in revenues. If they paid [their interns], it wouldn't make a big difference to them, but it would make a huge difference to us.'" (citing Alexander Footman, a co-Plaintiff in the *Glatt* lawsuit)); Amy Kaufman, 'Black Swan' *Passes $300 Million in Global Box Office*, L.A. TIMES (May 16, 2011), http://articles.latimes.com/2011/may/16/entertainment/la-et-0516-box-office-side-20110516.

142 Perlin, *supra* note 69.

143 Yamada, *supra* note 33, at 4 ("Until *Glatt v. Fox Searchlight Pictures, Inc.*, there was no published case authority specifically addressing whether typical internships meet the definition of employee status under the FLSA.").

144 Glatt Complaint, *supra* note 135, at 1. Plaintiffs Kenneth Gratts and Eden Antalik were added in an amended complaint dated October 19, 2012. *See Employment Litigation and Discrimination*, 25 BUS. TORTS REP. 270, 277 (2013); Snyder & Smythe, *supra* note 66.

145 Glatt Complaint, *supra* note 135, at 1, 18. Such a jurisdiction calls for a three-year statute of limitations. 29 U.S.C. § 255 (2012).

146 The court also had subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1337, and under the FLSA pursuant to 29 U.S.C. § 216(b), as well as jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332 (the Class Action Fairness Act) and 28 U.S.C. § 1367 (supplemental jurisdiction). Glatt Complaint, *supra* note 135, at 5–6.

147 The Plaintiffs also sued under Articles 6 and 19 of New York's Labor Law, and the supporting New York State Department of Labor Regulations, 12 N.Y. Comp. Codes R. & Regs. tit. 12, § 142 (2013) (collectively, NYLL). *See* Glatt Complaint, *supra* note 135, at 3.

148 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work.").

149 *See generally* Glatt Complaint, *supra* note 135.

150 Glatt Complaint, *supra* note 135, at 1.

151 Steven Greenhouse, *Judge Rules That Movie Studio Should Have Been Paying Interns*, N.Y. TIMES, June 11, 2013, at B1; Snyder & Smythe, *supra* note 66.

compensation,[152] the Plaintiffs brought this action on behalf of themselves and those similarly situated (Intern Class)[153] who would elect to opt-in to the action, pursuant to the FLSA.[154]

On June 11, 2013, the district court,[155] in response to the Plaintiffs' and the Defendants' motions for summary judgment, held that Glatt and Footman were employees under the FLSA, rather than "trainees" exempt from the statute's scope.[156] The court adamantly followed the Department of Labor's six-part test, focusing on the provision that questioned whether the company had derived an immediate advantage from the interns' work.[157] This ruling indicated that Glatt and Footman were owed back pay under federal and state wage and hour laws.[158]

The court implemented the first stage of the two-step FLSA class certification process by conditionally certifying a collective action.[159] It concluded that the Plaintiffs "had put forth adequate generalized proof that [the Fox] interns were victims of a common policy to replace paid workers with unpaid interns."[160] While it found that there were "disparate factual and employment settings," the court held that

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152 Glatt Complaint, *supra* note 135, at 8–11; *Employment Litigation and Discrimination*, *supra* note 144, at 277.

153 The similarly situated interns included those working—with one of more of the following divisions of FEG: Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media—between September 28, 2005 and the date of final judgment in the matter. The Plaintiffs suspected that the Intern Class included more than 100 members in the aggregate, and as such, was so numerous that joinder of all members would have been impracticable. Glatt Complaint, *supra* note 135, at 6–7; *see also* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 534 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 Civ. 6784(WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *motion to certify appeal granted*, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

154 29 U.S.C. §§ 201–219 (FLSA), and specifically, the collective action provision of 29 U.S.C. § 216(b), asserting violations of the FLSA and NYLL. Glatt Complaint, *supra* note 135, at 3. The intern plaintiffs also moved for opt-out class certification for their NYLL claims under Federal Rule of Civil Procedure 23 (Rule 23). FED. R. CIV. P. 23; Glatt Complaint, *supra* note 135, at 3.

155 The Honorable Judge William H. Pauley III, U.S. District Court for the Southern District of New York. *See Glatt*, 293 F.R.D. at 516.

156 Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 534 (S.D.N.Y. 2013), *on reconsideration in part,* No. 11 Civ. 6784(WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *motion to certify appeal granted*, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013) ("Considering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are 'employees' covered by the FLSA and NYLL."); *see also Employment Litigation and Discrimination*, *supra* at note 144. However, the court also held that Glatt was time-barred from pursuing a claim, and that questions of fact remained as to whether Antalik was an employee of FEG. *Glatt*, 293 F.R.D. at 525, 530 (order granting summary judgment that plaintiffs are "employees" and Antalik's class certification of her NYLL claims and conditional certification of an FLSA collective action), *on reconsideration in part*, 11 Civ. 6784(WHP), 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *motion to certify appeal granted*, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

157 Greenhouse, *supra* note 151.

158 *Glatt*, 293 F.R.D. at 534, 539.

159 *Id.* at 538. The court also granted the interns' motions to certify a class action under Rule 23 for NYLL violations. *Id.*

160 *Id.*

"common issues of liability predominated over individual issues and defenses."[161] Lastly, the court fortified its determinations with policy arguments, explaining that fairness and procedural considerations underline the utility of collective actions for FLSA claims.[162]

In September of 2013, Fox moved for an interlocutory appeal and to stay the class certification.[163] While the court granted the motion to certify an immediate appeal, it denied Fox's motion to stay the action.[164]

Although the district court still has questions of fact to resolve at trial and the Second Circuit is currently hearing challenges to these class certification decisions,[165] many are celebrating a first victory for the unpaid intern[166] and suggesting this decision may materially change the practice.[167]

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161 *Id.*

162 *Id.* ("[T]he same fairness and procedural considerations that make a class action a superior mechanism for the NYLL claims make a collective action a superior mechanism for the FLSA claims.").

163 Glatt v. Fox Searchlight Pictures Inc., No. 11 Civ. 6784(WHP), 2013 WL 5405696, at *1 (S.D.N.Y. Sept. 17, 2013) (order certifying appeal). For this reason, the court has not yet reached the second stage of the two-step FLSA collective certification process.

164 *Id.*

165 The Second Circuit has taken the *Glatt* case up on appeal, in tandem with a lawsuit filed by former interns who sued Hearst Corporation. Ben James, *2nd Circ. to Tackle Fox, Hearst Intern Wage Claims*, LAW360 (Nov. 26, 2013, 8:22 PM), http://www.law360.com/articles/491974/2nd-circ-to-tackle-fox-hearst-intern-wage-claims; Ben James, *Opening Shots Fired in Fox, Hearst Intern Wage Appeals*, LAW360 (Apr. 1, 2014, 3:45 PM), http://www.law360.com/articles/523374/opening-shots-fired-in-fox-hearst-intern-wage-appeals; Gabriella Khorasanee, *More on the Hearst and Black Swan Interns, Appeals Granted*, FINDLAW (Dec. 2, 2013 2:58 PM), http://blogs.findlaw.com/second_circuit/2013/12/more-on-the-hearst-and-black-swan-interns-appeals-granted.html; Christie Smythe, *Fox Searchlight Can Appeal Ruling on Unpaid Internships*, BLOOMBERG (Sept. 17, 2013, 2:57 PM), http://www.bloomberg.com/news/2013-09-17/fox-searchlight-can-appeal-ruling-on-unpaid-internships.html. For a summary of the *Hearst* case, see *infra* Part III.B.

166 In May of 2014, the U.S. District Court for the Southern District of New York also certified a class of 3000 former interns in a lawsuit against Warner Music Group and Atlantic Recording Corporation. *See* Grant v. Warner Music Grp. Corp., No. 13 Civ. 4449(PGG), 2014 WL 1918602 (S.D.N.Y. May 13, 2014) (order authorizing notice to members of the putative collective action); Kurt Orzeck, *Ex-Warner Interns Win Class Cert. in Wage-And-Hour Action*, LAW360 (May 13, 2014, 8:35 PM), http://www.law360.com/employment/articles/537628/ex-warner-interns-win-class-cert-in-wage-and-hour-action.

167 Miller & Horn, *supra* note 134 (noting that an intern class action lawsuit "could radically change the industry's reliance on unpaid neophytes . . . . forc[ing] Hollywood to change everything from the way film crews are assembled to the manner in which new talent is cultivated"); Perlin, *supra* note 69 ("[T]he higher it goes [up the court system], the more the reasoning is affirmed and the better it is for labor, for workers, for students, all across the country." (quoting plaintiff Eric Glatt)). However, not all experts are convinced that this is in fact the "beginning of the end." *See* Grasgreen, *supra* note 65.

B. Xuedan Wang v. Hearst Corporation

In February 2012, former Harper's Bazaar intern, Xuedan "Diana" Wang, filed a lawsuit in the Southern District of New York[168] against Hearst Corporation, asserting that, between August and December of 2011, she regularly worked between forty and fifty-five hours a week without pay.[169] As "Head Accessories Intern," Wang alleged that she assisted with magazine photo shoots, hand-delivered clothes, maintained a database of fashion items lent to the magazine, filed expense reports and reimbursement requests, and managed a team of eight interns.[170]

Wang sought to certify a collective action pursuant to 29 U.S.C. § 216(b),[171] as (1) all potential members were subject to Hearst's same compensation policies and practices in violation of the FLSA,[172] (2) all members were employees of Hearst Corporation within the meaning of 29 U.S.C. § 203(e),[173] and (3) because such a class would entail a number of members so numerous that joinder would be impracticable.[174] Wang then sought a declaratory judgment that the practices complained of were unlawful[175] and an order requiring the Defendant to provide back pay for all the required wages that it had failed to pay.[176]

In July of 2012, a federal court implemented the first step of the two-stage certification process, granting the Plaintiff's motion for

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168 Class Action Complaint at 1, Wang v. Hearst Corp., No. 12 Civ. 0793 (S.D.N.Y. Feb. 1, 2013) [hereinafter Wang Complaint].

169 Wang Complaint, *supra* note 168, at 3, 10–11; *The Hearst Corporation Class Action Litigation*, UNPAID INTERNS LAWSUIT AN OUTTEN & GOLDEN LLP WEBSITE, http://www.unpaidinternslawsuit.com/hearst-corporation (last visited Oct. 22, 2014).

170 Wang Complaint, *supra* note 168, at 10–11; Maurice Pianko, *Setback: Hearst Harper's Bazaar Unpaid Interns Lawsuit Dismissed — Part 1*, INTERNJUSTICE.COM (May 13, 2013), http://internjustice.com/2013/05/13/setback-hearst-harpers-bazaar-unpaid-interns-lawsuit-dismissed-part-1.

171 Wang Complaint, *supra* note 168, at 8. Wang also sought to certify a class under Rule 23. *Id.* at 7.

172 *Id.* at 4, 7, 9. Alleged violations of the FLSA included failure to pay minimum wage, *id.* at 11, and overtime wages, *id.* at 13, as well as "fail[ure] to make, keep, and preserve accurate records with respect to" the class' hours worked daily and each week. *Id.* at 14. Wang also alleged violations of NYLL, including failure to pay minimum wage, *id.* at 14, and overtime wages, *id.* at 15, as well as "fail[ure] to make, keep, and preserve accurate records with respect to" the class' hours worked daily and each week, *id.* at 17, and failure of spread-of-hours pay, in violation of "NYLL Art. 19 §§ 650 *et seq*. and the supporting New York Department of Labor Regulations." *Id.* at 16–17.

173 *Id.* at 12.

174 *Id.* at 6. Wang also sought to enforce a three-year statute of limitations, pursuant to 29 U.S.C. § 255, which would include individuals who served as Hearst's interns between February 1, 2009 and the date of final judgment on the matter who chose to opt-in under 29 U.S.C. § 216(b). *Id.* at 8, 13.

175 Under the NYLL. *See* Wang Complaint, *supra* note 168, at 19; *see also supra* note 147.

176 Wang Complaint, *supra* note 168, at 19.

conditional certification under the FLSA[177] and certifying that court-authorized notice[178] be issued to potential class members so as to include all individuals who worked as unpaid or underpaid interns at Hearst Magazines since February 1, 2009.[179] The court made the preliminary determination that Hearst's unpaid interns were "similarly situated" because Hearst had (1) "uniformly determin[ed] that the interns were not 'employees,'" (2) "required all interns to submit college credit letters," and (3) "used interns to perform entry-level work with little supervision."[180]

However, in May of 2013, the district judge in *Wang*[181] declined to uphold the Plaintiffs' Labor Department test[182]—deviating from the *Glatt* judge's June 2013 decision—evidence that even courts within the same district may not agree on certification standards in intern classes. In *Wang*, the court applied a "totality of the circumstances" test and held that while the Plaintiffs had met the requirements of numerosity, typicality, and adequacy, "the individualized nature" of the interns' claims suggested that case management of a collective action "would be difficult, if not near impossible, and separate actions may be more appropriate."[183] The court examined the factual similarities between the Plaintiffs and the numerous opt-in class members,[184] and found that the members interned during different timeframes, for different durations, with different weekly hours.[185] Further, the various Plaintiffs had interned with twenty different Hearst publications, in departments varying from editorial and publishing to model bookings and fashion,[186] which each demanded different duties and expectations of their

177 Wang v. Hearst Corp., No. 12 CV 793(HB), 2012 WL 2864524, at *2 (S.D.N.Y. July 12, 2012), *reconsideration denied*, 2012 WL 3642410 (S.D.N.Y. Aug. 24, 2012). The court determined that in "the initial stage of [an] action, the plaintiffs need only 'make a modest factual showing' that they and potential opt-in plaintiffs 'together were victims of a common policy or plan that violated the law.'" *Id.* It also claimed that "at this point, the 'court should not [assess] the merits of the underlying claims.'" *Id.* (citation omitted).

178 Pursuant to 29 U.S.C. § 216(b).

179 *Wang*, 2012 WL 2864524, at *2; *see also* Greenhouse, *supra* note 151.

180 *Wang*, 2012 WL 2864524, at *2.

181 The Honorable Judge Harold Baer, Jr., U.S. District Court for the Southern District of New York. *See id.* at 1.

182 Wang v. Hearst Corp., 293 F.R.D. 489, 498 (S.D.N.Y. 2013), *motion to certify appeal granted*, No. 12 CV 793(HB), 2013 WL 3326650 (S.D.N.Y. June 27, 2013). The court also denied the interns' request to certify the class action suit under Rule 23. *See* Snyder & Smythe, *supra* note 66. The court however, has not yet discussed collective action under FLSA. *See generally* Cindy Schmitt Minniti, *Unpaid Interns Lack Class, Says New York Court*, FORBES (May 16, 2013, 11:59 AM), http://www.forbes.com/sites/theemploymentbeat/2013/05/16/unpaid-interns-litigation-lacks-class-says-new-york-court.

183 *Wang*, 293 F.R.D. at 498.

184 *Id.* at 490–93.

185 *Id.*

186 *Id.*

interns.[187] Though the Plaintiffs asserted otherwise, the court found that the levels of instruction that the interns received varied as well—some received numerous educational sessions, others received just a few minutes of guidance—and that such variations constituted questions of fact specific to each intern.[188]

Class certification in the *Wang* FLSA case is still pending the second step of the process, as the Defendants have not yet brought a decertification motion in order for the determination to be made.[189] Instead, the Hearst interns have appealed the district court's ruling to the Second Circuit, which is currently hearing challenges to both the *Wang* and *Glatt* class certification decisions, in tandem.[190]

IV. PROBLEMS

A. *Shortcomings of the Court-Developed Two-Part Certification Test*

In 2010, the U.S. Court of Appeals for the Fifth Circuit implemented the two-step certification process in *Acevedo v. Allsup's Convenience Stores Inc.*[191] This case serves as an excellent case study of the two-part test's shortcomings,[192] even though it pertained to full-time employees, not interns.[193] In *Acevedo*, at the first stage of the certification process, the district court conditionally certified a class in an FLSA action.[194] Upon notice, approximately 800 Plaintiffs who worked in 300 of the Defendant's stores, opted-into the § 216(b)

187 *Id.* at 496–97.

188 *Id.* at 497.

189 Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 367 (S.D.N.Y. 2007).

190 James, *2nd Circ. to Tackle Fox, Hearst Intern Wage Claims*, *supra* note 165 (explaining that the Second Circuit's decision "could shed light on the standard for determining [whether] unpaid interns qualify as 'employees' under wage-and-hour laws"); James, *Opening Shots Fired in Fox, Hearst Intern Wage Appeals*, *supra* note 165; Khorasanee, *supra* note 165; Abigail Rubenstein, *Unpaid Intern Wage Battle Heats up in 2nd Circ.*, LAW360 (Apr. 10, 2014, 4:39 PM), http://www.law360.com/articles/527031/unpaid-intern-wage-battle-heats-up-in-2nd-circ; Smythe, *supra* note 165.

191 600 F.3d 516 (5th Cir. 2010).

192 Bernstein & Wood, *supra* note 6 (describing the test as "unworkable" and the case as a "case-management horror story").

193 Allsup's Convenience Stores, Inc. (Allsup's) is a chain of convenience stores in New Mexico, Texas, and Oklahoma. *See Acevedo*, 600 F.3d at 518; *see also* ALLSUP'S, http://www.allsups.com/about (last visited Oct. 22, 2014). In 2007, approximately 800 current and former employees of Allsup's opted into a representative action against their employer, seeking payment of unpaid wages and overtime under the FLSA. After the district court decertified the representative action and dismissed the plaintiffs' claims, the employees filed a second action, seeking joinder of all dismissed plaintiffs in a single lawsuit advancing the same claims against Allsup's. *See Acevedo*, 600 F.3d at 519.

194 *Acevedo*, 600 F.3d at 519.

action,[195] and asserted that the Defendant maintained a company-wide policy that governed all the employee members, thereby constituting sufficient commonality among their claims.[196] After discovery, in the second stage of certification, the circuit court found the claims to be too dissimilar to be tried as one representative action and therefore decertified the collective action.[197] However, as the class had already been notified of the Defendant's wrongs, and the statute of limitations had not yet run, the Plaintiffs' counsel filed separate suits on behalf of the approximately 800 opt-in Plaintiffs, asserting the same claims as in the first case. The Fifth Circuit held that the claims would each have to be handled separately on a store-by-store basis.[198]

Such an outcome is inefficient, imposes a tremendous burden on the courts, imposes a difficult financial burden on the individuals to fund their own legal representation, and poses a risk of inconsistent or varying adjudications. One could imagine how a similar ruling could be problematic in the intern context—if each store required its own action, the same may be true for each department of a large corporation. For example, in *Xuedan Wang v. Hearst Corp*[199]—where the magazine publisher argued that interns working for different publications within the company, or in different departments within each publication[200] should not constitute a single class—the consequences could lead to hundreds of independent suits, as interns have now been made aware of the potential claims. Such a result would be inefficient, cumbersome, and potentially unjust.

B. *Problems that Stem from Applying the FLSA Class Certification Process to Unpaid Interns*

The problems inherent in the two-step certification are exacerbated when applied to unpaid interns seeking employee compensation rights. First, district courts designed the two-step process to facilitate actions brought by employees seeking unpaid, legally-obligated compensation under the FLSA. However, before a court can determine that unpaid interns are due such wages, it must first determine whether the interns qualify as employees. Therefore, subjecting interns to the rigorous two-

195 *Id.* at 518–19, 522.

196 *Id.* at 521.

197 *Id.* at 519.

198 *Id.* at 520, 523.

199 293 F.R.D. 489 (S.D.N.Y. 2013). For a more complete discussion, see *supra* Part III.B.

200 For example, this could include interns who worked for one employer—Hearst Corporation—but within varying publications and departments, such as *Seventeen* magazine's fashion department, *Cosmopolitan* magazine's editorial department, or *Esquire* magazine's graphic design department.

step employee class certification process is unfairly prejudicial. Requiring unpaid interns to opt-in to a class that may never reach the merits of its claim creates a number of problems that do not arise in the context of established employees.

Because interns almost always work for a few months and only request minimum wage,[201] the back pay remedies that an individual intern seeks will usually add up to only a few thousand dollars.[202] Thus, interns are especially unlikely to file lawsuits independently[203] and, even if they did, lawyers are unlikely to take on the individual's claims.[204] The additional time and funds required by a two-step certification process exacerbates this problem. As some have suggested, interns who face large corporations are the proverbial David against the corporate Goliath.[205] Therefore, the need for simplified and successful class action certification, once an intern chooses to be part of the class, is exceptionally important.

Additionally, the intern economy's inherent incentive system creates additional opt-in deterrents, as interns agree to work for free, in exchange for "getting a foot in the door" of their desired industries.[206]

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201 Cameron Keng, *The Era of Internships Are Over, Never Hire an Intern Again*, FORBES (Sept. 6, 2013, 10:18 PM), http://www.forbes.com/sites/cameronkeng/2013/09/06/the-era-of-internships-are-over-never-hire-an-intern-again ("The average internship is three months.").

202 Jack L. Newhouse, *Unpaid Intern Lawsuits May Reduce Job Opportunities*, FORBES (Sept. 24, 2013, 6:28 AM), http://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities ("For instance, a New York based employer that hired one unpaid intern to work 35 hours per week for eight weeks is required to pay that intern at least $2,030. If that employer hires one intern each year, then over a six-year period the employer would be liable for back wages totaling $12,180. . . . [However, if] 40 interns worked 35 hours per week for eight weeks, then the employer would be liable for back wages totaling $487,200.").

203 Keng, *supra* note 201 ("The average internship is three months. Assuming a full time workweek, the intern would earn $1,160 a month or $3,480 for the entire internship. To put this into context, an average attorney will bill at least $300 dollars an hour. The intern's [lawsuit becomes more expensive than his] 'hypothetical minimum summer wages' . . . .in about 12 hours of the attorney's billable hours. If you hired the attorneys representing Fox Searchlight, then you'd be paying Proskaur [sic] Rose about $1,000 dollars an hour.").

204 Mayo, *supra* note 75 ("'These are minimum-wage cases. That's all you can sue for. It's not that much money and it's not worth the lawyer's time. That's why we have widespread wage theft all across America, and lawyers are doing nothing about it, and it isn't in their interest to bring the cases.'" (quoting Ross Eisenbrey, Vice President of the Economic Policy Institute who specializes in labor and employment law); *see also* 29 U.S.C. § 216 (2012) ("The court in [an FLSA class] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.").

205 Tanya de Grunwald, *Interns: All Work, No Pay*, GUARDIAN (Nov. 22, 2013, 6:00 AM), http://www.theguardian.com/money/2013/nov/22/interns-all-work-no-pay-internships ("This is David and Goliath stuff, especially when so many interns are keeping quiet, willing to allow themselves to be exploited in order to get on to the first rung of the work ladder."); Pianko, *supra* note 170 ("[C]lass certification empowers unpaid interns so that they don't feel that they are taking on a Goliath all alone. They're already reluctant to come forward for fear they will diminish their career prospects. Combining the high risk of legally confronting a former employer with the prospect of a relatively paltry payback just means that unpaid interns will continue to be exploited without fighting back because of the fear it's just not worth it.").

206 PERLIN, *supra* note 1, at 23.

Bringing an independent lawsuit against potential employers becomes especially risky—doing so could possibly sabotage an intern's future career within the industry she seeks to enter.[207]

The existing two-step "approve now, worry later" process poses a real risk that a large class of interns may be decertified in the second stringent step, while still subjecting these individuals to industry-wide scorn and possible rejection, thus disincentivizing an intern from opting-in to a class in the first place. However, the two-part test requires that such class members opt-in *before* the class can be fully certified, and *before* the class can reach the merits of its argument. Such demands—accompanied by these significant risks—deter and may, ultimately, deny interns the back-pay redress to which they may be entitled. These are not concerns of full-time employees because the FLSA's anti-retaliation provisions protect such individuals.[208] If such difficulties are not overcome with a new test, the merits of the unpaid interns' cases will remain unchallenged, and the question of whether these unpaid interns are in fact employees denied fair wages under the FLSA will go unresolved.

V. PROPOSAL FOR A NEW CERTIFICATION TEST FOR UNPAID INTERNS

A. *The Special Demands of an Unpaid Intern Class Require a One-Step Test*

The courts should adopt a different test to determine whether a class of interns is similarly situated for purposes of FLSA class action claims. As the FLSA does not specify a legislative rule for this determination, and as the Supreme Court also has not ruled on an official test, the district court-made test has governed. Instead, in the case of unpaid intern class certification decisions, courts should look to the more streamlined one-step test that has been used in the U.S. Court of Federal Claims.[209] While used in a different context (monetary claims

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207 *See Interns Who Sued Now Can't Find Jobs*, *supra* note 17 (discussing the widespread intern fear of the professional stigma associated with joining a lawsuit class and interviewing Erica van Rabenswaay—a former intern who brought a suit against fashion designer, Norma Kamali—who explained that "'people are afraid to come forward because they fear their names being tarnished in the fashion world,'" and Molly Socha—another former intern at *The New Yorker*—who explained that while she was aware of her rights, she wouldn't want a lawsuit to ruin her reputation, "'I think that [risk] would stop anybody'").

208 For a discussion of 29 U.S.C. § 215(a)(3) and FACT SHEET NO. 77(A), see *supra* note 20.

209 The U.S. Court of Federal Claims is a federal court that hears monetary claims against the U.S. government. Established pursuant to Congress's authority under Article One of the Constitution, the Court consists of sixteen judges nominated by the President and confirmed by the Senate for a term of fifteen years. 28 U.S.C. §§ 171–172 (2012); *see also About the Court*, U.S. CT. OF FED. CLAIMS, http://www.uscfc.uscourts.gov/about-court (last updated Feb. 19, 2014).

against government, rather than private actions against employers) this test was similarly designed to address opt-in class certification.

B. *The Opt-In Test as Used for Class Certification in the U.S. Court of Federal Claims*

The 1972 Federal Claims Court decision in *Quinault Allottee Ass'n v. United States*[210] has been frequently cited as establishing an appropriate one-step, eight-criteria test for assessing whether or not to certify an opt-in class.[211] This test recognized the equitable purposes of class certification: (1) to promote good litigation management by balancing competing interests such as time, efficiency, cost, and the right of individual plaintiffs to file complaints on behalf of others with similar claims, "prevent[ing] a multiplicity of suits based on a common wrong to all,"[212] and (2) to provide an avenue to redress wrongs that would not otherwise be remediable as the individual claims involved are each too small, or the claimants are too widely dispersed.[213]

The test—clarified in the 1999 federal claims case, *Berkley v. United States*[214]—incorporated some portions of Rule 23 of the Federal Rules of Civil Procedure.[215] It specifies that, in a one-step decision, opt-in certification is proper when:

> (i) the [members] must constitute a large but manageable class, (ii) there is a question of law common to the whole class, (iii) this common legal issue is a predominant one, overriding any separate factual issues affecting the individual members, (iv) the claims of the present plaintiffs are typical of the claims of the class, (v) the government has acted on grounds generally applicable to the whole class, (vi) the claims are so small that it is doubtful that they would be pursued other than through this case, (vii) the current plaintiffs will fairly and adequately protect the interests of the class without a conflict of interest, (viii) the prosecution of individual actions by members of the class, some in district courts and some in this court, would create a risk of consistent or varying adjudications.[216]

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210 453 F.2d 1272 (1972).

211 Berkley v. United States, 45 Fed. Cl. 224, 230 (1999).

212 Green v. Wolf Corp., 406 F.2d 291, 300 (2d Cir. 1968).

213 *Id.* at 297.

214 45 Fed. Cl. 224.

215 *Id.* at 230. Note that in 2002, Federal Claims Rule 23 was amended to more closely match Federal Rule of Civil Procedure 23. R. FED. CL. 23 rules committee's note. Thus, the *Berkley* test was not used extensively by the courts, which instead applied the amended rule. However, because the FLSA has not been similarly amended to match Rule 23, this Note does not consider the implications of that amendment.

216 *Berkley*, 45 Fed. Cl. at 230 (citation omitted). In the Federal Claims Court's test, the fifth consideration is whether "*the government* has acted on grounds generally applicable to the whole

Most importantly, the court emphasized that these are considerations that offer courts discretion to certify classes in order to promote equity, which is at the core of class actions.[217]

C. *The Federal Claims Test Would Best Address the Needs of the Unpaid Intern Class*

Courts should consider these factors and make a class determination in one step. The new test would still allow courts to determine whether the class members are "substantially similar" for purposes of an FLSA certified class action, while permitting an intern class to move straight to the merits. This test would also further enable courts to come to an equitable decision regarding the interns as it would also let courts better serve the traditional equitable purposes of class action[218] and it would better serve the purposes of the FLSA.[219]

D. *Applying the New Test to Intern Lawsuits*

The streamlined, one-step test that this Note proposes will allow courts to more swiftly determine whether to certify an intern class in cases such as *Glatt v. Fox Searchlight Pictures Inc.* and *Wang v. Hearst Corp*. In applying the test, courts would follow the structure of the Federal Claim Court's test, considering each of the eight parts discussed above.[220]

First, the court would determine whether the members constitute a large but manageable class. Courts applying this test have found classes to be manageable where (1) the plaintiff "'carefully details with specificity'"[221] who is to be included in the class, and (2) where the defendant should be able to identify the class members using its own

class." *Id.* (emphasis added). This Note's proposed test has adapted this consideration for the intern-employer discussion by replacing "the government" defendant with "the employer" defendant.

217 *Id.* at 226, 230, 235.

218 Equitable purposes of class actions, include, but are not limited to increasing efficiency of the legal process; lowering litigation costs; aggregating potential recoveries so as to attract legal representation and meaningful case resolutions, rather than hushed settlements; and imposing the costs of wrongdoing on the defendant, to purposely change future behavior.

219 The FLSA was created in 1938 to establish a minimum wage and a limit on the number of hours, which may be worked in a standard workweek. It also provides standards for equal pay, overtime pay, record keeping, and child labor. Ultimately, its goal was to give "'all our able-bodied working men and women a fair day's pay for a fair day's work.'" *See* Grossman, *supra* notes 40–41 and accompanying text (quoting President Roosevelt).

220 *See* discussion *supra* Part V.B.

221 Adams v. United States, 93 Fed. Cl. 563, 571 (2010).

records.[222] Courts have held proposed classes of 1595 members[223] to be "large, but manageable," so intern classes up to this size[224] would also likely be acceptable under the new test, though the court would need to determine whether a larger class would also be manageable. This prong of the test is essential for intern classes, as some employers host thousands of interns.[225] In such instances, a single class could be unruly and, instead, multiple, smaller lawsuits may be more manageable.

Second, the court would ask whether there existed a question of law that was common to the entire class,[226] and third, whether this common legal issue was predominant enough to override any separate factual issues affecting the individual members. Prior courts have determined that "[t]he issue of whether there is a question of law common to the whole class is satisfied 'when there is one core legal question that is likely to have one common defense.'"[227] Courts have also held that "the common question of law should be addressed first and . . . separate[ly] from any factual differences involving damages determination."[228] In the case of interns, the system will inevitably entail varying details per intern—tasks assigned, supervision given, work hours and dates, etc.[229] As the class action suits have generally asked the courts to determine a common question of whether interns were victims of a common policy to replace paid workers with unpaid interns, and whether common issues of liability predominated over disparate individual facts and employment settings, a common issue is at the crux of the unpaid intern lawsuits. This is the most appropriate way to

222 *Berkley*, 45 Fed. Cl. at 231.

223 *Id.*

224 In *Fox Searchlight*, the plaintiffs sought to certify a class of interns who worked within one of four FEG divisions, between September 28, 2005 and the date of final judgment in the matter—an estimated class of more than 100 members. *See supra* note 153.

225 The Walt Disney Company's Magic Kingdom College Program has employed more than 50,000 interns over the course of its thirty-year existence. PERLIN, *supra* note 1, at 6. Such a class, even when narrowed by the statute of limitations may still be too large for effective class certification.

226 In *Fox Searchlight*, the plaintiffs raised a common legal question of whether the FEG internship program denied the class minimum wages under the FLSA, and, if so, whether such a finding should be applied to each plaintiff in a *per se* fashion. *See* case facts *supra* Part III.A. The *Fox Searchlight* court concluded (1) that the plaintiffs had "put forth adequate generalized proof that [the FEG] interns were victims of a common policy to replace paid workers with unpaid interns," and (2) that while "there were disparate factual and employment settings, the common issues of liability predominate[d] over individual issues and defenses." *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 538 (S.D.N.Y. 2013) (citations and internal quotation marks omitted).

227 *Berkley*, 45 Fed. Cl. at 232 (quoting Taylor v. United States, 41 Fed. Cl. 440, 446 (1998)) (citing Moore v. United States, 41 Fed. Cl. 394, 397–98 (1998)).

228 *Id.* at 232 (citing *Taylor*, 41 Fed. Cl. at 446).

229 For example, see discussion of *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013), *supra* Part III.B.

determine whether unpaid interns are similarly situated under the FLSA.

Fourth, the court would assess whether the claims of the present plaintiffs were typical of the claims of the class. This step has not been particularly restrictive in the Federal Claims test.[230] While not uniquely necessary for unpaid intern suits, this prong is necessary for pragmatic reasons, as atypical named plaintiffs would likely make class action litigation ineffective.[231] Many of the intern plaintiffs[232] have asserted that the defendant employers unlawfully deprived all class members of pay for work that required compensation.[233] Thus, any one member would likely be found to be typical of all members of the class.

Fifth, the court would ask whether the defendant employer had acted on grounds generally applicable to the whole class. Intern lawsuits would likely be separated by *claim* type, though some courts have found that federal laws, similar to the FLSA, impact all class members, and thus meet this fifth requirement.[234] Such an outcome would allow courts to consider the class's FLSA claims holistically, and separately from claims brought under state labor laws.[235]

Sixth, the court would determine whether the claims are so small that they would unlikely be pursued other than through a class action. As discussed above,[236] interns typically work for a few months and request only minimum wage, so the back-pay remedies that an individual intern seeks usually do not amount to more than a few

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230 *Berkley*, 45 Fed. Cl. at 232; Armitage v. United States, 18 Cl. Ct. 310, 313 (1989).

231 *See, e.g.*, *In re* Milk Prods. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999).

232 *See, e.g.*, Glatt Complaint, *supra* note 135, at 6–7; Class and Collective Action Complaint at 4; Class Action Complaint at 3, Ballinger v. Advance Magazine Publishers, Inc., No 13 CV 4036 (S.D.N.Y. June 13, 2013), *available at* http://wage-hour.net/file.axd?file=2013%2F6%2FBallinger+v.+Advance+Magazine+Publishers.pdf; Davenport v. Elite Model Mgmt., No. 13-CV-01061 (S.D.N.Y. Feb. 15, 2013), *available at* http://articles.law360.s3.amazonaws.com/0416000/416466/Elite%20Model%20Wage%20&%20Hour%20Class%20Action%20-%20J.%20Nathan%20-%20Filed%202-15-13.pdf; Wang Complaint, *supra* note 168, at 8; Complaint at 6–7, Bickerton v. Rose, No. 650780/2012, 2012 WL 7783892 (N.Y. Sup. Ct. Mar. 19, 2012).

233 Glatt Complaint, *supra* note 135, at 8–11; *Employment Litigation and Discrimination*, *supra* note 144, at 277.

234 *See* Moore v. United States, 41 Fed. Cl. 394, 400 (1998) (finding that the fifth *Quinault* factor was met because "[t]he Amendments impact all class members. The government['s] . . . actions affected them simultaneously."); Buchan v. United States, 27 Fed. Cl. 222, 225 (1992) (finding that the fifth *Quinault* test was met because "the Government acted on grounds generally applicable to the whole class by denying each prospective class member regularly-scheduled overtime pay . . . ."); Armitage v. United States, 18 Cl. Ct. 310, 313 (1989) (finding that the fifth *Quinault* test factor was met because the court was satisfied that the government acted in a way generally applicable to the whole class and the "action [did] not appear to be one which, at least at the liability phase, implicate[d] matters unique to a given employee . . . .").

235 *Glatt* and *Wang* both involved NYLL claims in addition to the FLSA claims. Of course, where an identical Rule 23 class can be certified for the state claim, the court could consider both the FLSA and state claim simultaneously.

236 *See supra* Part IV.B.

thousand dollars.[237] Because the cost of litigation is likely to be significantly more than the potential remedy, interns are disincentivized from filing lawsuits independently.[238] Even if interns do wish to sue, the relatively small amounts at stake make lawyers unlikely to take on individual intern claims.[239]

Seventh, the court would examine whether the named plaintiffs would "fairly and adequately" represent the other class members' interests.[240] The court would also ensure that no conflict of interest exists. This step would involve a fact-specific inquiry[241] that, while not unique to intern lawsuits, would safeguard against an inappropriate named plaintiff appearing on behalf of the class.

The eighth and final question the court would ask is whether the prosecution of individual actions by members of the class would create a risk of inconsistent or varying adjudications.[242]

E. *Parameters of the Proposed Test*

It should be emphasized that this proposed test will not, and should not, automatically entitle all interns to back pay wages. Instead, this test is intended to streamline the class action certification process so that the courts may reach the merits of the interns' cases more efficiently, without procedural hurdles dissuading class members from opting-in. This proposed test is an appropriate substitute for the existing, but unofficial, two-step certification process currently used by the courts, as it accounts for (1) the FLSA's opt-in class action requirement, (2) the equitable purposes of class actions,[243] and (3) the policy arguments for more easily arriving at court decisions that will help remedy and regulate the exploitation of the unpaid internship framework.

CONCLUSION

The merits of practical education are tremendous when programs meet the six factors outlined in the Department of Labor's Fact Sheet Number 71. However, the system of unpaid internships has spiraled out

237 *See supra* note 202.

238 *See* Keng, *supra* note 201.

239 *See* 29 U.S.C. § 216 (2012); Mayo, *supra* note 75.

240 *See, e.g.*, *In re* Milk Prods. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999) ("A named plaintiff who lacks the desire to 'vigorously pursue' the interests of potential class members is not a fair and adequate representative of the class." (citation omitted)).

241 *See* Berkley v. United States, 45 Fed. Cl. 224, 233–34 (1999).

242 *Id.* at 230.

243 *See supra* note 218.

of control;[244] unregulated unpaid internships in the current "intern economy" vary greatly from the unpaid positions at issue in *Walling v. Portland Terminal*.[245] Thus, the Supreme Court's 1947 approval of a student-trainee exception may no longer apply in all cases, and lawsuits have become a timely means of examining the modern practice and determining whether they violate minimum wage laws. Timely litigation and rulings against employers who take advantage of the internship system would help establish what work constitutes labor covered by the FLSA's minimum wage protections and what work qualifies for the student-trainee exception established in *Walling*.

As class actions are the most workable way to address these issues, this Note's proposal addresses the burdens of the existing two-step class certification process and suggests an already workable one-step alternative. By simplifying the certification process, this proposed standard removes a barrier that currently discourages unpaid interns from joining an intern class. Without this barrier, more cases will enter the court system and judges will be able to examine the merits to assess whether an internship program at issue either requires pay or qualifies for modern-day student-trainee exemptions. Such decisions will provide a guideline for employers in structuring their future internship offerings, and in deciding whether these positions must be remunerated.

244 *See supra* Part I.C.

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