EXPLOITATION UNDER THE GUISE OF EDUCATION: A PROPOSAL FOR THE CLASSIFICATION OF STUDENT WORKERS

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I. INTRODUCTION

With recent changes to student athlete compensation,[1] high profile circuit court decisions,[2] and a considerable volume of scholarship

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1. *See* Steve Berkowitz, *College Athletes Are School Employees, New National Labor Relations Board Memo Says*, USA TODAY (Sept. 29, 2021, 6:05 PM), https://www.usatoday.com/story/sports/college/2021/09/29/nlrb-memo-says-college-athletes-school-employees/5915491001/ [https://perma.cc/X5WA-K5Y5].

2. *See* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021); *see also* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016); Benjamin v. B&H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017).

discussing unpaid internships,[3] the current landscape surrounding uncompensated student work is shaky and ever-changing. In particular, the circuits are now split over how small of a segment of work should be considered when balancing whether an employee or employer is the primary beneficiary of a working relationship.[4] This type of balancing test is known as the primary beneficiary test.[5] Until the United States Court of Appeals for the Sixth Circuit's recent decision in *Eberline v. Douglas J. Holdings*, courts typically examined either large portions[6] of the working arrangement or the entire working arrangement as a whole when applying the test.[7] In *Eberline*, however, the Sixth Circuit held that the primary beneficiary test should apply to the "targeted segment of the program at issue" rather than to the educational program and working relationship as a whole.[8] Given this circuit split, there is an increased possibility of uncertainty and confusion for both employees and employers.

This Note will argue that the Sixth Circuit's formulation of the primary beneficiary test should be codified by Congress in the Fair Labor Standards Act.[9] Because Congress is unlikely to act, the Department of Labor could promulgate a new regulation under its granted rulemaking authority.[10] Or at a minimum, the Department could issue new guidance in the form of a fact sheet that instructs employers and interns that smaller segments of the working relationship can be considered for compensation,[11] even in a working relationship that is educational on the whole. The nationwide adoption or codification of a well-tailored and targeted test such as the Sixth Circuit's new formulation of the primary

3. *See, e.g.*, Abigail Johnson Hess, *More Than 40% of Interns Are Still Unpaid—Here's the History of Why That's Legal*, CNBC (Aug. 17, 2021, 11:32 AM) https://www.cnbc.com/2021/08/17/more-than-40percent-of-interns-are-still-unpaidwhy-thats-legal.html [https://perma.cc/53LT-YDFB]; *see also* Kimberlee McTorry, *Death of Unpaid Internships, the Rise of Social Equality: Legality of Unpaid Internships Under the Fair Labor Standards Act*, 8 S. J. POL'Y & JUST. 47 (2014); *see also* Paul Budd, Comment, *All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 U. KAN. L. REV. 451 (2015).

4. *See Eberline*, 982 F.3d at 1014.

5. *See* U.S. DEP'T OF LAB., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2018), https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships#2 [https://perma.cc/2M6X-6VCG].

6. *See, e.g., Benjamin*, 877 F.3d at 1142, 1147–48 (applying the primary beneficiary test only to salon work and not the classroom-based educational segments of the employment relationship).

7. *See, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016).

8. *Eberline*, 982 F.3d at 1013.

9. *See infra* Section III.B.

10. *See* 29 U.S.C. § 214(a).

11. *See infra* Section III.C.2.

beneficiary test[12] could achieve two goals. First, a clearer rule would help to reduce uncertainty for employers and student workers alike. Second, this more targeted approach to worker classification would lead to more equitable compensation for student workers by preventing employers from taking advantage of their labor to complete tasks that provide little or no benefit to the workers themselves.

II. BACKGROUND

A. Labor and Internships in the Early Twentieth Century and the Passing of the Fair Labor Standards Act

Prior to 1938, the lax labor regulations in the United States labor market allowed for extensive child labor, unfair compensation, and extremely long workdays and workweeks.[13] Eventually, Congress attempted to establish more equitable labor standards through legislation.[14] Despite the efforts of progressive reformers throughout the late nineteenth and early twentieth centuries to impose child labor laws, eight-hour workdays, and other protections, it took the Great Depression and President Franklin D. Roosevelt's New Deal to establish some level of labor protections consistent with the goals of progressive reformers.[15] Even prior to the Fair Labor Standards Act (FLSA), President Roosevelt established the National Industrial Recovery Act (NIRA) in 1933, suspending antitrust laws in exchange for employer signees agreeing to a 35–40 hour workweek, a $12–15 minimum weekly wage, and a general agreement not to employ workers under sixteen years of age.[16]

However, in 1935, the Supreme Court blocked labor progress in *Schechter Poultry Corp. v. United States*, invalidating parts of the NIRA and the restrictive labor codes it authorized.[17] The Court reasoned that the Act amounted to an unconstitutional delegation of government power to

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12. *Eberline*, 982 F.3d at 1014.

13. *See* Peter Cole, *The Law That Changed the American Workplace*, TIME (June 24, 2016, 9:30 AM), https://time.com/4376857/flsa-history/ [https://perma.cc/GS3D-SYS4] (highlighting the poor working conditions in the early 20th century, including five-year old children working in coalmines, pay at less than $1 per day, 12–18 hour working days, and seven-day workweeks).

14. *Id*.

15. *Id*.

16. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage,* U.S. DEP'T OF LAB. (June 1978), https://www.dol.gov/general/aboutdol/history/flsa1938 [https://perma.cc/748N-DVSF].

17. *See generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

private interests.[18] In response to the dire economic circumstances of the great depression as well as pressure mounting from labor groups and the general public, President Roosevelt signed the FLSA in 1938.[19] The Act established a minimum wage, limits on the work day and week, and eliminated child labor.[20] Notably, the FLSA did not pass without struggle but instead required several rounds of deliberations in Congress.[21] These deliberations eventually lead to a version of the Act stripped of some of its originally intended protections.[22]

Since 1938, the labor and employment landscape in the United States has progressed, but change has been sluggish. In response to a changing economic landscape, employment situations not originally contemplated in the FLSA have become commonplace. In particular, unpaid internships for students have become increasingly popular.[23] The unpaid internship was given legal backing in 1947 when the Supreme Court decided in *Walling v. Portland Terminal Co.* that work done as part of a training program did not have to be compensated at the FLSA's new minimum wage.[24] The Court reasoned as such because the employer in that case received "no 'immediate advantage' from any work done by the trainees," thus rendering the trainees not true employees for purposes of the FLSA.[25] Following this decision, employers effectively had a new means with which to receive free labor, so long as they could show that the uncompensated workers were the beneficiaries of the work.[26] This led to an eventual increase in student employment and internships, particularly in response to a growing college population and a tight job market.[27]

While they have become more popular since *Portland Terminal*, internships and other unpaid educational working relationships have roots

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18. *Id.*

19. Cole, *supra* note 13.

20. *Id.*

21. *See* Grossman, *supra* note 16 (discussing the several rounds of deliberation and seventy-two proposed amendments required to achieve the passage of the Fair Labor Standards Act, as well as the Act's careful drafting to evade the Court's potential disarming of the Act).

22. *Id.*

23. *See* Hess, *supra* note 3 (citing a National Association of Colleges and Employers survey indicating that 40% of graduating college seniors in 2021 participated in an unpaid internship).

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

25. *Id.*

26. *Id*.

27. *See* Hess, *supra* note 3 (quoting an interview with Joshua Kahn, National Association of Colleges and Employers Assistant Director of Research: "This expansion of the college population occurred during a tight job market, so unpaid internships became seen as a way to help get these folks some experience in lieu of a full-time, paying job.").

dating as far back as apprenticeships in the eleventh century.[28] In that era, agricultural workers lived with a "master" for as long as a decade and did not earn wages until the end of the apprenticeship, at which point the apprentice became a journeyman and could earn a living.[29] The term "intern" was first applied to medical students in the 1920s, though the government and business world later adopted the term in the 1960s as student internships across academic disciplines became more popular.[30] The commonality of internships has increased considerably over the last few decades, from about 3% of college students completing internships in the 1980s[31] to 75% of college seniors having completed internships in 2021.[32] Generally, unpaid student employment is seen as a way for students to receive real-world training as well as to provide free assistance to the employer.[33] While this relationship can of course be beneficial for both student and employer, there is increasing criticism mounting against this form of employment relationship, which will be discussed in this Note.[34]

Despite the differences between traditional compensable work and non-compensable student employment, the FLSA still applies to these working relationships.[35] The FLSA contains provisions regulating maximum hours,[36] minimum wage for workers considered "employees,"[37] and student employment in general.[38] For purposes of determining whether student workers or interns are "employees" under the FLSA, one can look to the Act's definitions for "employees" and "employers."[39] The Act defines an "employee" as "any individual employed by an employer,"[40] "employ" as "to suffer to permit work,"[41] and an "employer" as "any [individual, partnership, association, corporation, business trust, legal representative, or organized group of persons] acting directly or

28. *See A Brief History of the Internship*, TAYLOR RSCH. GRP. (Feb. 4, 2014), https://www.taylorresearchgroup.com/news/2017/4/5/a-brief-history-of-the-internship [https://perma.cc/AT5T-3SGS].
29. *Id.*
30. *Id*.
31. *Id*.
32. Hess, *supra* note 3.
33. *Id.*
34. *See infra* Section II.D.
35. 29 U.S.C. § 203 (2018).
36. *Id.* § 207.
37. *Id.* § 206.
38. *Id.* § 214.
39. *Id.* § 203.
40. *Id*. § 203(e)(1).
41. *Id*. § 203(g).

indirectly in the interest of an employer in relation to an employee."[42] At times, the working relationship between an intern or student and a school or employer can fit these definitions, making the worker an employee requiring compensation under the FLSA.[43] For this reason, the FLSA and its ever-developing application to student employment is an important subject of inquiry when seeking to understand the current circumstances surrounding unpaid student employment.

B. Walling v. Portland Terminal and the Development of the Primary Beneficiary Test

The method used to determine whether a trainee or intern is in fact an employee described in *Portland Terminal* eventually became known as the "primary beneficiary test."[44] Courts applying *Portland Terminal* to a learning or training situation use the test to determine whether the employee or employer is the primary beneficiary of the work performed.[45] If the employer is the primary beneficiary, the relationship is akin to a standard employment relationship, and the employee must be paid.[46] But if the employee is the primary beneficiary—receiving educational or other benefits that exceed the value of the services rendered, as is the case in most internships—the employer is not required to compensate the employee for the latter's services.[47] For example, in a supposedly educational work context, a court will look to whether the student worker is gaining the primary benefit of the working relationship.[48] In some unpaid work situations, the employer may be receiving the primary benefit of the relationship by utilizing unpaid work under the guise of education.[49] In the past, this test has been applied generally to either the entire working relationship, or large segments of it, rather than to specific tasks or segments of labor.[50]

To help both employers and interns understand the status of their relationship—particularly whether the interns constitute "employees" requiring minimum wage compensation[51]—the Department of Labor in

42. *Id*. §§ 203(a), (d).
43. U.S. DEP'T OF LAB., FACT SHEET #71, *supra* note 5.
44. *Id.*
45. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 526 (6th Cir. 2011).
46. *Id*. at 529.
47. *Id.* at 525.
48. *See*, *e.g., id*.
49. *Id*. at 527.
50. *See, e.g.,* Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1142, 1147–48 (9th Cir. 2017) (applying the primary beneficiary test only to salon work and not the classroom-based educational segments of the employment relationship).
51. 29 U.S.C. § 206 (2018).

1967 issued guidance on trainees in its Field Operations Handbook, laying out six criteria and stating that a trainee is not an employee only if all the criteria are met.[52] In 2010, the Department of Labor's Fact Sheet #71 extended this guidance to unpaid interns specifically working in the for-profit private sector.[53] Specifically, the guidance provides that courts look to six specific factors when determining whether a student is, in fact, an employee requiring compensation under the FLSA.[54] This fact sheet is helpful in the sense that it is a readily available list of factors promulgated by a government agency that can assist in guiding employer and intern activity, so that these actors understand the status of their relationship. However, these factors do not bind courts, and while courts reference them,[55] courts have recently declined to mechanistically apply the Fact Sheet's factors.[56]

Rather than simply adopt the Department of Labor's formulation from Fact Sheet #71, courts instead apply their own formulations of the primary beneficiary test, at times even laying out their own list of factors to consider when applying it, as the Second Circuit did in *Glatt v. Fox Searchlight* in 2011.[57] The *Glatt* court's factors consider whether

> (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any

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52. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534–35 (2d Cir. 2016) (citing U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, Ch. 10, § 10b11 (Oct. 20, 1993)).

53. U.S. DEP'T OF LAB., WAGE & HOUR DIV., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (2010), https://www-s3-live.kent.edu/s3fs-root/s3fs-public/file/internship-fact-sheet.pdf [https://perma.cc/VC96-KM8P].

54. The factors are as follows:
(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
(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.
Id.

55. *Glatt*, 811 F.3d at 534–35.

56. *Id*. at 536–37 (stating that while the six-part test outlined in the 2010 Fact Sheet #71 is "essentially a distillation of the facts discussed in *Portland Terminal*[,]" the test is only persuasive and is too rigid to warrant absolute deference.) The court then looks simply to whether the intern or employer is the primary beneficiary of the relationship. *Id.*

57. *See id*.

> promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[58]

These *Glatt* factors seek to relate to the intersection of work and education more closely, attempting to tailor the primary beneficiary test more closely to the reality of unpaid student employment.[59] This approach exemplifies the flexibility of the primary beneficiary test, which allows it to be applied to today's more common unpaid student internship.

Nonetheless, the primary beneficiary test's flexibility has, at times, led to somewhat inconsistent application and results. For example, courts including the Supreme Court in *Portland Terminal* have applied the test to the entire working relationship,[60] while others have applied the test only

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58. *Id.*

59. *Id.*

60. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947); *see also* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (stating that the "totality-of-the-circumstances" must be considered when deciding whether a trainee or intern is in fact an employee).

to some working aspects of a relationship and not the entire relationship between "employer" and intern.[61] The question of how specific a segment of the employment relationship the primary beneficiary test ought to be applied to has effectively created a circuit split, as stated in Judge Batchelder's concurrence in part to the Sixth Circuit's holding in *Eberline v. Douglas J. Holdings*.[62]

C. Eberline v. Douglas J. Holdings and its Impact on Labor Relations

In *Eberline*, the Sixth Circuit sought to determine whether a class of cosmetology students working and studying at a for-profit cosmetology school were employees requiring compensation under the FLSA.[63] The students in this case participated in both classroom education and clinical salon work while attending the defendant's school, which helped them to work towards the 965-hour "practical experience" requirement set by the state for anyone to become a licensed cosmetologist.[64] These clinic salons were open to the public, with customers paying for beauty services provided by students and purchasing retail beauty products.[65] Students were supervised and graded regarding their cosmetology work and were required to sign an enrollment agreement with the school.[66] The agreement included no mention of students being compensated for any of the time spent during their relationship with the school.[67] Despite the students' lack of compensation for any time spent at the defendant institution, the defendant nonetheless made a profit from student tuition, customer's retail purchases, and sales from public salon services.[68]

The dispute in *Eberline* stemmed from the plaintiff students' performance of cleaning and janitorial tasks during their time at the clinic salon.[69] These tasks included doing laundry, sweeping the studio, and cleaning the microwave.[70] One student testified that students were not permitted to leave until every station in the studio was so clean "you could eat off it pretty much."[71] At times, students would even come in on days

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61. *See* Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1142, 1147–48 (9th Cir. 2017).
62. Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1019, 1024 (6th Cir. 2020) (Batchelder, J. concurring in part)., *cert. denied*, 141 S. Ct. 2747 (2021).
63. *Id*. at 1008–09.
64. *Id*. at 1009.
65. *Id*.
66. *Id*. at 1010.
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.

when the salon was closed to do a "deep cleaning."[72] The plaintiffs in this case estimated that students spent about 150 to 348 hours on these tasks over their time at the school and argued that these tasks were not included in the state requirements for cosmetology schools.[73] Further, the school did not provide classroom instruction on these tasks nor supervise students as they performed these tasks as it did when students were engaged in more educational activities in the salons.[74] That said, students were in a sense given academic credit for these tasks, but it is unclear whether the school was actually permitted to issue credit for time spent on these less-educational duties.[75]

The students eventually filed a complaint under the FLSA seeking compensation for all time spent working in Douglas J's clinics.[76] The district court granted the students partial summary judgment on the grounds that the cleaning and janitorial activities were far removed from the parties' educational relationship.[77] The opinion further indicated that the school was effectively taking advantage of the students by forcing them to perform the janitorial tasks, thus making the students employees under the FLSA.[78] The school then filed an interlocutory appeal, which the Sixth Circuit granted, reviewing the legal issues de novo to determine whether the students at the cosmetology schools were employees at all.[79]

The Sixth Circuit discussed the various approaches to classifying student work, eventually quoting *Solis v. Laurelbrook Sanitarium and School, Inc.*, which explained that "determining employee status by reference to labels used by the parties is inappropriate" and that "the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship."[80] The court also mentioned factors from *Laurelbrook* that it would look to in determining the primary beneficiary, such as whether the purported employee expected compensation, derived educational value from the work, or displaced paid employees.[81] The court further stated that it would consider additional

72. *Id*.
73. *Id*. at 1011.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id.* at 1012.
78. *Id*.
79. *Id*.
80. *Id*. at 1012–13 (quoting Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 524, 529 (6th Cir. 2011)).
81. *Id*. at 1013.

factors so long as they shed light on which party primarily benefits from the relationship.[82]

On its face, the court's clear formulation of the primary beneficiary test did not differ substantially from the test used in other circuits, however, its application of the test differed from other circuits' in that it applied only to "that targeted segment of the program at issue" rather than the educational program and working relationship as a whole.[83] Were the test not allowed to be applied to such a small portion of the working relationship, the Sixth Circuit reasoned that an educational employer could "extract uncompensated labor from students that is noneducational so long as the value of that labor to the [employer] does not exceed the value of the overall relationship to the students."[84] This targeted approach seeks to bring the application of the primary beneficiary test into better accordance with the purpose of the FLSA.[85] The approach does so by rejecting claims for compensation where the school receives an incidental benefit from a student's work while still allowing for the possibility of compensation for labor that does not actually provide a benefit to students that exceeds the benefit of free labor received by the school. This modified use of the primary beneficiary test is a step towards effectively putting a stop to the type of exploitation that the FLSA was designed to combat.[86]

As previously mentioned, the concurrence in this case claimed that the majority's application of the primary beneficiary test created a circuit split, applying the primary beneficiary test to smaller segments of work than ever before, rather than considering the entire working relationship.[87] The *Eberline* court sought to dispel the concurrence's assertion by citing to cases, like *Laurelbrook*, in which the court considered only the challenged parts of an educational work program.[88] The court further relied on *Benjamin v. B&H Educ., Inc.*, in which the Ninth Circuit applied the test only to time spent in salons.[89] Finally, the court cited to *Hollins v. Regency Corp*., in which the Seventh Circuit focused only on how time spent in salons related to the educational goals of the cosmetology program at issue in that case.[90] These cases, similar to *Eberline*, took a somewhat targeted

82. *Id*.
83. *Id*.
84. *Id*. at 1017.
85. *Id*.
86. *Id*.
87. *Id*. at 1019, 1024 (Batchelder, J. concurring in part).
88. *Id*. at 1014–15 (citing Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 520–32 (6th Cir. 2011)).
89. *Id*. (citing Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1142, 1147–48 (9th Cir. 2017)).
90. *Id*. (citing Hollins v. Regency Corp, 867 F.3d 830, 836–37 (7th Cir. 2017)).

approach by not asking whether the students were the primary beneficiary of the entire relationship with their employer.[91] However, the courts in these cases only applied the test to different locations and aspects of the educational programs, not to specific tasks within these different locations.[92] In contrast, the Sixth Circuit in *Eberline* held that the primary beneficiary test could be applied to very specific segments of work, namely janitorial tasks.[93] Because the Sixth Circuit itself and other courts have failed to apply the primary beneficiary test in such a specific and segmented manner in the past, this holding constitutes a split from prior decisions of the other circuits. This split is yet to be resolved, as the Supreme Court recently denied certiorari in the case.[94]

Early interpretations of *Eberline* focused on the portion of work to which the primary benefit test ought to apply. First, in *Salem v. Michigan State University*, the United States District Court for the Western District of Michigan used the factors outlined in *Eberline* and cited to the case to say that "the primary benefit test can apply to a *portion* of a relationship between the student and employer."[95] Using the Sixth Circuit's formulation of the primary beneficiary test, the *Salem* court held that although the plaintiff students' work was a part of their education, it was arguably more for the institution's benefit.[96] Thus, the court held that the plaintiffs had a plausible claim under the FLSA.[97] Second, the Western District of Michigan similarly applied *Eberline* in *Wilson v. Peckham, Inc.*[98] The defendant in that case argued that the employees' allegedly uncompensated activities were "de minimis."[99] The Sixth Circuit in *Eberline* stated that claims for compensation ought to be rejected when "based on activities undertaken for de minimis amounts of time or are too difficult in practice to record."[100] This rule was adopted in *Eberline* to make its new targeted approach more functional and to reject more frivolous and inconsequential claims for compensation.[101] These two

91. *Benjamin*, 877 F.3d at 1142, 1147–49; *Hollins*, 867 F.3d at 836–37.
92. *Benjamin*, 877 F.3d at 1142, 1147–49; *Hollins*, 867 F.3d at 836–37.
93. *Eberline*, 982 F.3d at 1014, 1017–18.
94. Douglas J. Holdings, Inc. v. Eberline, 141 S. Ct. 2747 (2021).
95. Salem v. Mich. St. Univ., No. 1:19-cv-220, 2021 WL 1381149, at *10 (W.D. Mich. Apr. 13, 2021).
96. *Id*.
97. *Id.*
98. Wilson v. Peckham, Inc., No. 1:20-cv-565, 2021 WL 3168616, at *7 (W.D. Mich. July 26, 2021).
99. *Id.*
100. Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1018 (6th Cir. 2020) (citing Aiken v. City of Memphis, 190 F.3d 753, 758 (6th Cir. 1999)), *cert. denied*, 141 S. Ct. 2747 (2021).
101. *Id.*

recent applications of *Eberline* show that the Sixth Circuit's updated approach to employee classification is already being applied, posing the threat of a greater rift between circuits in the application of the primary beneficiary test.

D. Current Difficulties Surrounding Unpaid Internships and Student Employment

Considerations for employers regarding unpaid student work have evolved. To avoid disputes, employers now must consider not only the Department of Labor's enumerated factors,[102] but also factors laid out by various circuit courts.[103] Additionally, they must consider whether small segments of their student employees' or interns' work primarily benefit the employees[104] and whether these segments of the employment relationship are "de minimis" or practically "too difficult to record."[105] These same concerns apply equally to students, wondering whether they ought to be paid for the tasks they are assigned as a part of their employment and wondering whether making a claim for compensation is tenable.[106] It is also important to recognize that the FLSA's rules do not apply to all employers equally.[107] Some non-profit employers are able to hire interns as volunteers but are not required to compensate them, particularly when these interns come in as volunteers with no expectation of compensation.[108] However, the likelihood of this exemption's susceptibility to abuse is outside the breadth of this Note, which focuses

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102. U.S. DEP'T OF LAB., *supra* note 5.

103. *See, e.g.,* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016); Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1142, 1147–48 (9th Cir. 2017); *Eberline*, 982 F.3d at 1014–18 (6th Cir. 2020); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 524, 529 (6th Cir. 2011).

104. *Eberline*, 982 F.3d at 1017.

105. *Id*. at 1018–19 (citing *Aiken*, 190 F.3d at 758).

106. *See* Derek Thompson, *Unpaid Internships: Bad for Students, Bad for Workers, Bad for Society*, ATLANTIC (May 10, 2012), https://www.theatlantic.com/business/archive/2012/05/unpaid-internships-bad-for-students-bad-for-workers-bad-for-society/256958/ [https://perma.cc/J5B7-CWC7].

107. *See* U.S. DEP'T OF LAB., FACT SHEET #71, *supra* note 5 ("The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible").

108. *Id*.

primarily on the relationship between unpaid internships and for-profit employers.

Along with the difficulties of applying the primary beneficiary test, brought into the limelight by the split created in *Eberline*, unpaid student work in general has come under considerable scrutiny. Academic and legal scholars,[109] Congress,[110] and the National Labor Relations Board[111] have all recently addressed unpaid student work. In general, there is now increased focus on wage theft and fair labor standards for students in the wake of recent developments in the classification of NCAA student athletes.[112] Students, scholars, and the public are questioning the fairness of uncompensated student work, leading to some level of uncertainty for employers and students alike.

III. ANALYSIS

The current state of student employment and unpaid internships is unsustainable. From concerns about unfair opportunities for students who can afford to take unpaid work to concerns about wage theft and non-educational work going unpaid, it is evident that progress must be made. The developments stemming from *Eberline* only add to the complications surrounding student employment, leading to confusion amongst students and employers alike.[113] Borrowing from professor Carol M. Rose, the law surrounding student work is muddy and could use a period of

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109. *See* McTorry, *supra* note 3; *see also* Budd, *supra* note 3; *see also* Morgan Knott, Note, *Intern or Employee in Disguise? The Rise of Unpaid Internship and the Primary Beneficiary Test*, 84 MO. L. REV. 177 (2019); Michael L. Stevens & Karen S. Vladeck, *Class Dismissed? Second Circuit Overrules DOL's Unpaid Intern Factors and Adopts Primary Beneficiary Test*, 41 EMP. REL. L. J. 54 (2015); Howard S. Lavin & Elizabeth E. DiMichele, *Intern or Employee? The Circuits Are Split*, 42 EMP. REL. L. J. 91 (2016).

110. *See* Steve Berkowitz, *Bill Would Make Athletes at Public College Employees, Allow Them to Collectively Bargain*, USA TODAY (May 27, 2021, 6:20 PM), https://www.usatoday.com/story/sports/college/2021/05/27/bill-would-make-college-athletes-employees-allow-them-unionize/7465542002/ [https://perma.cc/JU27-5V8K].

111. *See* Berkowitz, *College Athletes*, *supra* note 1.

112. *See* Nicholas C. Daly, Note, *Amateur Hour Is Over: Time for College Athletes to Clock in Under the FLSA*, 37 GA. ST. U. L. REV. 471 (2021) (arguing that college athletes should be categorized as employees under the FLSA and discussing their current treatment); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/LT6C-JVDX].

113. *See* Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183, 1209–11 (2015) (discussing the difficulty for employers of predicting liability regarding their unpaid interns, as well as the need to protect interns from work relationships that mislabel individuals to evade obligations under the FLSA).

"crystallization"—the adoption of more hard-edged rules which more clearly define what elements of student work ought to be compensated.[114] Progress and clarification are essential at this stage. Whether this progress comes in the form of legislative enactment, or simply clarification from the Department of Justice, it is important that the concerns of students, employers, and the public are taken into consideration.

For instance, a new fact sheet from the Department of Labor or an amendment to the FLSA could be effective in helping to lead to a clearer and more equitable landscape for students and employers. In either event, either the legislature or the Department of Labor should continue in the in the path charted by the court in *Eberline*, which allows for a more precise categorization of student work.[115] The targeted approach formulated in *Eberline*[116] can be used as a step towards eliminating wage theft under the guise of education.

One of the main goals of the FLSA is to set a minimum wage that employees' pay cannot fall below.[117] However, allowing employers to circumvent minimum wage requirements by using the Act's exemption for vocational learners[118] to extract labor from students under the guise of education greatly frustrates that goal. As such, an approach like that of the Sixth Circuit in *Eberline*[119] could help to prevent this exploitation. By "allow[ing] for the possibility of compensation for labor that—although related to the educational relationship in an attenuated way—does not actually provide a benefit to students that exceeds the benefit of free labor received by the school,"[120] the test is effective in accurately encompassing the economic realities of a work situation. This test can lead to more equitable compensation for student workers. For employers, a clearer and more universally applied test will allow for continued use of unpaid

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114. *See generally* Carol M. Rose, Note, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (highlighting the cycles of crystallization—the adoption of hard-edged rules that tell everyone exactly where they stand—and mud—the subsequent clarifications, exceptions, and "equitable second-guessing").

115. *See generally* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

116. *Id*. at 1014.

117. *Handy Reference Guide to the Fair Labor Standards Act,* U.S. DEP'T OF LAB., WAGE & HOUR DIV. (2016), https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa [https://perma.cc/P4NF-NPFR].

118. U.S. DEP'T OF LAB., FACT SHEET #71, *supra* note 5.

119. *See Eberline*, 982 F.3d at 1014 (concluding that "when a plaintiff asserts an entitlement to compensation based only on a portion of the work performed in the course of an educational relationship, courts should apply the primary-beneficiary test . . . only to that part of the relationship, not to the broader relationship as a whole.").

120. *Id*. at 1017.

student interns with more defined parameters concerning what that relationship should look like.

A. The Value and Propriety of the Eberline Approach

The Sixth Circuit's approach in *Eberline* should be adopted nationwide—and perhaps expanded upon. The court's new targeted formulation of the primary beneficiary test can serve as an important step toward fairer compensation for student workers, as well as a clearer picture for employers as to what aspects of the working relationship must be compensated. As it stands, instances of wage theft and minimum wage violations for unpaid student workers are rarely investigated or punished because the Department of Labor typically only investigates for-profit companies based on complaints.[121] These complaints are few and far between, as interns are reluctant to file complaints for a variety of reasons.[122] If the rules surrounding unpaid student work were more clear perhaps workers would feel more confident in filing complaints, or perhaps workplaces would avoid relationships that run afoul of the FLSA. To clarify the bounds of the student-work relationship, some sort of judicial, legislative, or regulatory enactment formally adopting *Eberline* is necessary.

The targeted approach to the primary beneficiary test enunciated in *Eberline*[123] could be effective in clarifying what work must be compensated, potentially reducing wage theft, and leading to more equitable compensation in educational working contexts. Without this approach, courts consider a wider segment of the working relationship, rather than applying the test to specific tasks or small segments of the relationship.[124] Had the court in *Eberline* applied the test in that manner, it might have considered the whole of the students' time spent in salons to be educational because it provided the students with the primary benefit of the work.[125] However, this less specific approach could easily overlook

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121. Kara Brandeisky & Jeremy B. Merrill, *How the Labor Department Has Let Companies Off the Hook for Unpaid Internships*, PROPUBLICA (Apr. 9, 2014, 2:59 PM) https://www.propublica.org/article/how-the-labor-department-let-companies-off-hook-for-unpaid-internships [https://perma.cc/YJY3-7WR8].

122. *Id*. (noting that students are often reluctant to report an employer due to their view that the unpaid internship is a way to get their foot in the door).

123. *Eberline*, 982 F.3d at 1014.

124. *See, e.g.,* Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1142, 1147–48 (9th Cir. 2017) (applying the primary beneficiary test only to salon work and not the classroom-based educational segments of the employment relationship).

125. *See generally*, *Eberline*, 982 F.3d at 1006.

massive amounts of time spent doing work that is arguably non-educational—work that might typically be done by a compensated worker.

In the situation examined by the court in *Eberline*, the plaintiffs spent up to twenty percent of their time at the defendant's salons doing non-educational janitorial tasks.[126] Employers should not be permitted simply to use such considerable portions of a student's time in order to gain free labor under the guise of education. One can easily imagine several other unpaid student employment relationships in which the student might be required to perform non-educational tasks but in a primarily educational context.

Critics of the Sixth Circuit's targeted primary beneficiary test might argue that claims related to specific tasks might increase, or that certain tasks might be considered compensable while others are not, just as the defendant argued in *Eberline*.[127] However, the targeted approach can be tailored in a way that avoids these potential issues. The Sixth Circuit noted that safeguards already exist—claims for compensation are rejected when based on activities that are undertaken for de minimis amounts of time or are in practice too difficult to record.[128] Accordingly, even when the *Eberline* test is applied, employers and students need not worry that their time will be bogged down by the constant recording of "de minimis" tasks. The approach outlined in *Eberline* is reasonable and balances the realities of the workplace while still helping to reduce wage theft. Any minimal increase in time spent documenting work tasks, while it might prove slightly cumbersome, is a small price to pay for the reduction of the exploitation of student labor.

Further, the defendant in *Eberline* expressed concern that such a targeted approach might make district courts' job unduly complex.[129] However, as the Sixth Circuit made clear, courts already undertake fact-specific, targeted analyses in other employment compensation cases, and are well situated to do so.[130] Indeed, further application by other courts of

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126. *Id.* at 1018.

127. *Id.*

128. *Id.* (citing Aiken v. City of Memphis, 190 F.3d 753, 758 (6th Cir. 1999)).

129. *Id.* at 1017.

130. *See id.* at 1017–18 (considering claims brought by emergency medical technicians seeking compensation for their lunch breaks and holding that they are not entitled to compensation for breaks in which they are required to answer emergency calls but are not required to stay in their trucks and perform other work duties (citing Jones-Turner v. Yellow Enter. Sys., LLC, 597 F. App'x 293, 297–98 (6th Cir. 2015)); *see also* Hill v. United States, 751 F.2d 810, 814 (6th Cir. 1984) (finding that mail carriers were not entitled to compensation for lunch breaks when they were still responsible for some work tasks during them); Myracle v. Gen. Elec. Co., No. 92-6716, 1994 WL 456769, at *5 (6th Cir. Aug. 23, 1994) (workers not entitled to compensation for breaks in which supervisors rarely interrupted asking for responses to inquiries).

a more targeted primary beneficiary test such as the test employed by the *Eberline* court would help to bring unpaid internship jurisprudence more in line with other areas of employment law. If courts evaluating other employment compensation issues look to targeted segments of the working relationship and can make adequate determinations when doing so, the same is possible when examining vocational-learning relationships.

In short, the targeted approach taken in *Eberline*[131] should be adopted nationwide by courts hearing compensation claims from interns at for-profit institutions. As mentioned previously, the primary beneficiary test, under a variety of names, is applied differently in different courts, which has led to uncertainty for both employers and interns.[132] The Supreme Court denied certiorari in *Eberline*,[133] but its approach is still of considerable value and should be adopted through whatever reasonable means possible.

B. Codifying the Sixth Circuit's Test in the Fair Labor Standards Act

Until the Supreme Court hears a case requiring it to define who qualifies as an employee under the FLSA, courts will continue to apply different tests and apply them in different manners, leading to widespread uncertainty.[134] Given the Supreme Court's recent denial of certiorari,[135] it's unclear how long this uncertainty will prevail. To reduce this uncertainty, the legislature could pre-empt the Court and codify the Sixth Circuit's interpretation of the primary beneficiary test in the FLSA. Section 203 of the Act defines "employ" as to "suffer or permit work."[136] To codify the *Eberline* test, the legislature could modify or add to this definition, stating that even in educational contexts, requiring a vocational learner to perform tasks that are primarily for the benefit of the employer could be considered "employment" for purposes of the act. The legislature could also make it clear that it is possible for a worker to be both a vocational learner and an employee, depending on the task. Further, the legislature could codify the test in Section 206 of the FLSA—its minimum wage provisions.[137] In this section, the legislature could add a provision simply restating the *Eberline* test, stating that minimum wage

131. *Id*. at 1014.
132. *See* Malik, *supra* note 113, at 1199–203.
133. Douglas J. Holdings, Inc. v. Eberline, 141 S. Ct. 2747 (2021).
134. *See* Malik, *supra* note 113.
135. *See Eberline*, 141 S. Ct. 2747.
136. 29 U.S.C. § 203(g).
137. 29 U.S.C. § 206.

compensation is required even for relatively small segments of work required in an educational context.[138]

Further, to alleviate any possible concerns from employers regarding the practicality of this arrangement, the legislature could include some ameliorative provisions, again echoing *Eberline*.[139] The legislature could include language in Section 206 making it clear that tasks undertaken for "de minimis" amounts of time, or tasks that are too difficult to record in a practical manner do not necessarily require compensation.[140] In doing so, the legislature would effectively adopt the approach taken by the Sixth Circuit, requiring compensation for tasks that do not primarily benefit student workers but doing so in a way that should not substantially burden educational employers or students.

Rather than waiting for the Supreme Court to hear a case applying the primary beneficiary test, swift action by Congress could quickly reduce uncertainty. This result would be positive for employers and students alike, adding much needed clarification. Along with clarifying the student-work relationship, taking an approach mirroring the Sixth Circuit's in *Eberline* would encourage a more equitable situation for students working in for-profit settings without substantially decreasing the value of hiring student workers for employers. Internships provide value for students looking to get a foot in the door, while also providing cheap—or often free—labor for for-profit employers.[141] That said, this exemption to the FLSA's minimum wage requirements should not be exploited to extract free labor from students while providing them minimal educational benefit. The legislature can help to close this loophole by codifying the Sixth Circuit's version of the primary beneficiary test. It is important to note, however, that congress is unlikely to be willing or able to effectively amend the FLSA, as it does not generally amend broad statutes to address problems as specific as this.[142] As such, the Department of Labor may be better suited to act.

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138. *See generally* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

139. *See id*. at 1018.

140. *Id.*

141. *See* Malik, *supra* note 113, at 1187 ("Internships provide real-world skills different from knowledge obtained in the classroom, making graduates with internship experience more valuable candidates"); *see also* Knott, *supra* note 109, at 177 ("Employers seek to hire people who have completed an internship because they value the skills and practical experience gained from an internship. Employers especially like to use unpaid interns so they can observe and train their prospective employees while simultaneously benefitting from the free labor.").

142. *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, 1549 (2010). ("It is also highly unlikely that Congress could effectively amend the FLSA

C. Proposal for Clarification from the Department of Labor

Another alternative to waiting for the Supreme Court to resolve the circuit courts' split regarding the primary beneficiary test is for the Department of Labor to take its own action. This could come in the form of modifying Fact Sheet #71,[143] issuing a new Fact Sheet, or promulgating a new rule that offers guidance in accordance with the Sixth Circuit's approach. The stated purpose of Fact Sheet #71 is to provide information to "help determine whether interns and students working for 'for-profit' employers are entitled to minimum wages and overtime pay under the Fair Labor Standards Act (FLSA)."[144] The fact sheet derives almost all of its information from analyzing circuit courts' different approaches and laying out what factors courts typically consider when applying the primary beneficiary test.[145]

While only used by courts as persuasive authority, Fact Sheet #71 is often cited to in employment cases,[146] and can be looked to by employers and students alike for guidance regarding their rights and responsibilities in unpaid internship relationships. Further, one proposal suggests that the Wage and Hour division of the Department of Labor could use its rulemaking authority under Section 214(a) of the FLSA to promulgate a rule mandating a specific approach to employee classification.[147] In fact, due to its expertise in the area, more accountable political position, its ability to engage in notice-and-comment rulemaking, and Congress' implied delegation of rulemaking authority to the Department, the

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to address the unpaid internship problem; Congress writes broad statutes and generally does not amend them to address such specific problems. Congress has, however, vested the WHD with the power to administer the FLSA by promulgating rules and regulations that have the force of law.").

143. *See* U.S. DEP'T OF LAB., FACT SHEET #71, *supra* note 5.

144. *Id.*

145. *Id.*

146. *See, e.g.,* Wolfe v. AGV Sports Grp., Inc., No. CCB-14-1601, 2014 WL 5595295, at *2 (D. Md. Nov. 3, 2014); Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845, 850–55 (S.D. Ind. 2016); Xuedan Wang v. Hearst Corp., 293 F.R.D. 489, 493 (S.D.N.Y. 2013); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534–35 (2d Cir. 2016).

147. *See* Curiale, *supra* note 142, at 1548 ("The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under [S]ection 206 [minimum wage provisions] of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe." (quoting 29 U.S.C. § 214(a))).

Department of Labor is in a far better position to adopt the *Eberline* court's new approach.[148]

1. Modifying Fact Sheet #71

Practically, the Department of Labor could modify Fact Sheet #71 by adding a simple statement that courts, particularly in the Sixth Circuit, apply the test to smaller segments of the work relationship, rather than looking at the relationship as a whole. It is important to recognize, however, that this statement would not be binding on any courts and could simply be disregarded by any court looking to the Fact Sheet for guidance. Its value might instead be in keeping interns and employers aware of a newly developing approach to employment classification. Again, the Department should also indicate that tasks undertaken for "de minimis" amounts of time or tasks that are too difficult to record do not require compensation.[149] The Department could even outline what sort of work it predicts is too "de minimis" or practically "difficult to record."[150] Naturally, too precise a definition of these terms may exclude work that should be compensated, but the issuance of some guidelines for employers to follow in hiring workers in an educational context could prove valuable, where it could lead to less claims for minimum wage compensation by letting employers know for what they need to compensate students.

Even further, the Department of Labor could create sample time sheet templates or something similar that would allow workers or employers to clearly demarcate what tasks they are undertaking, allowing for easy classification of these tasks and fair compensation. Employers might argue that these tasks are too difficult to record. For example, the cosmetology students in *Eberline* undertook small janitorial tasks throughout the day, punctuating their truly educational work.[151] However, the time spent on these tasks could add up, leading to hours of uncompensated work with no educational benefit. By encouraging more stringent documentation and

148. *See id*. at 1549–50. (explaining that "Congress created the Wage and Hour Division to administer the FLSA and has expressly delegated to it rulemaking authority with respect to many portions of the statute, including the power to make regulations regarding learners and apprentices. With such delegation of authority comes a basic presumption that Congress intended for the agency to fill gaps in the statute." Further, "the agency should promulgate this rule because it is the more politically accountable entity (as compared to courts), and therefore, is in a better position to make this kind of decision.").

149. *See* Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1016 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

150. *Id.* at 1019.

151. *Id*. at 1010–19.

classification of this work, the potential for large amounts of non-educational labor to go uncompensated could be decreased.

By disseminating information in furtherance of the Sixth Circuit's approach in *Eberline*, the Department of Labor would effectively put both students and employers on notice of the possibility that specific tasks will be considered by courts applying the primary beneficiary test. This might encourage employers to avoid requiring unpaid interns to perform tasks that do not primarily benefit the students. As such, this small amendment could encourage a less exploitative relationship nationwide between employers and unpaid interns. Of course, as merely persuasive authority, the fact sheet would not be binding on any courts applying the primary beneficiary test.[152] However, Fact Sheet #71 is considered and cited to regularly in cases regarding claims arising under the FLSA, although it has recently been controverted by some courts.[153] Regardless, an updated Fact Sheet more in line with a modern interpretation of the FLSA could be instrumental in reducing the uncertainty surrounding unpaid student employment at for-profit institutions.

2. Promulgating a New Regulation Under the FLSA

Congress has enabled the Department of Labor to promulgate new regulations through Section 214 of the FLSA.[154] This section pertains mostly to apprentices and learners who are employed under special certificates so as to be paid under minimum wage,[155] but the Department of Labor could issue new rules, orders, or regulations under this section that apply to the classification of student workers in general. The Wage and Hour Division was created to administer the FLSA, and as it was delegated with rulemaking authority, it appears to be proper for the Division to "fill gaps" in the FLSA.[156] Given this power, the Wage and Hour Division should use its Section 214 power to promulgate a new rule clarifying the purposes of the Act and incorporating the newest formulation of the primary beneficiary test set forth in *Eberline*.[157] Within

152. Wolfe v. AGV Sports Grp., Inc., No. CCB-14-1601, 2014 WL 5595295, at *2 (D. Md. Nov. 3, 2014)

153. *See, e.g., id.*; *see also, e.g.,* Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845, 855 (S.D. Ind. 2016) (stating that the Fact Sheet is not currently a proper distillation of the test set forth in *Portland Terminal*); Xuedan Wang v. Hearst Corp., 293 F.R.D. 489, 493 (S.D.N.Y. 2013); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016).

154. 29 U.S.C. § 214(a).

155. *See id*.

156. *See* Curiale, *supra* note 142, at 1549–50.

157. Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006, 1013–14 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2747 (2021).

or along with this new regulation, the Department of Labor also could include any of the provisions or recommendations discussed in the previous section.[158]

While amending Fact Sheet #71 or issuing a new Fact Sheet may be an effective action as a quick, stop-gap measure that helps inform employees and student workers/interns about their relative rights and responsibilities, a new rule promulgated under the FLSA would have binding authority. As such, a rule that clarifies the appropriate classification of unpaid work that incorporates *Eberline*'s more precise approach[159] could be an effective step towards eliminating the ambiguity and confusion surrounding unpaid work. Further, the rulemaking process would be more inclusive and susceptible to input from not only regulators but any concerned parties.[160] These parties could include labor organizations, student workers, employers, and any concerned regulator or legislator. This more inclusive process would help to shape any rule codifying the *Eberline* test[161] to more effectively meet the logistical and public policy concerns surrounding an issue of this magnitude. As unpaid educational work has grown so much in volume and popularity, the number of interested parties to any rule drastically changing how these work relationships operate could be massive, and it is, of course, important to shape the rule to these concerns and to the original policies that the FLSA was passed in furtherance of. As it stands, no entity appears better suited to actuate this change than the Department of Labor itself.

V. CONCLUSION

The United States labor and employment landscape has changed drastically since the FLSA was passed. In order to better serve the goals underlying that landmark piece of legislation, some amount of change and modernization is now necessary. With the rise of unpaid internships and the recent developments surrounding the classification of student workers, the time is ripe for change in the labor and employment world. Courts have created increasingly complex and sophisticated tests for employee classification, and the federal circuits now diverge from each other in their application of these tests.[162] As noted, this divergence can lead to

158. *See supra* Section III.B.

159. *See supra* Section III.B.

160. *See* Curiale, *supra* note 142, at 1551. ("Notice-and-comment rulemaking would allow employers, interns, and any other interested parties to participate in the decision making process, instead of simply having a court impose a rule.").

161. *Eberline*, 982 F.3d at 1014.

162. *See, e.g., id.*; *see also* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016).

confusion and uncertainty for employers and student workers. The most equitable formulation and application of the primary beneficiary test to date is found in *Eberline*.[163] As such, a binding codification of this test by Congress or the Department of Labor would serve the dual purposes of reducing confusion and preventing the unfair exploitation of student workers under the guise of education.

163. *See Eberline*, 982 F.3d at 1013–14.