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**BLURRING THE LINE BETWEEN STUDENT AND EMPLOYEE:  
EXPLOITATION OF FOR-PROFIT COLLEGE STUDENTS**

*Michele Abatangelo*\*

**ABSTRACT**

For decades, for-profit colleges throughout the United States have exploited their students through a predatory business model. In February 2022, the Education Department approved \$415 million in borrower defense claims for nearly 16,000 students who attended for-profit schools finding that these schools misrepresented post-graduation employment prospects. For-profit colleges also use manipulative recruitment tactics such as targeted advertising of low-income and minority students and providing false information to prospective students about loan repayment obligations post-graduation. Some for-profit institutions also rely on student labor in their facilities rather than hiring paid employees. This review discusses why it is imperative that courts scrutinize the tactics used by for-profit institutions when faced with a Fair Labor Standards Act claim.

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## I. INTRODUCTION

In 2007, Eric Luongo, a former Navy Seal, began attending DeVry University with the hope of earning an Associate's degree in web graphic design.<sup>1</sup> Eric chose DeVry because the school's representatives told him that graduates were making \$80,000+ working as web graphic designers.<sup>2</sup> Eric expressed his concern about paying for school to members of the DeVry staff and they assured Eric that he would not have to pay and that his classes would be covered by the G.I. Bill and other grants.<sup>3</sup> DeVry representatives told Eric that he needed to fill out a Free Application for Federal Student Aid (FAFSA) and complete a Master Promissory Note (MPN).<sup>4</sup> Eric was confused because he thought he was going to school for free.<sup>5</sup> So Eric reached out to a DeVry representative again who told Eric that he would not have to pay for anything because he was a veteran and qualified for grants.<sup>6</sup>

After graduating in June 2011, Eric started to receive letters in the mail from loan service providers telling him he owed money for student loans.<sup>7</sup> Due to DeVry's deceptive tactics, Eric graduated with \$101,000 in debt from an associate's degree program.<sup>8</sup> What made Eric's situation worse was that he could not find a job as a web graphic designer, and in fact, he never actually worked as a web graphic designer.<sup>9</sup> Eventually, Eric decided to attend a different institution to seek his Bachelor's degree in another field of study.<sup>10</sup> Ninety-six percent of students who graduate from for-profit colleges owe money and generally are in twice as much debt when compared to a graduate

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<sup>1</sup> *Oversight of For-Profit Colleges: Protecting Students and Taxpayer Dollars from Predatory Practices Before the H. Appropriations Comm.*, 116th Cong. (2019) (statement of Eric Luongo).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* A "Master Promissory Note (MPN) is a legal document in which you promise to repay your loan(s) and any accrued interest and fees to the U.S. Department of Education." *Master Promissory Note*, U.S. DEP'T OF EDUC., <https://studentaid.gov/mpn/>.

<sup>5</sup> Hearings, *supra* note 1 (statement of Eric Luongo).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

of a traditional school,<sup>11</sup> finding themselves in a similar situation as Eric, owing thousands of dollars in student loans.

For decades, the for-profit college business model has allowed institutions to exploit their students, specifically low-income and minority students.<sup>12</sup> African American and Latino students make up less than one-third of college students, but they represent about half of the students who attend for-profit colleges.<sup>13</sup> Due to the manipulative advertising targeting low-income students used by these institutions, a large percentage of the student population ends up defaulting on their loans.<sup>14</sup>

For-profit colleges also charge their students higher tuition and fees when compared to community colleges and public universities.<sup>15</sup> The average tuition at a for-profit college is over \$10,000 more than tuition at a community college.<sup>16</sup> For the 2016-2017 school year, the average tuition and fees for full-time undergraduates were \$4,100 for community colleges, \$8,200 for public four-year colleges, and \$16,000 for for-profit colleges.<sup>17</sup> What makes these figures more shocking is that for-profit four-year colleges only have a 35% six-year graduation rate compared to 65% for public four-year colleges and 76% for private four-year colleges.<sup>18</sup> The Department of Education's most recent data shows that 14.3% of students at for-profit colleges default on their loans compared to 7.1% at for public colleges and 6.6% at private non-profit colleges.<sup>19</sup> Six years after students enroll in for-profit college

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<sup>11</sup> Hannah Appel & Astra Taylor, *Educ. with a Debt Sentence: For-Profit Colls. as American Dream Crushers and Factories of Debt*, 24(I) New Labor Forum 31, 32 (2015).

<sup>12</sup> Ariel Gelrud Shiro & Richard V. Reeves, *The For-Profit Coll. System Is Broken And The Biden Admin. Needs To Fix It*, BROOKINGS (Jan. 12, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/01/12/the-for-profit-college-system-is-broken-and-the-biden-administration-needs-to-fix-it/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> CTR. FOR ANALYSIS OF POSTSECONDARY EDUC. AND EMP., *For-Profit Coll. 's By The Numbers*, (Updated Feb. 2018), <https://capseecenter.org/research/by-the-numbers/for-profit-college-infographic>.

<sup>16</sup> Shiro & Reeves, *supra* note 12.

<sup>17</sup> CTR. FOR ANALYSIS OF POSTSECONDARY EDUC. AND EMP., *supra* note 15.

<sup>18</sup> *Id.*

<sup>19</sup> Lindsay Huth, *Trouble At For-Profit Colls. In 5 Graphs: Here's What's Happening*, USA TODAY (Mar. 26, 2019, 6:00 AM), <https://www.usatoday.com/story/news/education/2019/03/26/for-profit-college-closing-argosy-university/3271813002/>.

programs, 90% of students actually earn less than the average high school graduate.<sup>20</sup>

On top of this, for-profit-schools expand their profit margins by relying on student labor in their facilities instead of paid employees.<sup>21</sup> Many for-profit colleges provide the real-world experience necessary for students to obtain degrees in a particular vocational field. These fields include cosmetology, culinary arts, visual arts, and medical fields including certified registered nurse anesthetists' programs, and osteopathic medicine programs.<sup>22</sup> The for-profit college business model allows for a tremendous amount of room to exploit students obtaining degrees in these fields. Students across the country have sued for-profit institutions for back-pay they should have earned while working at the schools.<sup>23</sup> These students argue that they should be considered employees under the Fair Labor Standards Act (FLSA) because the work they did at the institutions fell outside their required curriculum.<sup>24</sup>

This Note will discuss why the predatory nature of the for-profit college business model makes it imperative that courts scrutinize the tactics used by for-profit institutions when faced with an FLSA claim. This Note will be divided into five sections. Part II of this Note examines the for-profit college business model and why it has earned these institutions their bad reputation. Part III will address the Fair Labor Standards Act and how employees are defined under this act. Part IV will explore the primary beneficiary test and the various interpretations of the test, which the courts have used to determine whether a student or intern is an employee under the FLSA. Part V will explain why the United States District Court for the Eastern District of Michigan's formulation of the primary beneficiary test in *Eberline v. Douglas J. Holdings, Inc.*<sup>25</sup> is best equipped to consider exploitative tactics used by for-profit institutions. Part VI will conclude that when deciding whether a student is an employee under

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<sup>20</sup> Shiro & Reeves, *supra* note 12.

<sup>21</sup> See *Benjamin v. B & H Educ. Inc.*, 877 F.3d 1139, 1141 (9th Cir. 2017); *Eberline v. Douglas J. Holdings, Inc.*, 339 F. Supp. 3d 634, 640 (E.D. Mich. 2018).

<sup>22</sup> See *Schumann v. Collier Anesthesia P.A.*, 803 F.3d 1199 (11th Cir. 2015); *Benjamin*, 877 F.3d at 1139; *Eberline*, 339 F. Supp. 3d at 634; *Velarde v. GW GJ, Inc.*, 914 F.3d 779 (2d Cir. 2019).

<sup>23</sup> See *Schumann*, 803 F.3d at 1199; *Benjamin*, 877 F.3d at 1139; *Eberline*, 339 F. Supp. 3d at 634; *Velarde*, 914 F.3d at 779.

<sup>24</sup> See *id.*

<sup>25</sup> 339 F. Supp. 3d 634 (E.D. Mich. 2018).

the FLSA, courts should apply the District Court for the Eastern District of Michigan's reasoning in *Eberline* because of the ability of for-profit institutions to take advantage of their students through manipulative recruitment tactics, high tuition rates, large loan default rates and universal program requirements.

## II. PREDATION AND EXPLOITATION: THE FOR-PROFIT BUSINESS MODEL

For-profit colleges are both owned and operated by businesses.<sup>26</sup> In 1997, investors realized that high profits could be made from for-profit schools and “by 2009, at least 76 percent of students attending for-profit colleges were enrolled in a college owned by either a company that is traded on a major stock exchange or a college that is owned by a private equity firm.”<sup>27</sup> For-profit colleges, unlike traditional colleges, receive their primary source of funding from students,<sup>28</sup> and the primary source of student tuition is student loans funded by taxpayers in the United States.<sup>29</sup> Seventy-one percent of students at for-profit colleges borrow money from the federal government.<sup>30</sup>

For-profit schools' recruitment tactics have also given them a bad reputation.<sup>31</sup> For-profit institutions use “predatory recruitment tactics” to target African American and Latino communities, low-income students, and students who are first-generation college students.<sup>32</sup> These predatory recruitment tactics include false promises and faulty information to increase enrollment, while providing sub-par training programs that leave students with no skills and mounting

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<sup>26</sup> STAFF OF S. COMM. ON HEALTH, EDUC., LAB. AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUC.: THE FAILURE TO SAFEGUARD THE FED. INVESTMENT AND ENSURE STUDENT SUCCESS (Comm. Print 2012).

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Shiro & Reeves, *supra* note 12.

<sup>31</sup> Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Educ.*, 28 JCUL 45, 52 (2011).

<sup>32</sup> Shiro & Reeves, *supra* note 12; Bonadies et al., *For-Profit Sch.'s Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate*, HARV. L. REV. BLOG (July 20, 2018), <https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate>.

debt.<sup>33</sup> Recruiters for for-profit colleges use aggressive and unethical tactics to target these students while also promising high salaries after graduation and lying to students about loan repayment obligations post-graduation.<sup>34</sup> The Director of Admissions at Argosy University, a for-profit school that closed its doors in 2019, would tell his enrollment counselors to “[c]reate a sense of urgency. Push their hot button. Don’t let the student off the phone. Dial, dial, dial.”<sup>35</sup> Similarly, enrollment advisors at Ashford University were told by their superiors to “dig deep into students’ suffering to convince them that a college degree is going to solve all their problems.”<sup>36</sup>

The predatory recruitment tactics and false information are the reasons why for-profit colleges enroll only ten percent of students in the U.S., while accounting for half of the student-loan defaults.<sup>37</sup> In the U.S. Senate’s report on for-profit colleges, it found:

repeated instances of recruiters misleading prospective students with regard to the cost of the program, the availability and repayment obligations of Federal student loans, the time to complete the program, the completion rates of other students, the job placement rate of other students, the transferability of credits, and the reputation and accreditation of the college.<sup>38</sup>

Because of the increase in low-income students and their eligibility for Federal Pell Grants,<sup>39</sup> federal aid to these colleges increased from \$4.6 billion in 2000 to \$26.5 billion in 2009.<sup>40</sup>

Ashford University, a for-profit college that lost its accreditation in 2018, is a clear example of manipulative recruitment tactics used in for-profit college advertising. Only sixteen percent of

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<sup>33</sup> Bonadies et al., *For-Profit Sch.’s Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate*, HARVARD L. REV. BLOG (July 20, 2018).

<sup>34</sup> James, *supra* note 31 at 68 (citing Daniel Golden, *The Homeless at Coll.*, BLOOMBERG BUS. WKLY., Apr. 30, 2010, at 64).

<sup>35</sup> Appel & Taylor, *supra* note 11, at 33.

<sup>36</sup> *Id.* (internal quotation marks omitted).

<sup>37</sup> James, *supra* note 31.

<sup>38</sup> STAFF OF S. COMM. ON HEALTH, EDUC., LAB. AND PENSIONS, *supra*, note 26.

<sup>39</sup> Pell Grants establish financial assistance for low-income students “reflect[ing] an enduring American belief in the ability of higher education to function as a ‘great equalizer.’” James, *supra* note 14 at 61. (citing MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, *THE STUDENT AID GAME* 11 (1998)).

<sup>40</sup> James, *supra* note 31, at 52 (citing Daniel Golden, *The Homeless at Coll.*, BLOOMBERG BUS. WKLY., Apr. 30, 2010, at 64).

the students at Ashford University graduated.<sup>41</sup> About twenty percent of their students that did graduate reported being unemployed, which is five times higher than the national rate.<sup>42</sup> The average Ashford student graduated with \$34,375 in debt.<sup>43</sup> Despite these numbers, Ashford boasted about the high number of degrees that were obtained by minority students at their university, but did not mention the low graduation and employment rates of these same individuals.<sup>44</sup> In a lawsuit against Ashford by the State of California, California recounted the “predatory practices” used by the school including “lying to prospective students about the probability of obtaining jobs, and subsequently saddling them with enormous debt; using illegal debt collection practices when students struggle to pay their bills; and employing admissions counselors who effectively act as ‘salespeople working in toxic boiler-room conditions.’”<sup>45</sup>

Corinthian College, a for-profit college that was forced to close its doors in 2015 after being fined \$30 million following an investigation into their predatory practices, also used similar manipulative tactics.<sup>46</sup> Corinthian made false statements about job placement rates and engaged in unlawful debt collection tactics.<sup>47</sup> Corinthian used racially biased marketing and spent over \$600,000 for two weeks of advertising on the Black Entertainment Television Channel (BET).<sup>48</sup> Ashford University and Corinthian College are clear examples of how these institutions use manipulative tactics to target low-income and minority students.

### III. THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 was enacted “to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining

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<sup>41</sup> Bonadies, *supra* note 33.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



power to secure for themselves a minimum subsistence wage.”<sup>49</sup> The FLSA defines an employee as “any individual employed by an employer.”<sup>50</sup> The FLSA defines an employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>51</sup> and employ as “to suffer or permit to work.”<sup>52</sup>

In *Walling v. Portland Terminal Co.*,<sup>53</sup> the United States Supreme Court held that the FLSA covers “trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation.”<sup>54</sup> If an employer-employee relationship exists under the FLSA, the employer must pay the employee at least \$7.25 per hour,<sup>55</sup> the current federal minimum wage.<sup>56</sup> The FLSA ensures that if an individual is an employee, the employer pays that employee for his or her work.<sup>57</sup>

Students can also bring claims under the FLSA.<sup>58</sup> If students believe that they should be compensated for their work and brings a lawsuit under the FLSA, most courts use a variation of the primary beneficiary test to determine whether the student is an employee under the FLSA.<sup>59</sup> The Department of Labor has stated that whether an intern or trainee is an employee under the FLSA depends on the “unique circumstances of each case.”<sup>60</sup>

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<sup>49</sup> *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1207 (11th Cir. 2015) (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945)). See also 29 U.S.C.A. § 201-202(a) (1938).

<sup>50</sup> 29 U.S.C.A. § 203(e)(1).

<sup>51</sup> *Id.* § 203(d).

<sup>52</sup> *Id.* § 203(g).

<sup>53</sup> 330 U.S. 148, 151 (1947).

<sup>54</sup> *Id.*

<sup>55</sup> U.S. DEP’T OF LAB. WAGE AND HOUR DIV., *Fact Sheet 13: Emp. Relationship Under the Fair Lab. Standards Act (FLSA)*, (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship#:~:text=In%20the%20application%20of%20the,which%20he%20or%20she%20serves.>

<sup>56</sup> This article is limited to federal law and the Fair Labor Standards Act and will not address the issue under state law.

<sup>57</sup> U.S. DEP’T OF LAB. WAGE AND HOUR DIV., Field Assistance Bulletin No. 2018-2 (Jan. 5, 2018).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

#### IV. THE PRIMARY BENEFICIARY TEST

The primary beneficiary test is used to determine whether an employment relationship exists by determining which party receives the primary benefit from the relationship.<sup>61</sup> The primary beneficiary test was first announced by the Supreme Court in *Walling v. Portland Terminal Co.*<sup>62</sup> in 1947. In *Portland Terminal Co.*, trainees sued Portland Terminal Company for compensation under the FLSA for a seven-to-eight-day training course they underwent to become certified brakemen.<sup>63</sup> As part of the training course, the men first learned how to do routine activities and then, under close employee supervision, were allowed to complete the actual work of a brakeman.<sup>64</sup> The trainees did not pay for the course, their work did not displace the work of the employees, and it did not further the company business, but sometimes actually hindered it.<sup>65</sup> After successful completion of the training program, the men were put on a list from which their names could be drawn if the company needed their services.<sup>66</sup>

The Supreme Court stated that it was “without doubt” that the FLSA covered the work of “trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation.”<sup>67</sup> However, because the FLSA defines employ as including “to suffer or permit to work,” the Court determined that the Act was not intended to include all persons who “without any express or implied compensation agreement,” are working on the premises of another for their advantage.<sup>68</sup> In this case, the Supreme Court held that because the railroad received no “immediate advantage” from the trainees’ work, the trainees should not be considered employees under the FLSA.<sup>69</sup>

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<sup>61</sup> *Eberline v. Douglas J. Holdings, Inc.*, 339 F. Supp. 3d 634, 642 (E.D. Mich. 2018).

<sup>62</sup> 330 U.S. 148 (1947).

<sup>63</sup> *Id.* at 149–50.

<sup>64</sup> *Id.* at 149.

<sup>65</sup> *Id.* at 150–53.

<sup>66</sup> *Id.* at 150.

<sup>67</sup> *Id.* at 151.

<sup>68</sup> *Id.* at 152.

<sup>69</sup> *Id.* at 153.

### A. The Primary Beneficiary Test Analysis

Typically, at specialized training and licensing certification schools, many of which are for-profit institutions, students must perform tasks that blur the line between student and employee. In subsequent lawsuits, circuit courts have favored the primary beneficiary test to determine whether a student is an employee under the FLSA; however, the courts have examined different factors to make this determination.<sup>70</sup> Although some courts have used this test differently, the focus of the test is to look at which party receives the primary benefit from the relationship. The circuit courts have split their primary beneficiary analysis into two categories. Some courts have looked to *Glatt v. Fox Searchlight Pictures*,<sup>71</sup> in which the Second Circuit focused on a set of factors that analyze the benefit that the student receives from the educational context while still relying on whether the employer's program is taking unfair advantage of the student or intern. Other courts have looked to *Solis v. Laurelbrook Sanitarium & School, Inc.*,<sup>72</sup> in which the Sixth Circuit makes its primary beneficiary determination by focusing on factors such as whether the relationship replaces paid employees and the educational value derived from the relationship.<sup>73</sup>

#### 1. The Glatt Factors Analysis

In *Schumann v. Collier Anesthesia, P.A.*,<sup>74</sup> twenty-five registered nurse anesthetists (SRNAs) sued Wolford College LLC, a for-profit college in Florida, for unpaid wages and overtime under the FLSA.<sup>75</sup> Wolford College is owned by Defendant Lynda Waterhouse and other anesthesiologists who have an "ownership interest" in Defendant Collier Anesthesia, P.A., ("Collier").<sup>76</sup> Wolford College offers a twenty-eight month Master of Science degree in nurse

<sup>70</sup> See *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (2d Cir. 2015); See also *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518, 529 (6th Cir. 2011).

<sup>71</sup> 791 F.3d 376 (2d Cir. 2015).

<sup>72</sup> 642 F.3d 518, 529 (6th Cir. 2011).

<sup>73</sup> *Id.*

<sup>74</sup> 803 F.3d 1199 (11th Cir. 2015).

<sup>75</sup> *Id.* at 1202.

<sup>76</sup> *Id.* at 1203.

anesthesia, where the first three semesters are classroom learning, and the last four are clinical experience.<sup>77</sup>

Under Florida Law, to become a certified registered nurse anesthetist (CRNAs), students must complete a minimum of 550 clinical cases in different surgical procedures.<sup>78</sup> Along with the administration of anesthesia and monitoring of patients, students must also know how to “complete preoperative forms for patients; set up anesthesia equipment; draw proper medications; monitor patients through the induction, maintenance, and emergence phases of anesthesia; stock and re-stock anesthesia carts; prepare rooms for use; clean equipment; and serve while ‘on call.’”<sup>79</sup>

The former students argued that their clinical education was not just education, but rather, that they served as “employees” as defined by the FLSA.<sup>80</sup> The former students submitted evidence that Collier saved money by displacing licensed CRNAs with SRNAs, that the students worked over forty hours a week, that their eight-hour shifts were generally over eight-hour shifts, and they were scheduled for 365 days a year.<sup>81</sup> The former students’ argument that they displaced the work of CRNAs and saved Collier money was largely dependent upon the testimony of Barbara Rose, a former employee of Collier, who was in charge of scheduling assignments at Collier’s clinical sites.<sup>82</sup> Rose stated that she “strived to use SRNAs to reduce the number of Collier CRNAs needed for the schedule.”<sup>83</sup>

Wolford provided evidence at trial to the contrary, showing that the students were never guaranteed employment with Collier after graduation.<sup>84</sup> The students signed Wolford’s handbook with the understanding that they would not become employed through their participation in the clinical program, and that having the students participate in procedures slows down the anesthesia process because they need training and may make mistakes that the CRNA needs to fix.<sup>85</sup> The students responded to this argument by referring to the “Revised Teaching Rule,” which stated that Collier could be

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1204.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1205.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1204.

<sup>85</sup> *Id.* at 1204–06.

reimbursed for student activities.<sup>86</sup> Because of this rule, Collier instituted a two-to-one SRNA-to-CRNA supervision ratio.<sup>87</sup> Collier admitted that it billed Medicare for some patients using the rule, but also stated that its payroll costs did not change despite this new rule.<sup>88</sup>

The Eleventh Circuit stated that although it believed the proper test to use to determine if the students were employees under the FLSA was the primary beneficiary test the Supreme Court explained in *Portland Terminal Co.*, it did not believe that a strict comparison should be made because *Portland Terminal Co.* was decades old and the facts greatly differed from the case at bar.<sup>89</sup> The court stated that “[l]onger-term, intensive modern internships that are required to obtain academic degrees and professional certification and licensure in a field are just too different from the short training class offered by the railroad in *Portland Terminal* for the purpose of creating its own labor pool.”<sup>90</sup> Instead, the court looked to *Glatt v. Fox Searchlight Pictures*,<sup>91</sup> in which the Second Circuit compared the modern internship to the facts in *Portland Terminal Co.*<sup>92</sup>

The Eleventh Circuit decided that the *Glatt* factors were the best way to decide which party receives the primary benefit where both parties benefit greatly from the relationship.<sup>93</sup> These factors “focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is otherwise abusive towards the student.”<sup>94</sup>

The *Glatt* factors include a non-exhaustive list of seven factors the court should consider when deciding which party has the primary benefit of the relationship.<sup>95</sup> The factors are the extent to which (1) the intern and the employer understand that the intern is not to be compensated,<sup>96</sup> (2) the internship provides training similar to that

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<sup>86</sup> *Id.* at 1206.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1203.

<sup>90</sup> *Id.* at 1211.

<sup>91</sup> 791 F.3d 376 (2d Cir. 2015).

<sup>92</sup> *Schumann*, 803 F.3d at 1210.

<sup>93</sup> *Id.* at 1211.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

provided in an educational environment,<sup>97</sup> (3) the internship is related to the intern's formal education program by integrated coursework or academic credit, (4) the internship accommodates the intern's academic coursework by taking into account the academic calendar, (5) the internship's duration is limited to the period that the internship provides the intern with beneficial learning, (6) the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern, and (7) the intern and the employer understand that the intern is not entitled to a job after the completion of the internship.<sup>98</sup>

The court remanded the case to the district court with instructions to analyze who received the primary benefit of the relationship by using the *Glatt* factors.<sup>99</sup> Because an internship differs slightly from the clinical experience in this case, the court modified some of the factors.<sup>100</sup> The fourth factor requires the court to consider whether there is an appropriate reason for clinical education when school is out of session.<sup>101</sup> Further, for the fifth factor, the court should consider "whether the duration of the internship is grossly excessive in comparison to the period of beneficial learning" because an internship is not an "exact science."<sup>102</sup> Lastly, the district court should determine whether the assigned schedule is necessary for the type of training the students are completing.<sup>103</sup>

*Benjamin v. B&H Education Inc.*<sup>104</sup> involved cosmetology students seeking compensation for work done at the Marinello Schools of Beauty, a for-profit school operated by Defendant B&H Education, Inc.<sup>105</sup> The students argued that they were entitled to compensation under the FLSA for work done at the school because B&H did not properly educate and train them, and instead used them for unpaid labor.<sup>106</sup> B&H has schools in Nevada and California that provide the

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<sup>97</sup> This includes the clinical and other hands-on training provided by educational institutions.

<sup>98</sup> *Schumann*, 803 F.3d at 1211–12 (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1213.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 877 F.3d 1139 (9th Cir. 2017).

<sup>105</sup> *Id.* at 1141–42.

<sup>106</sup> *Id.*

necessary classroom and clinic instruction required to take the licensing exam in both states.<sup>107</sup> In addition to cosmetology skills, the state licensing exam tests “sanitation and cleaning knowledge.”<sup>108</sup> These cosmetology students practiced their skills on customers in the clinic with minimal instructor supervision.<sup>109</sup> The students had cleaning and customer service duties that included “sanitizing their work stations, laundering linens, dispensing products, greeting customers, making appointments, and selling products.”<sup>110</sup>

The Ninth Circuit reasoned that to determine whether the students should be considered employees under the FLSA, the primary beneficiary test should be used because it best captures the economic realities test followed by the Supreme Court in cases outside the educational context.<sup>111</sup> Under the economic realities test, the two main factors the Supreme Court considered were that the volunteers were financially dependent on the foundation where they worked for long periods of time, and that the volunteers expected to be awarded “in-kind non-cash” benefits in return for their services.<sup>112</sup>

After applying the primary beneficiary test, the court held that the cosmetology students were not employees under the FLSA.<sup>113</sup> In making this determination, the court analyzed the students’ situation using the *Glatt* factors stated above.<sup>114</sup> After examining these factors, the court concluded that the students were not employees under the FLSA.<sup>115</sup> The students did not expect to be compensated for their work at the school, they received hands-on training and academic credit, and the clinical work allowed the students to complete the hours necessary to take the licensing exam.<sup>116</sup> Additionally, there was no evidence that the school required the students to stay in the program for longer than

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<sup>107</sup> *Id.* at 1142.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1144; *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (holding that the FLSA test of employment is one of “economic reality”); *Rutherford Food Corp v. McComb*, 331 U.S. 722 (1947) (using the economic reality test to determine if an employment relationship exists depends on the “circumstances of the whole activity and the parties’ respective contributions to the accomplishment of a common objective”).

<sup>112</sup> *Benjamin*, 877 F.3d at 1144.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1146.

<sup>115</sup> *Id.* at 1147.

<sup>116</sup> *Id.*

necessary to take the exam.<sup>117</sup> The students did not displace the paid employees because the school employed staff that would “instruct students, run clinics, operate front desks, inventory and stock the dispensary, handle the logistical needs of the clinics, and perform nighttime janitorial services.”<sup>118</sup> Finally, the students had no expectation of employment after graduation.<sup>119</sup>

The facts in *Velarde v. GW GJ, Inc.*<sup>120</sup> are similar to those in *Benjamin*.<sup>121</sup> The Plaintiffs were cosmetology students at the Academy, a for-profit cosmetology training school in Erie County, New York.<sup>122</sup> Three years after graduating from the Academy, the students sued for unpaid wages for services performed at the salon during their time at the school.<sup>123</sup> After completing eight weeks of classroom instruction, the students worked thirty-four hours per week for twenty-two weeks without any pay except for nominal tips from customers.<sup>124</sup> Like the students in *Benjamin*, the students completed cosmetology services to become licensed, while also completing janitorial and clerical services during their training.<sup>125</sup> The Academy’s revenue came from the students’ work in the salon and the students’ tuition and other fees.<sup>126</sup>

The Second Circuit adopted the primary beneficiary test created in *Glatt* because it said “disentangling the threads of a complex economic fabric and teasing out the respective benefits garnered by students and their commercial training programs is key to determining whether, for FLSA purposes, a trainee is serving *primarily* as an employee of that school or training program—or is *primarily* a student.”<sup>127</sup> Using this test, the Second Circuit determined that the

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1147–48.

<sup>119</sup> *Id.* at 1148.

<sup>120</sup> 914 F.3d 779 (2d Cir. 2019).

<sup>121</sup> See *Benjamin v. B&H Educ. Inc.*, 877 F.3d 1139 (9th Cir. 2017) (*Benjamin* involved cosmetology students who sued B&H Education, Inc. for compensation for work completed during their cosmetology program. The students argued that the school did not properly educate and train them, and instead used them for unpaid labor.).

<sup>122</sup> *Id.* at 781.

<sup>123</sup> *Id.* at 782.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 785.



students were the primary beneficiary of their relationship with the school and were not employees under the FLSA.<sup>128</sup>

At the Academy, the students completed the required 1,000 hours of coursework, including many hours of supervised work in the salon which was necessary to take the licensing exam in New York.<sup>129</sup> The court stated that the clerical and janitorial work that the students were asked to perform was a part of their practical skills learning and gave them the ability to familiarize themselves with what they may do in their day-to-day life upon graduation.<sup>130</sup> Additionally, the students failed to show that their work replaced the work of paid employees.<sup>131</sup> The court relied on a prior case where the Second Circuit stated that “[a] student’s work is ‘complementary if it requires some level of oversight or involvement by an employee, who may still bear primary responsibility.’”<sup>132</sup> For these reasons, the court determined that the students were not employees under the FLSA.<sup>133</sup>

## 2. *The Primary Beneficiary Test: The Laurelbrook Analysis*

In *Solis v. Laurelbrook Sanitarium & School, Inc.*,<sup>134</sup> the Sixth Circuit decided that the primary beneficiary test was appropriate to determine whether students should be considered employees under the FLSA.<sup>135</sup> Although *Laurelbrook* involved a nonprofit corporation, the analysis still provides guidance for Sixth Circuit cases involving for-profit institutions and the FLSA. In *Laurelbrook*, Department of Labor Secretary Hilda Solis brought an action against Laurelbrook Sanitarium and School, Inc. for a violation of the child labor provisions of the FLSA.<sup>136</sup> Laurelbrook is a nonprofit corporation with both academic and vocational programs, one of their main vocational programs being a Medicaid-funded nursing home.<sup>137</sup> This fifty-bed,

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<sup>128</sup> *Id.* at 783.

<sup>129</sup> *Id.* at 786.

<sup>130</sup> *Id.* at 787.

<sup>131</sup> *Id.* at 788.

<sup>132</sup> *Id.* (citing *Wang v. Hearst Corp.*, 877 F.3d 69, 75 (2d Cir. 2017)).

<sup>133</sup> *Id.* at 789.

<sup>134</sup> 642 F.3d 518, 529 (6th Cir. 2011).

<sup>135</sup> *Id.* at 529.

<sup>136</sup> *Id.* at 519.

<sup>137</sup> *Id.* at 523.

intermediate-care nursing home is called the Sanitarium, where students are trained to provide medical assistance to patients.<sup>138</sup>

The Sixth Circuit held that “the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship.”<sup>139</sup> To make this primary beneficiary determination, the court listed factors to consider such as whether the relationship takes the place of paid employees and the “educational value derived from the relationship.”<sup>140</sup> In this case, the benefit that Laurelbrook was receiving from the students’ vocational program was weighed against the benefit that the students were receiving from the program itself.<sup>141</sup> The school received benefits from the students’ work such as contribution to the maintenance of the school, payment from the services provided by the students in the Sanitarium, contribution to the licensing requirement for the Sanitarium, and proceeds from the sales that students made which directly contributed to Laurelbrook’s operation.<sup>142</sup> The benefits the students received from the school included hands-on training with tools, which made them more eligible for a career in a vocation after graduation.<sup>143</sup> Additionally, the evidence showed that the students did not displace the paid employees and the instructors spent extra time watching over the students instead of performing other work.<sup>144</sup> The Sixth Circuit found that the students received the primary benefit from their time at Laurelbrook, and for that reason, the students were not employees under the FLSA.<sup>145</sup>

Seven years later, the United States District Court for the Eastern District of Michigan, Southern Division addressed this same question in the context of a for-profit vocational school in *Eberline v. Douglas J. Holdings, Inc.*<sup>146</sup> The district court, in this case, took a different approach to the primary beneficiary test than the Sixth Circuit applied in *Laurelbrook*.<sup>147</sup> Douglas J. Holdings (“Douglas J.”) owned

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 529.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 530–31.

<sup>142</sup> *Id.* at 530.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 530–31.

<sup>145</sup> *Id.* at 532.

<sup>146</sup> 339 F. Supp. 3d 634, 636 (E.D. Mich. 2018).

<sup>147</sup> *Id.* at 643.

six for-profit cosmetology schools, which between 2010 and 2014, made a profit of over \$1.5 million per year.<sup>148</sup> The main source of revenue for Douglas J. was from tuition, which was \$17,850 for the full-time program and \$17,000 for the part-time program, as well as the sale of cosmetology training kits, beauty product salon service sales that the students provided to the public.<sup>149</sup>

Three former Douglas J. students sued the institution for compensation under the FLSA for the cleaning, laundry and restocking completed during their time at the school.<sup>150</sup> Although the students provided salon services to the public as part of their training, Douglas J. employed other staff at the salon.<sup>151</sup> Douglas J. employed aesthetics and guest services support staff.<sup>152</sup> The support staff's main job was to ensure the salon was clean by providing students with towels and other products, and doing laundry and dishes, among other things.<sup>153</sup> The guest services support staff worked at the front desk and kept the waiting room clean.<sup>154</sup> The school had a nighttime janitorial service that cleaned the facilities six nights a week.<sup>155</sup>

To take the state-administered licensing exam and become a licensed cosmetologist in Michigan, students must spend 1,500 hours in a clinical and classroom setting.<sup>156</sup> Because Douglas J. was an accredited and licensed cosmetology school, it needed to conform its curriculum to what is tested on the licensing exam.<sup>157</sup> The court described the state curriculum:

eighty practical hours of facials, fifty-five practical hours of manicures, 400 practical hours of hairdressing, 170 practical hours of hair coloring, and 180 practical hours of chemical hair restructuring, among other categories of skills. It also mandated forty clinical hours on Sanitation/Patron Protection, Laws & Rules,

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<sup>148</sup> *Id.* at 637–43.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 636.

<sup>151</sup> *Id.* at 637.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 638.

<sup>157</sup> *Id.*

Personal Hygiene, Salon Management, [and]  
Mechanical & Electrical Equipment Safety.<sup>158</sup>

The students tracked their hours in a log that was approved by their instructor after completion of a task.<sup>159</sup>

In addition to completing the requirements to take the licensing exam, one student also explained how the students would spend time on tasks they considered outside the scope of their curriculum.<sup>160</sup> The students testified that they would spend hours doing laundry, sweeping the salon floors, cleaning and stocking the shelves in the waiting area, cleaning the breakroom, emptying the trash, and cleaning the classrooms.<sup>161</sup> The students explained that on slow days in the salon they would spend multiple hours cleaning and at least half an hour cleaning on busier days.<sup>162</sup> Instructors were encouraged to have the students complete these cleaning tasks and students who refused would be sent home for the day and would have to make up the hours on a different day.<sup>163</sup> Mondays were known as “strictly cleaning” days because the salon was closed to the public and on these days the students would deep clean the clinic and the classrooms.<sup>164</sup> One of the students estimated that “348 of her 1,075 clinical and unassigned hours were spent cleaning.”<sup>165</sup>

Cleaning tasks were not the only jobs the students were given outside of their curriculum.<sup>166</sup> The students also helped with guest services by getting salon guests beverages, sweeping and dusting, and helping sell products at the salon.<sup>167</sup> The school kept track of how many products the students sold and provided the students with incentives to sell the products.<sup>168</sup> Because of the lack of designated areas for cleaning and sales in the student’s hour log, the instructors told the students to write down these tasks in whatever area they needed to fulfill hours.<sup>169</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 639.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 639–40.

<sup>164</sup> *Id.* at 640.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

Upon reviewing the facts of this case, the District Court for the Eastern District of Michigan determined that the relationship between the school and the students should be analyzed the same way the court analyzed the relationship in *Schumann*.<sup>170</sup> If the court determined that the activity is within the curriculum, then the primary beneficiary test used in *Laurelbrook* applies.<sup>171</sup> However, if the task is considered outside of the curriculum or learning situation, the court must look at whether “the employer is taking unfair advantage of the student’s need to complete the internship or educational program.”<sup>172</sup> If this is the case, then the student would be considered an employee for any hours spent on the task considered outside of the curriculum.<sup>173</sup>

The students in *Eberline* asked that the District Court for the Eastern District of Michigan find that they should be considered employees for their work cleaning, doing laundry, and restocking shelves.<sup>174</sup> The court found that the cleaning, laundry, and restocking tasks were outside of the student curriculum.<sup>175</sup> Once the court made this determination, it next analyzed whether Douglas J. was taking unfair advantage of the students.<sup>176</sup> The court found that Douglas J. was taking unfair advantage of the students because Douglas J. made the educational program implicitly and explicitly contingent on the student’s completion of the cleaning tasks.<sup>177</sup>

Lastly, to consider an intern or student an employee, the FLSA includes a provision that states that the task must not be *de minimus*, meaning that the student or intern must have spent a substantial amount of time on the task, not just a few seconds or minutes.<sup>178</sup> The *Eberline* court concluded that the students spent a substantial amount of time on the cleaning tasks.<sup>179</sup> Considering this analysis, the court found in favor of the students in *Eberline* and held that the students were the primary beneficiary of the relationship; however, because the non-

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<sup>170</sup> *Id.* at 643.

<sup>171</sup> *Id.* (citing *Schumann*, 803 F.3d at 1214–15).

<sup>172</sup> *Id.* (citing *Schumann*, 803 F.3d at 1214–15).

<sup>173</sup> *Id.* at 643–44 (citing *Schumann*, 803 F.3d at 1215).

<sup>174</sup> *Id.* at 644.

<sup>175</sup> *Id.* at 646.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 647 (citing *White v. Baptist Mem’l Health Care Corp.*, 699 F.3d 869, 873 (6th Cir. 2012) (quoting *Hill v. U.S.*, 751 F.2d 810, 814 (6th Cir. 1984)).

<sup>179</sup> *Id.*

curricular tasks were so far outside their curriculum, the students should be considered employees with respect to the cleaning tasks.<sup>180</sup>

Douglas J. appealed the district court's decision to the Sixth Circuit Court of Appeals.<sup>181</sup> The Sixth Circuit first asserted that the primary beneficiary test should be used in this case because the students were working at the salon for educational purposes and these janitorial tasks "spr[un]g from the students' relationship with Douglas J."<sup>182</sup> Secondly, the court reasoned that the primary beneficiary analysis is only applied to the work said to fall outside their curriculum, while taking into account any other benefits the work has "as a result of its place in the educational relationship."<sup>183</sup> The court can apply the primary beneficiary test only to the "segment of work" at issue because the Department of Labor has issued regulations that make it clear that a person can be both an employee in one capacity and a non-employee in another.<sup>184</sup> This application of the primary beneficiary test gives the students the opportunity to be compensated for work that, although done in an educational setting, does not provide a benefit to the student that surpasses the benefit the school is receiving.<sup>185</sup>

The Sixth Circuit determined that the district court incorrectly applied the primary beneficiary test as it was used in *Laurelbrook* because that court did not look at the fact that the cleaning tasks took place within the "educational context, regardless of its ultimate educational benefit."<sup>186</sup> The Sixth Circuit reversed the district court's judgment that the plaintiffs were employees with respect to the cleaning, laundry and restocking tasks, and remanded the case back to the district court with instructions to apply the primary beneficiary test and consider the factors discussed in *Laurelbrook*.<sup>187</sup> In addition to considering the factors in *Laurelbrook*, the Sixth Circuit instructed the district court to consider whether the tasks were mandatory or voluntary; the relationship of the work under scrutiny to the school curriculum; state regulations and the school's mission; how the work performed relates to the work the students will be doing in a real-world setting; the academic credit the students obtained for the work; and

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<sup>180</sup> *Id.*

<sup>181</sup> *Eberline v. Douglas J. Holdings, Inc.*, 982 F.3d 1006 (6th Cir. 2020).

<sup>182</sup> *Id.* at 1014.

<sup>183</sup> *Id.* at 1014–17.

<sup>184</sup> *Id.* at 1015 (citing 29 C.F.R. § 553.103 (2021)).

<sup>185</sup> *Id.* at 1018.

<sup>186</sup> *Id.* at 1013.

<sup>187</sup> *Id.* at 1018.

whether the work was for “de minimis amounts of time” or for too short of a time to be considered significant.<sup>188</sup>

In *Anderson v. Mt. Clemens Pottery Co.*,<sup>189</sup> which was overturned on grounds unrelated to the “de minimis” standard, the Supreme Court defined what amount of work should be considered “de minimis.”<sup>190</sup> The Court in this case stated that:

When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee must give up a substantial measure of his time and effort that compensable working time is involved.<sup>191</sup>

What qualifies as a “substantial measure of time and effort” has not been established by the Supreme Court; however, the Court makes it clear that a few seconds or minutes of work would be considered “de minimis,” while anything more than that is likely up for debate.

### **B. Summary of the Primary Beneficiary Test Interpretations**

Courts have interpreted the primary beneficiary test in different ways.<sup>192</sup> In *Schumann v. Collier Anesthesia, P.A.*,<sup>193</sup> *Benjamin v. B&H Education, Inc.*,<sup>194</sup> and *Velarde v. GW GJ, Inc.*,<sup>195</sup> the courts applied the seven *Glatt* factors to decide which party has the primary benefit of the relationship.<sup>196</sup> They reasoned that these factors are the best way

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<sup>188</sup> *Id.* at 1018–19.

<sup>189</sup> 328 U.S. 680 (1946).

<sup>190</sup> *Id.* at 692.

<sup>191</sup> *Id.*

<sup>192</sup> *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *Eberline v. Douglas J. Holdings, Inc.*, 339 F. Supp. 3d 634 (E.D. Mich. 2018); *Eberline v. Douglas J. Holdings, Inc.*, 982 F.3d 1006 (6th Cir. 2020); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015); *Benjamin v. B&H Education, Inc.*, 877 F.3d 1139 (9th Cir. 2017); *Velarde v. GW GJ, Inc.*, 914 F.3d 779 (2d Cir. 2019).

<sup>193</sup> 803 F.3d 1199 (11th Cir. 2015).

<sup>194</sup> 877 F.3d 1139 (9th Cir. 2017).

<sup>195</sup> 914 F.3d 779 (2d Cir. 2019).

<sup>196</sup> *Schumann*, 803 F.3d at 1211; *Benjamin*, 877 F.3d at 1147.

to decide which party receives the primary benefit when both parties benefit greatly from the relationship.<sup>197</sup> These factors “focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is otherwise abusive towards the student.”<sup>198</sup>

Under the *Laurelbrook*<sup>199</sup> analysis, the benefit that the school receives from the students should be weighed against the benefit that the students realize from the school’s program itself.<sup>200</sup> Under the Eastern District of Michigan’s analysis in *Eberline*, if the court determines that the activity is within the school’s curriculum, then the primary beneficiary test used in *Laurelbrook* applies.<sup>201</sup> But, if the activity is considered outside of the curriculum or learning situation, the court must look at whether “the employer is taking unfair advantage of the student’s need to complete the internship or educational program.”<sup>202</sup>

On appeal by Douglas J., the Sixth Circuit found that the district court incorrectly applied the primary beneficiary test.<sup>203</sup> The Sixth Circuit stated that the district court should have used the primary beneficiary test as it was used in *Laurelbrook* because the students were working at the salon for educational purposes and these janitorial tasks derived from the students’ relationship with Douglas J.<sup>204</sup> The Sixth Circuit also held that courts should apply the primary beneficiary test only to the “segment of work” at issue because the Department of Labor has issued regulations that make it clear that a person can be both an employee in one capacity and a non-employee in another.<sup>205</sup>

## V. SAFEGUARDING VULNERABLE STUDENT WITH THE PRIMARY BENEFICIARY TEST

Although not explicitly stated, the version of the primary beneficiary test used in *Eberline*<sup>206</sup> considers the danger posed by the

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<sup>197</sup> *Schumann*, 803 F.3d at 1211.

<sup>198</sup> *Id.*

<sup>199</sup> 642 F.3d 518, 529 (6th Cir. 2011).

<sup>200</sup> *Laurelbrook*, 642 F.3d at 530–31.

<sup>201</sup> *Eberline*, 339 F. Supp. 3d at 643 (citing *Schumann*, 803 F.3d at 1214–15).

<sup>202</sup> *Id.* (citing *Schumann*, 803 F.3d at 1214–15).

<sup>203</sup> *Eberline*, 982 F.3d at 1014–15.

<sup>204</sup> *Id.* at 1014.

<sup>205</sup> *Id.* at 1015 (citing 29 C.F.R. § 553.103 (2021)).

<sup>206</sup> 339 F. Supp. 3d 634 (E.D. Mich. 2018).



for-profit business model.<sup>207</sup> The district court recognized the potential for for-profit institutions to employ abusive and manipulative tactics.<sup>208</sup> As such, it employed a primary beneficiary test that takes into consideration the unfair advantage of these students and employs a test that does not automatically consider a task to be within the educational context if it is assigned by a teacher who also gives the student the required assignment.<sup>209</sup> The version of the primary beneficiary test advocated by this court helps diminish the threat posed by the goal of the for-profit business model, which is to make as much money as possible at the expense of the students. In *Eberline*, the district court recognized that activities that fall “beyond the confines of the learning situation” are within the protection of the FLSA when the employer uses the student’s need to complete his or her education to take unfair advantage of the student.<sup>210</sup>

In *Eberline*, the district court laid out the test in a way that safeguards against exploitation of students at for-profit institutions.<sup>211</sup> The court explained that if the complained of activity is “outside the training or learning situation...then the Court must look at whether the employer is taking unfair advantage of the student’s need to complete the internship or educational program.”<sup>212</sup> If so, then the student would “qualify as an ‘employee’ for all hours expended in...tasks so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship.”<sup>213</sup>

The district court in *Eberline* also acknowledged the power imbalance between Douglas J. and its students, which goes to the heart of the problem with the for-profit business model.<sup>214</sup> Students at for-profit institutions spend thousands of dollars, take out loans, and find themselves trapped and deceived because a program is not what it was

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<sup>207</sup> The court suggests that the first determination to be made is whether the “complained of activity” falls within the learning situation. If it does, then the primary beneficiary test in *Laurelbrook* applies. If it does not and the activity is “well beyond the bounds of what could fairly be expected to be a part of the internship or educational program,” then the court “must look at whether the employer is taking unfair advantage of the student’s need to complete” the program. *Eberline*, 339 F. Supp. 3d at 643.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Eberline*, 339 F. Supp. 3d at 643.

<sup>211</sup> *See id.* at 641–45.

<sup>212</sup> *Id.* at 643–44 (citing *Schumann*, 803 F.3d at 1214–15).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 646.

made out to be. The *Eberline* court points out that the students had no alternative but to complete the cleaning, laundry, and restocking tasks because if they refused to do so, they would be sent home and the \$18,000 they spent on tuition and student loans would have been for nothing.<sup>215</sup>

These students are not spending this money to clean, do laundry and restock shelves. They are spending this money because they want a useful, quality education that will make them a competitive applicant in the cosmetology field. For-profit schools take advantage of the fact that students just spent thousands of dollars on an education and assign the students these tasks because they know that the students have too much to lose if they withdraw.

The Sixth Circuit's decision to reverse the district court's judgment on appeal will likely have a detrimental impact on students at for-profit institutions and allow these institutions to continue to benefit from the exploitative tactics. Because of the Sixth Circuit's ruling in *Eberline*,<sup>216</sup> if students continue to sue for-profit institutions under the FLSA, these institutions will be able to argue that work done by the students, although clearly outside of their curriculum, is within the "educational context," as long as they can show that the same instructor who oversaw the students "practical training" also assigned these tasks outside of their curriculum. The Sixth Circuit's statement that janitorial work, although outside of the student's curriculum is within the "education context" opens the door for these institutions to exploit their students and save money they would have spent on paid employees.

## VI. CONCLUSION

When deciding whether a student is an employee under the FLSA, courts should apply the district court's reasoning in *Eberline*. The ability of for-profit institutions to take advantage of their students through manipulative recruitment tactics, high tuition rates, large loan default rates and universal program requirements allow these institutions to create a power dynamic that greatly favors these money-hungry institutions. Douglas J., DeVry University, Corinthian College and Ashford University are clear examples of how for-profit institutions use manipulative tactics to take unfair advantage of their

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<sup>215</sup> *Id.*

<sup>216</sup> *See* 982 F.3d 1006 (6th Cir. 2020).

students and why courts should err on the side of caution when students are spending hours of their academic day on tasks that are clearly outside their curriculum.

Predatory practices at for-profit institutions will continue due to the complicity of the circuit courts in holding that tasks that spring from a student's relationship with the school, whether part of the curriculum or not, are subject to the primary beneficiary test analysis without considering the ability of for-profit institutions to take unfair advantage of their students. As the Sixth Circuit held in *Eberline*,<sup>217</sup> janitorial tasks "sprung" from a student's relationship with the school and therefore considering whether the school was taking advantage of the students was unnecessary. The district court's analysis in *Eberline*,<sup>218</sup> however, considered a for-profit institution's ability to take unfair advantage of a student and tailored the primary beneficiary test to take this into account. In its analysis, the district court stated that if the activity is outside of the curriculum, the court must first determine whether the school is taking unfair advantage of the student before determining who receives the primary benefit of the relationship.<sup>219</sup>

Although public, nonprofit, and for-profit colleges all vary in quality of education and graduation and loan default rates, these rates are most unfavorable at for-profit colleges.<sup>220</sup> At for-profit colleges, students are more likely to default on their loans, have high amounts of debt, withdraw at high rates and less likely to see any potential salary gains.<sup>221</sup> These statistics, coupled with the predatory nature of the for-profit college business model, make it imperative that courts closely analyze these institutions to ensure they are not taking advantage of their students.

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<sup>217</sup> 982 F.3d at 1014.

<sup>218</sup> 339 F. Supp. 3d at 643.

<sup>219</sup> *Id.*

<sup>220</sup> The Inst. for Coll. Access & Success, *The Evolution of the For-Profit Coll. Industry: New Challenges for Oversight*, 5 (Dec. 2019).

<sup>221</sup> *Id.*