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Hannah Oleynik*

INTRODUCTION

Tides are shifting at American universities, as students challenge their relationships with their colleges and argue for greater protections under federal law. At George Washington University, Resident Assistants ("RAs") worked to unionize and gained the support of an National Labor Relations Board ("NLRB") regional director.[1] On the courts and fields of Division I universities, NCAA athletes have challenged their tenuous relationships with the National Collegiate Athletics Association (NCAA), their universities, and their conferences, using a variety of legal mechanisms.[2] This increased activism, and especially the growing support for employment recognition for college athletes, could signal a new question for courts to unravel: when does a university student become an employee under the Fair Labor Standards Act ("FLSA")?

In this Note, I will examine this underlying question through the lens of extracurricular activities. I analyze a student worker's likelihood of success based on the current legal tests and propose an adapted version of the current primary beneficiary test in order to make FLSA recognition more likely for university student workers. Because much has been written about student athletes and their quest for employment recognition, this Note focuses instead on nonathlete student workers

* J.D., 2024, University of Pittsburgh School of Law; B.A., 2021, Pennsylvania State University. Many thanks to the excellent University of Pittsburgh Law Review editors for their hard work editing this note, and to the RAs and equipment managers I spoke with who helped inspire it.

[1] Rachel Sadon, *Resident Advisors at GWU Are Holding an Unprecedented Union Election*, DCIST (May 2, 2017, 3:44 PM), https://dcist.com/story/17/05/02/resident-advisors-at-gwu-are-holdin/.

[2] *See, e.g.*, Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021); NCAA v. Alston, 141 S. Ct. 2141 (2021).

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such as RAs and student equipment managers and assesses the feasibility of their claims under current law.

In Part I, I propose an explanation for the recent increase in student activism. In Part II, I provide an overview of the current state of the law towards students and the potential tests that courts could apply in analyzing their employment status. In Part III, I apply the framework for analyzing employee status articulated by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*,[3] to two groups of student workers: RAs and equipment managers. Finally, in Part IV, I discuss the challenges for student workers under the current legal framework and propose two mechanisms that would allow student workers to gain greater protection from their universities: (1) persuading courts to adopt an adapted version of the *Glatt* primary beneficiary test and (2) unionization.

I. A NEW STUDENT LABOR MOVEMENT: WHY NOW?

University students have never been viewed as the faces of the labor movement.[4] However, in recent years—buoyed by favorable NLRB decisions,[5] increased support for the labor movement,[6] and economic pressures exacerbated by the cost of college[7] and the COVID-19 pandemic[8]—both athletes and more traditional student workers have challenged the nature of the economic relationship between them and their universities. At Grinnell College in Iowa, a union won

[3] 791 F.3d 376 (2d Cir. 2015).

[4] *See* Jack Lillich, *The Changing Face of Labor and Labor Unions*, PURDUE UNIV. NEWS, https://www.purdue.edu/uns/html3month/2005/050831.O-Lillich.labor.html (last visited Apr. 29, 2024) (describing how the percentage of government workers with a labor union membership is more than quadruple that of private sector workers, a "dramatic shift in the kinds of jobs that are represented by a union").

[5] *See, e.g.*, *Trs. of Columbia Univ.*, 364 N.L.R.B. 1080 (2016).

[6] Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.

[7] NEETU ARNOLD, NAT'L ASS'N OF SCHOLARS, PRICED OUT: WHAT COLLEGE COSTS AMERICA 15 (2021), https://www.nas.org/reports/priced-out/full-report ("It's a long time since colleges and universities started diverting student tuition to pay for unnecessary administrative salaries and other fripperies, instead of actual education. It's a long time since students began to slip into crippling debt to pay for their inflated bills.").

[8] Katherine Mangan, *Covid-19 Pushes RAs to the Breaking Point: Some Are Striking. Others Quit.*, CHRON. OF HIGHER EDUC. (Sept. 18, 2020), https://www.chronicle.com/article/covid-19-pushes-ras-to-the-breaking-point-some-are-striking-others-quit.

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recognition for all undergraduate student employees.[9] Resident Assistants at Wesleyan University and Fordham University have formed unions.[10] Student athletes have sued their universities and the NCAA, arguing that they should be protected employees under the FLSA[11] and that the NCAA's rules violate antitrust law.[12] These actions raise an important question: why now? Prior to 2020, there were only two undergraduate student unions in the country,[13] and labor experts have argued that efforts for protection under federal labor and employment law have taken on a new tenor and momentum in recent years.[14]

Part of this change is attributable to a general resurgence in organized labor.[15] On a broad scale, the American labor movement is undergoing a renaissance: a 2022 Gallup poll found that support for labor unions had reached its highest point since 1965, with 71% of Americans approving of unions.[16] And advocacy for an increased minimum wage and increased protections—such as through the Fight for $15 campaign—has gained steam in the last decade.[17] Social movements are contagious:

[9] Kay Perkins, *Unionization is Catching on Among Undergraduate Student Workers*, NPR (June 7, 2022, 4:29 PM), https://www.npr.org/2022/06/07/1103569564/unionization-is-catching-on-among-undergraduate-student-workers.

[10] *See* Kay Perkins, *Wesleyan Student Staff Form First Known Undergrad Union to Win Voluntary Recognition*, CONN. PUB. RADIO (Mar. 25, 2022, 5:30 PM), https://www.ctpublic.org/news/2022-03-25/wesleyan-student-staff-form-first-known-undergrad-union-to-win-voluntary-recognition; Olivia Wood, *Fordham University's Resident Assistants Unionize*, LEFT VOICE (Feb. 9, 2023), https://www.leftvoice.org/fordham-universitys-resident-assistants-unionize/.

[11] *See, e.g.*, Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

[12] *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141 (2021).

[13] Willem Morris, *Undergraduate Worker Unions Are Taking Off*, JACOBIN (Apr. 16, 2022), https://jacobin.com/2022/04/undergraduate-student-worker-unions-kenyon-dartmouth-grinnell-wesleyan.

[14] *College Athletes Finding a Voice—The Status of Labor and Employment Issues in College Sports*, LEAD1 ASS'N, https://lead1association.com/college-athletes-finding-a-voice-the-status-of-labor-and-employment-issues-in-college-sports/ (last visited Apr. 29, 2024) ("Since the tragic death of George Floyd, the trend of increased student-athlete activism has aligned with the narrative in our country of people seeking more accountability and equality from individuals and entities.").

[15] McCarthy, *supra* note 6.

[16] *Id.*

[17] *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 7–8 (2016).

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http://lawreview.law.pitt.edu

observing workers in one industry use their voices to advocate for better wages and conditions can inspire other workers to do the same.[18]

The increased activism of student workers may also be tied to the increased expense of college, the pressures caused by the COVID-19 pandemic, and a greater consciousness of the inequities at play at universities. Much has been written about the social and economic impact of rising college tuition: namely, the large amount of debt that students tend to acquire along with their diplomas.[19] In 2018, the average debt for a recent graduate was $35,000.[20] These economic strains were accentuated by the pandemic, when most colleges kept tuition the same despite not offering the usual benefits of the college experience, like in-person classes and extracurricular activities.[21] Beyond the economic impact of COVID-19, the pandemic also transformed some students into essential workers who were responsible for enforcing safety protocols and keeping campus running while facing insecurity and a lack of transparency from their universities.[22]

Finally, in recent years, there has been increased consciousness about the ways that racial and social inequities manifest on college campuses.[23] Notably, lower-income students and non-white students are more likely to need to work during college.[24] Though studies show some benefits to part-time work during college,

[18] *See* David S. Meyer & Nancy Whittier, *Social Movement Spillover*, 41 SOC. PROBS. 277, 277 (1994) ("Social movements are not distinct and self-contained; rather, they grow from and give birth to other movements, work in coalition with other movements, and influence each other indirectly through their effects on the larger cultural and political environment.").

[19] *See* ARNOLD, *supra* note 7.

[20] *Id.* at 16.

[21] *Id.* at 15.

[22] *See* Mangan, *supra* note 8; Arneet Gurtatta, Opinion, *Student Workers Deserve More Support, Communication from University Amid Pandemic*, DAILY BRUIN (Mar. 7, 2021, 4:33 PM), https://dailybruin.com/2021/03/05/opinion-student-workers-deserve-more-support-communication-from-university-amid-pandemic.

[23] *See, e.g.*, Mathis Ebbinghaus & Sihao Huang, *Institutional Consequences of the Black Lives Matter Movement: Towards Diversity in Elite Education*, 21 POL. STUD. REV. 847 (2023); Elena G. van Stee, *3 Things the Pandemic Taught Us About Inequality in College—And Why They Matter Today*, CONVERSATION (Feb. 20, 2023, 8:19 AM), https://theconversation.com/3-things-the-pandemic-taught-us-about-inequality-in-college-and-why-they-matter-today-198713.

[24] Laura W. Perna & Taylor K. Odle, *Recognizing the Reality of Working College Students*, ACADEME, Winter 2020, at 17, 17, https://www.aaup.org/article/recognizing-reality-working-college-students#.ZCCRUOzMI6E.

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many students who work in college work more than the recommended twenty hours per week.[25] The ways that the college experience varies between students who must work and students who can afford to not work, coupled with economic pressures, could be sparking increased student labor activism.

Considering the general rejuvenation of the labor movement and the growth of undergraduate student activism, this Note assumes that it is only a matter of time before courts are forced to consider whether undergraduate students like Resident Assistants and athletics equipment managers, enrolled in seemingly "extracurricular" activities, are truly employees under the Fair Labor Standards Act. In analyzing this question, courts will have to grapple with the seemingly counterintuitive status of the law that says that student workers can form unions but do not have to be paid the minimum wage.[26]

II. CURRENT STATE OF THE LAW

Before delving into the FLSA's application to student workers, this Section first lays out the current state of the law. First, I explain the basic history and language of the FLSA. Second, I describe how the Department of Labor has interpreted the FLSA's provisions. Third, I highlight important Supreme Court precedent defining the term "employee," as well as lower court decisions applying the law to workers with similar experiences as student workers.

A. Fair Labor Standards Act

Congress enacted the FLSA in 1938 as complementary legislation to the National Labor Relations Act (NLRA).[27] While the NLRA protected group rights to organize labor unions, the FLSA protected the individual rights of employees.[28] The FLSA addresses its purpose as combatting the "labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency,

[25] *Id.*

[26] *Trs. of Columbia Univ.*, 364 N.L.R.B. 1080, 1080 (2016) (finding that student workers may be employees); Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1327 (10th Cir. 1981) (holding that Regis College Resident Assistants were not employees within the meaning of the FLSA); WAGE & HOUR DIV., U.S. DEP'T OF LAB., FIELD OPERATIONS HANDBOOK § 10(b)(24)(a) (2016) (stating that students participating "in activities generally recognized as extracurricular are generally not considered to be employees" under the FLSA).

[27] *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 623–24 (2019).

[28] *Id.* at 631–32.

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http://lawreview.law.pitt.edu

and general well-being of workers" and fulfills this purpose through the guarantee of a minimum wage and overtime for employees.[29] At the time of its passage, one legislator characterized the FLSA as "an honest and sincere effort to meet and not to avoid the just demands of the workingman that his fundamental rights be observed."[30]

Crucially, however, the FLSA applies only to those workers classified as employees. The definition offered by the FLSA very unhelpfully defines an employee as "any individual employed by an employer,"[31] while an employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee."[32] And, finally, to employ "includes to suffer or permit to work."[33] Though vague, these terms are interpreted broadly: speaking of the FLSA, the Supreme Court has stated that a "broader or more comprehensive coverage of employees within the stated categories would be difficult to frame."[34] From this definition, the FLSA also excludes certain categories of public servants, individuals who volunteer to perform services for a public agency, and individuals who volunteer for food banks and receive groceries.[35] Because of its ambiguous language, the FLSA provides little insight to student workers (or really, any worker) as to whether or not they are covered by the act.

B. Regulations and Administrative Interpretations

Regulations and interpretations issued by the Department of Labor's Wage and Hour Division ("WHD"), the agency tasked with administering the FLSA,[36] provide greater insight into coverage for student workers. The WHD under President Trump recently promulgated a rule addressing the distinctions between employees and independent contractors at the broadest level.[37] Though not directly on point to the

[29] 29 U.S.C. §§ 202(a), 206(a), 207(a)(1).

[30] 83 CONG. REC. 7310 (1938) (statement of Rep. William Fitzgerald).

[31] 29 U.S.C. § 203(e)(1).

[32] *Id.* § 203(d).

[33] *Id.* § 203(g).

[34] United States v. Rosenwasser, 323 U.S. 360, 362 (1945).

[35] 29 U.S.C. § 203(e)(2), (e)(4)–(5).

[36] *Id.* § 204.

[37] *See* 29 C.F.R. § 795.100 (2023); Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1638 (Jan. 10, 2024) (codified at 29 C.F.R. §§ 780, 788, 795).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

issue of student workers, the new rule is subject to greater deference than any of the interpretative rules directly addressing student workers[38] and provides an example of one of the ways that the WHD has attempted to flesh out the FLSA's vague definitions.[39] More relevantly, the WHD's *Field Operations Handbook* (the "*Handbook*") directly addresses the treatment of students involved in extracurricular activities:

> As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation is [sic] such activities would not necessarily create an employment relationship.[40]

Additionally, the *Handbook* outlines the circumstances in which "an employment relationship initially will not be asserted," including where the "activities are basically educational, are conducted primarily for the benefit of the participants, and comprise one of the facets of the educational opportunities provided to the students."[41] The *Handbook* also addresses the classification of "student-trainees," outlining six criteria that must all be met for a student trainee to not be an employee under the Act.[42] Finally, the *Handbook* again states that "[u]niversity or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act."[43] The

[38] *See* 29 C.F.R. § 795.100 (2023) ("To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded.").

[39] *See* 29 C.F.R. § 795.105.

[40] WAGE & HOUR DIV., *supra* note 26, § 10(b)(03)(e) (2016).

[41] *Id.* § 10(b)(03)(i)(1).

[42] *See* text *infra* accompanying notes 59–60.

[43] WAGE & HOUR DIV., *supra* note 26, § 10(b)(24)(a).

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http://lawreview.law.pitt.edu

Handbook distinguishes between student workers such as Resident Assistants, who receive "reduced room or board charges" and similar benefits as part of a "bona fide educational program," from students who work in dining halls and usher at sporting events "in anticipation of some compensation."[44]

The *Handbook* is a manual used by WHD staff for its interpretations of both statutory provisions and for "general administrative guidance."[45] Though the *Handbook* is not binding on courts or on the Department of Labor, it has received some deference from courts.[46] For student athletes, some courts have accorded *Skidmore* deference to the *Handbook*.[47] In *Berger v. NCAA*, the Seventh Circuit regarded the *Handbook* as persuasive authority and partially relied on the *Handbook*'s classification to support its determination that University of Pennsylvania track athletes were not employees of either their universities or of the NCAA.[48] In *Johnson v. NCAA*, the Eastern District of Pennsylvania considered the defendant NCAA and universities' motion to dismiss and made the assumption that the *Handbook* was entitled to "some deference."[49] However, the court noted that "an internal agency manual, because it 'is not subject to the kind of deliberateness or thoroughness that gives rise to significant deference,' is 'automatically at the lower end of the *Skidmore* scale of deference.'"[50]

C. Applicable Legal Tests for Employment Status

As noted above, a legal test for determining the employment status of student workers is not well-defined.[51] This Section discusses applicable Supreme Court

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[44] *Id.* § 10(b)(24)(a)–(b).

[45] *Field Operations Handbook*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/field-operations-handbook (Aug. 31, 2017).

[46] *Field Operations Handbook (FOH)*, WESTLAW: GLOSSARY (last visited Apr. 30, 2024); *see, e.g.*, Fast v. Applebee's Int'l, Inc., 638 F.3d 872, 877–79 (8th Cir. 2011) (holding that a statutory interpretation of the *Handbook* is entitled to deference).

[47] *See, e.g.*, Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *49 (E.D. Pa. May 17, 2018) ("While the DOL's interpretation in the FOH is 'not controlling' on this Court, it is 'persuasive.'") (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); Berger v. NCAA, 843 F.3d 285, 292 (7th Cir. 2016).

[48] *Berger*, 843 F.3d at 292–93.

[49] Johnson v. NCAA, 556 F. Supp. 3d 491, 504 (E.D. Pa. 2021).

[50] *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140).

[51] *See supra* Section II.A.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

precedent and provides an overview of the different precedents and legal analyses that would become relevant should a university student worker challenge their status under the FLSA. Because nonathlete student worker movements for FLSA classification are relatively rare, this Section provides an overview of cases involving volunteers, trainees, and interns, as well as recent student athlete cases.

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

Walling v. Portland Terminal Co. remains the seminal case regarding the employment status of trainees and interns.[52] In *Walling*, a railroad company offered practical training to prospective brakemen.[53] The training lasted about one week, and trainees were closely supervised by railroad employees.[54] The trainees only received a small stipend (for as long as the war lasted and if they successfully completed the program) and were certified as competent upon completion of the program.[55] The trainees were not guaranteed jobs at the end of the program, and they made the railroad less efficient because the trainees had to be supervised at all times.[56] The Supreme Court held that because the railroad did not receive an "immediate advantage," the trainees were not employees under the FLSA.[57]

The Court reasoned that the FLSA was "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another"—or all students would be considered employees of their schools.[58] *Walling*'s holding developed into a six-factor analysis used by courts and the Department of Labor to determine the employment status of trainees and similarly situated workers.[59] These criteria, derived directly from the specific facts of *Walling*, are stated clearly in the *Handbook*:

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[52] 330 U.S. 148 (1947).

[53] *Id.* at 149.

[54] *Id.*

[55] *Id.* at 150.

[56] *See id.*

[57] *Id.* at 153.

[58] *Id.* at 152.

[59] *See, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 30, 2001), *reprinted in* 2001 DOLWH LEXIS 10, at *3–6 (last visited Apr. 30, 2024) [hereinafter Wage & Hour Letter]; Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025–26 (10th Cir. 1993).

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http://lawreview.law.pitt.edu

(1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
(2) The training is for the benefit of the trainees or students.
(3) The trainees or students do not displace regular employees, but work under their close observation.
(4) The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded.
(5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
(6) The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.[60]

Though recent cases have declined to extend the *Walling* test to cases involving internships because of the factual differences between mid-twentieth century railroad training and modern internship and educational programs,[61] the case remains important as one of the few where the Court articulated criteria for determining the employment status of workers who receive an educational benefit from participation.

2. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)

Another important case decided by the Supreme Court involved whether workers who "volunteered" for a charitable organization but received significant in-kind benefits such as clothing and shelter were actually employees under the FLSA.[62] The Tony and Susan Alamo Foundation was a religious organization dedicated to conducting religious services and promoting Christianity."[63] Its income was derived from various commercial businesses rather than charitable donations, and it employed "associates" to staff the businesses.[64] These associates were former "drug addicts, derelicts, or criminals" who worked without wages but received shelter,

[60] WAGE & HOUR DIV., *supra* note 26, § 10(b)(11)(b).

[61] *See, e.g.*, Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016) (declining to use the Handbook's factors because they create a rigid test that is not applicable to all workplaces).

[62] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290 (1985).

[63] *Id.* at 292.

[64] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

clothing, and other benefits.[65] In this case, despite an associate's insistence, "characterized by the District Court as typical," that they did not want or expect wages,[66] the Court found that the associates "work[ed] in contemplation of compensation."[67] The Court distinguished the case from *Walling*, pointing to the fact that though the workers did not receive wages, they did expect the in-kind benefits and depended on the Foundation for years.[68]

Tony & Susan Alamo Foundation is useful for its analysis of the distinction between an unprotected volunteer and an FLSA employee and its use of the economic reality test. The economic reality test considers the totality of the circumstances and places special importance on the dependence of the worker to the employer.[69] Because the FLSA explicitly excludes certain types of volunteers from its definition of employees,[70] an understanding of the steps taken to move beyond "volunteer status" is essential for a university student worker to distinguish themselves as an employee.

3. Beyond *Walling*: Internships and Educational Programs

Because *Walling* relied on a rigid, fact-specific analysis, many courts have recently declined to strictly follow the *Walling* factors.[71] This Section discusses the recent adoption of the primary beneficiary test, which courts have used to analyze whether an employment relationship exists in an unpaid internship or in educational programs with work requirements.

Glatt v. Fox Searchlight Pictures, Inc., is an articulation of the primary beneficiary test from the Second Circuit. In *Glatt*, the plaintiff worked as an unpaid intern for Fox while pursuing graduate-level coursework and did not receive course credit.[72] As an intern, Glatt worked five days a week from 9:00 a.m. until 7:00 p.m. for a period of three months, where his responsibilities included filing and scanning

[65] *Id.*

[66] *Id.* at 300–01.

[67] *Id.* at 306.

[68] *Id.* at 301.

[69] *See* Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 165–66 (2006).

[70] 29 U.S.C. § 203(e)(4)–(5).

[71] *See, e.g.*, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525–26 (6th Cir. 2011).

[72] Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 531–32 (2d Cir. 2016).

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documents, maintaining personnel files, and tracking purchase orders.[73] In considering Glatt's case, the Second Circuit rejected a strict application of the Department of Labor's *Walling*-derived six factor analysis and instead adopted the primary beneficiary test to discern whether an employment relationship existed.[74] The court described the primary beneficiary test as having three components: an analysis of "what the intern receives in exchange for his work"; an examination of the intern-employer relationship's "economic reality"; and consideration of the fact that interns enter the relationship "with the expectation of receiving educational or vocational benefits" that all forms of employment do not entail.[75] To fully discern whether an employment relationship exists, the Second Circuit suggested that, when considering whether unpaid interns are employees, courts should consider seven factors, namely the extent to which:

1. both the intern and employer understand there is no expectation of compensation;
2. the internship is similar to training in an educational environment;
3. the internship is tied to a formal educational program;
4. the internship accommodates the intern's academic commitments;
5. the duration is limited to the time the internship provides the intern with beneficial learning;
6. the intern's work complements work performed by other employees; and
7. the intern understands they are not entitled to a paid job upon completion of the internship.[76]

The *Glatt* court added three new factors (factors three, four, and five) to the Department of Labor's six-factor test, each focused on the educational benefits of the internship program.[77] The *Glatt* test offers a flexible approach to employment inquiries.[78]

[73] *Id.* at 532.

[74] *Id.* at 535–36.

[75] *Id.* at 536.

[76] *Id.* at 536–37.

[77] Michael Pardoe, Glatt v. Fox Searchlight Pictures, Inc.*: Moving Towards a More Flexible Approach to the Classification of Unpaid Interns Under the Fair Labor Standards Act*, 75 MD. L. REV. 1159, 1182 (2016).

[78] *Id.* at 1188.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

Other circuits have adopted similar versions of the primary beneficiary test. The Eleventh Circuit adopted the *Glatt* factors in *Schumann v. Collier Anesthesia, P.A.*[79] In *Schumann*, students enrolled in a nurse anesthetist training program.[80] The program was designed to ensure students participated in at least 550 clinical cases, as required for students to receive licensure in accredited schools.[81] The students were often supervised by certified nurse anesthetists and performed such tasks as stocking carts, readying rooms, and preparing pre-op forms.[82] The students alleged that they worked in excess of forty hours per week and that the hospital benefitted from their labor, because fewer students working meant that more certified nurse anesthetists had to work.[83]

The Eleventh Circuit acknowledged that both the students and the hospital received benefits from the program and stated that in such cases the determining factor should be whether the benefits to the employer are abusive or unfair to the student.[84] The court determined that because students drove the need for the program to exist, and because the hospital devoted considerable time to training the students, the primary beneficiary test was inapplicable here.[85]

In *Solis v. Laurelbrook Sanitarium & School, Inc.*, the Sixth Circuit considered whether students at a boarding school with an educational curriculum that emphasized practical skills were employees.[86] As part of the practical curriculum, the students worked in the sanitarium's kitchen and housekeeping units.[87] The court found that the students were not employees, because while they provided economic benefit to the school, as the district court found, the sanitarium did not rely on the students' labor to operate; indeed, "Laurelbrook would not operate the Sanitarium if the school did not exist."[88] The court explained that factors such as "whether the

[79] Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1211–12 (11th Cir. 2015).

[80] *Id.* at 1202.

[81] *Id.* at 1203.

[82] *Id.* at 1204.

[83] *See id.* at 1204–05.

[84] *Id.* at 1211.

[85] *Id.* at 1213.

[86] Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 520–21 (6th Cir. 2011).

[87] *Id.* at 520.

[88] *Id.* at 519–20.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations."[89] The court also considered the tangible and intangible benefits conferred on students to be important: it noted that while the students received tangible benefits in terms of a vocational education, they also received intangible benefits in the form of a strong work ethic and leadership skills.[90] The Sixth Circuit emphasized the value of intangible benefits: it found that intangible benefits can tip the balance in an employer's favor, even when the employer receives tangible benefits from a student's labor.[91]

The Sixth Circuit's acceptance of intangible benefits in the primary beneficiary analysis is not uncommon. In a highly applicable case for university student workers, the Tenth Circuit held that Resident Assistants were not employees under the FLSA.[92] The RAs were responsible for tasks such as unlocking doors, encouraging participation in extracurriculars, and distributing mail.[93] Though the RAs provided economic benefit to the college, the court held that they were not employees because the RA program, considered in light of the college's overall educational purpose, provided educational benefits to students as well.[94] The Tenth Circuit agreed with the district court's conclusion that "[The RAs] enrolled as full-time students seeking growth and development from adolescents into mature human beings and desiring to earn the recognition of an academic degree."[95] In doing so, the court used the immeasurable educational benefits the RAs received to offset the measurable economic benefits the RAs provided.[96] This "totality of the circumstances" approach arguably shares similarities with use of intangible benefits which the Eighth Circuit and various district courts have accepted into their analyses.[97]

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[89] *Id.* at 529.

[90] *Id.* at 531.

[91] *Id.* at 531–32.

[92] Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1328 (10th Cir. 1981).

[93] *Id.* at 1326.

[94] *Id.* at 1327–28.

[95] *Id.* at 1328 (quoting Marshall v. Regis Educ. Corp., No. 78-M-93, 1980 U.S. Dist. LEXIS 16942, at *6 (D. Colo. May 29, 1980)).

[96] *See id.* at 1327–28.

[97] *Id.* at 1327; *see* Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005) (holding that while students performed chores that gave an economic benefit to the school, the chore requirement instilled the values of "teamwork, responsibility, accomplishment, and pride"); Woods v. Wills, 400 F. Supp. 2d 1145, 1166 (E.D. Mo. 2005) (finding that the requirement of performing security patrol did not make the students

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

4. Recent Student Athlete Cases

In recent years, student athletes have challenged their economic relationships to their universities.[98] Though this Note focuses on nonathlete student workers, a brief discussion of the pertinent issues in cases brought by student athletes challenging their employment status under the FLSA is necessary. Though there are distinctions to be made between student athletes and nonathlete student workers—namely in the labor they perform, and the educational benefits conferred by the labor—cases involving student athletes provide background into how recent courts have analyzed if and when university students can be employees of their university. They also provide insight into the challenges students workers will have to overcome if they want to be recognized as FLSA employees.

Courts have viewed the level of compensation received by student athletes as important in determining employee status. In *Livers v. NCAA*, the Eastern District of Pennsylvania determined that the plaintiff's athletic scholarship did not qualify as compensation in part because athletic and academic scholarships are not taxable income.[99] The court also stated that the plaintiff's dependence on the scholarship was not at the same level of dependence as the associates in *Tony & Susan Alamo Foundation*, and so the student athlete had not alleged sufficient facts to show employee status on this factor.[100] Similarly, the court in *Berger v. NCAA* found that the NCAA's tradition of amateurism was an essential component of the relationship between student athletes and their universities.[101] Because student athletes are aware of this tradition and nonetheless voluntarily pursue collegiate athletics for their own personal benefit rather than their universities', the court determined that the student athletes were not employees.[102]

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employees because security duty was meant to promote personal responsibility); Bobilin v. Bd. of Educ., 403 F. Supp. 1095, 1107–09 (D. Haw. 1975) (finding that many tasks performed by students have educational value and that here, "defendants have not made a showing that the cafeteria duty is so devoid of educational value as to be classified as employment").

[98] *See* cases cited *supra* note 2.

[99] Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *6 (E.D. Pa. May 17, 2018).

[100] *Id.* at *48.

[101] Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016).

[102] *Id.* at 293.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

Johnson v. NCAA is an ongoing case with interesting implications for student athletes and other student workers.[103] The district court in *Johnson* did not find that the *Field Operations Handbook* or the athletes' compensation arrangement was dispositive.[104] The court observed that universities who are members of the NCAA Division I exercise a high degree of control over student athletes: student athletes are not allowed to miss practice except for core educational classes, supervisors keep timesheets for student athletes, and the athletes are subject to student handbooks with rules about social media use and sports agents.[105] The court applied the *Glatt* factors and decided that the factors weighed in favor of finding that the athletes were employees.[106] Though the defendant universities and NCAA contended that the athletes received intangible benefits such as time management, teamwork, and work ethic,[107] the court determined that these intangible benefits were insignificant in comparison to the educational conflicts that participation in NCAA competition creates.[108] Thus, the court declined the defendants' motion to dismiss.[109]

III. CHALLENGES AND AVENUES FOR UNIVERSITY STUDENT WORKERS

In this Section, I layout one potential path to FLSA recognition for student workers. First, I discuss the threshold challenges for student workers seeking FLSA recognition. Second, I apply the adapted primary beneficiary test adopted by the

[103] Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021). Importantly, *Johnson* remains unresolved. Though the district court ruled that student athletes could pursue an FLSA claim against their universities and the NCAA, the defendants appealed to the Third Circuit. Peter Hayes, *NCAA Battling from Behind in Student Athlete Employee Suit*, BLOOMBERG L. (Jan. 17, 2023, 3:23 PM), https://news.bloomberglaw.com/litigation/ncaa-battling-from-behind-to-upend-student-athlete-employee-suit [https://perma.cc/29K9-DQ5E]. The Third Circuit began hearing arguments on the motion to dismiss on February 15, 2023. *Id.* If the Third Circuit rules in favor of the athletes, it would create a split with the Seventh and Ninth Circuits and increase the likelihood that the Supreme Court would take up the issue. *Id.* Beyond this, a ruling in favor of the student athletes would likely lead to broader implications for other university student workers.

[104] *Johnson*, 556 F. Supp. 3d at 506, 507 n.10.

[105] *Id.* at 496–98.

[106] *Id.* at 509–12.

[107] *Id.* at 505–06.

[108] *Id.* at 506.

[109] *Id.* at 512.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

Second Circuit in *Glatt* to two groups of student workers: Resident Assistants and student equipment managers.

A. Threshold Challenges: The Handbook *and the Volunteer Exclusion*

Before reaching the *Glatt* test, student workers face two hurdles. First, they must grapple with administrative interpretations which disfavor coverage for student workers. Next, student workers must distinguish themselves from "pure volunteers," who are not covered under the FLSA.

1. The *Handbook*

An initial challenge for student workers is the *Handbook*'s broad classification of a variety of student labor as non-FLSA protected work.[110] In some of the student athlete cases, the *Handbook* has been considered persuasive evidence of student athletes' classification of employees.[111] In order to succeed initially, student workers will have to address these arguments and assert that the *Handbook* is unpersuasive. In *Skidmore v. Swift & Co.*, the Supreme Court noted that:

> the rulings, interpretations and opinions of the Administrator under this Act [i.e., the FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[112]

An internal agency manual is, the Court has found, "'entitled to respect' under our decision in *Skidmore* . . . but only to the extent that those interpretations have the 'power to persuade.'"[113] The Third Circuit has found internal agency manuals to be "automatically at the lower end of the *Skidmore* scale of deference" because they are "not subject to the kind of deliberateness or thoroughness that gives rise to significant

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[110] WAGE & HOUR DIV., *supra* note 26, § 10b(03)(e).

[111] *See, e.g.*, Berger v. NCAA, 843 F.3d 285, 292 (7th Cir. 2016); Dawson v. NCAA, 250 F. Supp. 3d 401, 407 (N.D. Cal. 2017).

[112] 323 U.S. 134, 140 (1944).

[113] Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

deference."[114] Other courts have recognized that the interpretations offered by internal agency manuals are not dispositive.[115]

2. Volunteer Exclusion

The FLSA's exclusion of volunteers from protection also presents a challenge for student workers, many of whom work without traditional compensation arrangements.[116] However, *Tony & Susan Alamo Foundation* extends employee classification beyond those who receive wages: a person can also be an employee if they receive in-kind benefits and "work[ed] in contemplation of compensation."[117] The framework proposed by Mitchell H. Rubinstein might be useful to student workers for determining whether they can overcome this volunteer hurdle. Rubinstein distinguishes between "pure volunteers," who receive no tangible benefits from the organization they serve, and "volunteers plus," who receive benefits like death or disability insurance or reimbursement for driving.[118] While this framework will exclude some student workers who perform labor for their schools (such as uncompensated club leaders, for example), it also helps to distinguish the student workers who have the most viable FLSA claims from the student workers who will likely fail in court. This is because, as the Supreme Court explained, the test for whether a person is an employee hinges on the "economic reality" of the relationship between the worker and the organization.[119] While traditional wages are not necessary for a court to consider a worker an employee, courts expect to see some type of benefit conferred from organization to worker.[120] These benefit conferments are not rare occurrences in higher education. Take, for example, student RAs. Many RAs receive compensation in the form of reduced room and board rates, discounted

[114] Ebbert v. DaimlerChrysler Corp., 319 F.3d 103, 115 (3d Cir. 2003).

[115] *See* S. Forest Watch, Inc. v. Jewell, 817 F.3d 965, 971–72 (6th Cir. 2016); Moore v. Apfel, 216 F.3d 864, 868–69 (9th Cir. 2000).

[116] For example, many RAs are compensated by receiving room and board or room and board at a discount. *See, e.g.*, *Traditional Resident Advisor (Traditional RA) 2023–2024 Position Description*, UNIV. OF MICH. HOUS., https://jobs.housing.umich.edu/job-descriptions/traditional-ra-position-description-2023-2024/ (last visited May 4, 2024) [hereinafter *Michigan RA Description*].

[117] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 306 (1985).

[118] Rubinstein, *supra* note 69, at 152.

[119] *Tony & Susan Alamo Found.*, 471 U.S. at 301 (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961)).

[120] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

or free meal plans, and semester stipends.[121] Similarly, some student equipment managers, though not considered employees, receive scholarships or small stipends.[122]

Student workers who receive compensation through traditional, though inadequate, compensation packages will likely have the easiest time avoiding a "volunteer" classification—It is not really volunteering if you pursue an opportunity knowing or expecting some form of compensation. Students who are paid solely through scholarships or in-kind benefits like housing or meal benefits will likely have a greater challenge. Many courts do not recognize scholarships as compensation because they are not taxable income.[123] Thus, student workers will likely need to demonstrate a dependence on the scholarships or benefits approximating the dependence found in *Tony & Susan Alamo Foundation*. While the district court in *Livers* rejected the comparison of NCAA athletes to the associates in *Tony & Susan Alamo Foundation*, stating that the athletes' dependence on the scholarships was not great enough,[124] other student workers can present arguments of their dependence.

The workers with the strongest arguments are those who receive benefits like housing and meal plans, like RAs, because their situations are most similar to the associates in *Tony & Susan Alamo Foundation*. These student workers may struggle with the fact that their relationships are likely shorter in length than those in the associate-foundation relationship, but nevertheless, similarities abound: by agreeing to work for their universities, the student workers become dependent on their university for how they live, eat, and sleep.[125] While the court in *Livers* rejected the

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[121] *Resident Assistant Compensation Survey*, RESLIFE.NET, https://reslife.net/hp/resident-assistant-compensation-survey/ (last visited May 4, 2024).

[122] William Dunn, *Athletic Managers Work for Scholarships, Not Pay*, REVEILLE (Jan. 24, 2007), https://www.lsureveille.com/athletic-managers-work-for-scholarships-not-pay/article_b3ccd054-af9f-583c-b1b9-803d1d8d5800.html; Dana O'Neil, *The Tales of a College Basketball Student Manager*, ESPN (July 9, 2015, 9:00 AM), https://www.espn.com/mens-college-basketball/story/_/id/13215054/the-life-college-basketball-student-manager.

[123] *See* Cooney v. United States, 630 F.2d 438, 439 (6th Cir. 1980) (distinguishing a scholarship from compensation given for services in the context of medical residency); Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *6 (E.D. Pa. May 17, 2018) ("Academic and athletic scholarships, as compared with some other forms of scholarships, are not taxable income . . . . An academic scholarship is not compensation . . . .") (citation omitted).

[124] *Livers*, 2018 U.S. Dist. LEXIS 83655, at *47–48 (citing *Tony & Susan Alamo Found.*, 471 U.S. at 301).

[125] *See, e.g.*, Annemarie Cuccia, *'How Close We Got': The Georgetown RA Union that Almost Was*, GEO. VOICE (Aug. 20, 2020), https://georgetownvoice.com/2020/08/20/how-close-we-got-the-georgetown-ra-union-that-almost-was/ ("RA contracts can be terminated by the community director and res living at any

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

dependence argument for athletic scholarships,[126] other courts may be more amenable when student workers are paid not only through scholarships, but through room-and-board agreements. Student workers could highlight the high value of college and also the importance that many employers place on extracurricular "enrichment" activities—which are traditionally unpaid—to argue that they do depend on the scholarships to a certain extent.[127]

B. Application of the Primary Beneficiary Test

Though the primary beneficiary test has not been adopted by the Supreme Court to test whether interns or trainees are employees, the growing number of circuit courts that are adopting the test[128] make this a likely possibility should student workers get their day in court. The Second Circuit used a modified version of the test that has been described as more "flexible" than the rigid *Walling* test.[129] This Note will apply the *Glatt* factors to the circumstances of two select types of student workers: RAs and athletic equipment managers. These two groups were chosen because they usually receive some form of remuneration[130] (thus, fitting into Rubinstein's "volunteer plus" category) and because their roles, duties, and relationships to their universities are more uniform and defined than other student worker groups.[131]

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point without much warning, and that often resulted in RAs losing their housing and food security for the semester for what often was, what we would consider, bullshit.").

[126] *Livers*, 2018 U.S. Dist. LEXIS 83655, at *48.

[127] *See* Nicolas Roulin & Adrian Bangerter, *Students' Use of Extra-Curricular Activities for Positional Advantage in Competitive Job Markets*, 26 J. EDUC. & WORK 21, 21 (2013) (arguing that college graduates, aware that their degree may not be enough to make them stand out on the job market, participate in extracurriculars "to demonstrate competencies not otherwise visible in their résumés due to limited job experience").

[128] For cases in which circuit courts apply the primary beneficiary test, see Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016); McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011).

[129] Pardoe, *supra* note 77, at 1180–82.

[130] *See* Whitney Sandoval, *What Does a College Resident Advisor (RA) Do?*, BEST COLLS., https://www.bestcolleges.com/blog/what-does-resident-advisor-do/ (July 22, 2022) (regarding RA benefits); sources cited *supra* note 122 (regarding equipment manager benefits).

[131] Though RAs and equipment managers are not the only groups of student workers that receive compensation—for example, many student government presidents are compensated, and student journalists often receive stipends—how these other groups would fare using the primary beneficiary test is not examined in this Note. Workers like student journalists or student government officials often operate within a framework that is more complicated than a straightforward worker-university relationship, and

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

1. Understanding of No Expectation of Compensation

In *Glatt*, the interns were hired into explicitly unpaid internships where they received no compensation and no college credit.[132] In *Berger*, the court's analysis on this factor hinged on the NCAA's "tradition of amateurism."[133] Though the strength of the NCAA's amateurism argument has been questioned by the Supreme Court,[134] on this element of the *Glatt* factors, student workers can distinguish themselves from student athletes. As discussed above, many student workers do work in expectation of compensation: they expect housing, meal plan vouchers, or some form of scholarship.[135] The fact that this compensation is unregulated and/or below FLSA standards does not mean that they are undeserving of protection.[136]

2. Extent to Which Training Is Tied to a Formal Education Program

RAs and equipment managers, whose labor is typically distanced from their academic programs, will likely have this factor weighing in favor of employee status. For example, a student equipment manager whose duties include laundry, executing team drills, and tracking equipment is not likely to have these activities strongly tied to his or her formal academic studies. An RA whose obligation is to make rounds of his or her assigned building and to plan community events is likely undertaking

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often more varied from university to university. For example, the analysis for a student journalist would depend on whether their news organization was independent of their university, and for student government, the analysis would be complicated by how law and university policy govern the relationship between the student government and the rest of the university's administration. Thus, for simplicity's sake, this Note focuses on RAs and equipment managers who generally have more defined and uniform roles. Other student workers may have viable claims to FLSA-employee status, but the fact-specific analysis to assess these claims is beyond the scope of this Note.

[132] *Glatt*, 811 F.3d at 532–33.

[133] *See* Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016) (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984)).

[134] NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

[135] Ross Dellenger, *A Day in the Lives of Equipment Managers, The Unsung Heroes of College Football*, SPORTS ILLUSTRATED (Aug. 6, 2018), https://www.si.com/college/2018/08/06/lsu-tigers-equipment-managers (noting that each equipment manager on staff receives some scholarship money, while "the four head student managers are getting a full ride"); *Michigan RA Description*, *supra* note 116 (advertising that RA compensation "includes room and board"); Dunn, *supra* note 122 (remarking that equipment managers' scholarships cover tuition, room, and board); Cuccia, *supra* note 125 (writing that RAs are compensated with meal plans and housing).

[136] *See* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985) (establishing that compensation in the form of benefits may be "wages in another form").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

activities that are similarly unrelated to their course of study. At the very least, duties that are mostly practical seem much less educational in comparison to the activities in *Schumann*, where the work performed by the plaintiffs was to teach highly technical skills like preparing and monitoring the administration of anesthesia, and where the training programs were required to be completed for professional certification.[137]

Of course, the stickier challenge is the receipt of intangible benefits. The Sixth Circuit, for instance, has refused to recognize the employment status of student workers who confer tangible benefits to their schools if the student workers receive intangible benefits such as leadership experience or a strong work ethic.[138] Many students who perform labor for their universities, specifically in programs that tout these intangible benefits,[139] may struggle to show this factor in their favor because of courts' willingness to legitimize educational benefits beyond tangible learning experiences closely related to academic programs or licensure requirements.

3. Extent to Which Training Is Similar to Training in an Educational Environment

Student workers will likely prevail on this factor because of the independence many student workers have from supervisors and the minimal formal "training" many receive. Resident Assistants and equipment managers may have formal training periods and work under a hierarchy, but upon completion of training they are expected to perform their tasks independently.[140] Even if professional staff supervises these student workers to a certain extent (for example, giving them tasks to complete or guiding them through professional development activities), this

[137] Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203–04 (11th Cir. 2015).

[138] *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 531 (6th Cir. 2011).

[139] *See, e.g.*, *Equipment Room Student Manager*, WAKE FOREST UNIV.: STUDENT EMP., https://studentemployment.wfu.edu/equipment-student-manager/ (last visited May 6, 2024) (advertising an enhancement of "time management, problem solving and, [sic] teamwork skills").

[140] *See, e.g.*, Amelia McGuire-Matheny, *The RA Experience: What to Expect*, ARCADIA UNIV.: BECAUSE ARCADIA STUDENT BLOG (Feb. 16, 2023), https://www.arcadia.edu/student-life/meet-our-students/amellia-mcguire-matheny-25/the-ra-experience-what-to-expect/ ("Training is helpful, [but] being an RA is really a job where you learn the most by doing."); Jeff Zogg, *Hiring Student Equipment Managers*, HELMET TRACKER, https://helmettracker.com/hiring-student-equipment-managers/ (Feb. 25, 2020) ("Equipment Managers somehow work with the same amount of time every day to maintain scores of football helmets, shoulder pads, track equipment, and coaches. To say nothing of laundry, communications equipment, and tracking truckloads of apparel. Each day requires more time, more work, more energy. And so, Student Equipment Managers were created.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

supervision is likely entirely different from the role of a teacher or professor in a classroom environment and more similar to the role of a supervisor in a traditional employee-employer relationship.[141] Of course, universities may argue that for student work that aims to provide leadership experience and similar intangible benefits, the "training" is provided by giving student workers independence. However, student workers could likely point to other cases, such as *Marshall v. Baptist Hospital, Inc.*, where the lack of close supervision and training weighed in favor of finding that the X-ray tech trainees were employees.[142]

4. Extent to Which the Internship Accommodates the Intern's Academic Commitments

This factor most likely disfavors many student workers, though it will vary based on the specific student, program, and university. Some student work programs

[141] *See, e.g.*, *New Candidate Timeline: Student Staff Selection Process Timeline Spring Term 2024*, UNIV. OF PITT.: STUDENT AFFS. RESIDENCE LIFE, https://www.studentaffairs.pitt.edu/sites/default/files/assets/New%20Candidate%20Timeline%20Spring%202024%201.pdf (last visited May 6, 2024) ("All student staff members who are either hired or eligible for hire must participate in the spring Student Staff Workshop. Students sign up for a workshop time that works for them, meeting once a week with professional staff members in Residence Life to review important aspects of the student staff member role. While specifics are held for August training, workshop participants engage in reflection, dialogue, and learning around core concepts of the RA/CA role.") [hereinafter Pitt RA Description]. In general, RA positions seem to incorporate more opportunities for professional development and growth than equipment manager positions, perhaps because their work is more interpersonal and less task-oriented than equipment managers' work. *See, e.g.*, Jeff Ewing, *How to Get the Most Out of Your Supervisor*, RESLIFE.NET, https://reslife.net/ra/how-to-get-the-most-out-of-your-supervisor/ (last visited May 6, 2024) (noting that RA positions are distinct from other service positions and advising RAs to work with their supervisors for professional development opportunities). However, the responsibilities of Michigan State University RAs are an example of how—regardless of any opportunities for enrichment or professional development that a position *may* provide—student workers are fundamentally workers first. *Resident Assistant Position*, MICH. STATE UNIV.: RESIDENCE EDUC. & HOUS. SERVS., https://liveon.msu.edu/ResidentAssistantPositionDescription (last visited May 6, 2024) (describing RA duties of community development, community management, safety/crisis management, education, teamwork, and leadership). The responsibilities do not outline what supervisors owe their RAs and the job description does not even highlight how RAs can expect to improve their skills as they spend more time in the position. *Id.* Rather, the contract is a long list of tasks that RAs are expected to accomplish, presumably independently. *Id.*

[142] *Baptist Hosp., Inc.*, 473 F. Supp. at 475. Though this case was reversed on appeal, the Sixth Circuit agreed with the district court that "the clinical training program was seriously deficient in supervision, and that the students continued to perform clerical chores long after the educational value of that work was over." *Baptist Hosp., Inc.*, 668 F.2d at 236. The appellate court overturned this decision based on the fact that the district court had failed to correctly interpret a specific provision that insulated employers who acted in good faith with agency guidelines—and the Department of Labor had "issued an interpretation specifically governing paramedical students, and, more specifically, governing X-ray students" that the defending hospoital had relied on. *Id.* at 237.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

emphasize that academics come before any commitments the program requires of students.[143] For some students, this might mean that mandatory meetings are scheduled to account for academic commitments.[144] However, other students may be able to show that in all practicality, their educational commitments are often overshadowed by their work requirements. Student workers could demonstrate this by showing that the time commitments of their work program necessarily infringe on their formal educational programs. For example, equipment managers could point to the fact that they must attend daily practices, which may occur during the daytime when classes are going on, and thus have to build their schedules around this commitment.[145] Other student workers could argue that because their duties take up so much time,[146] they routinely work more than twenty hours per week, which studies show correlates negatively with academic performance.[147] This argument is like one made by student athletes in *Johnson* that the district court found persuasive evidence of the student athletes' status as employees.[148]

[143] *Confidence, Compassion Define Temple Resident Assistants*, TEMP. UNIV.: TEMP. NOW (Dec. 6, 2012), https://news.temple.edu/news/2012-12-06/resident-assistants ("We are looking for people . . . who know how to balance academics with the care of their residents."); Zogg, *supra* note 140 ("[R]emember, your student managers are students first. Most won't pursue a career as an Equipment Manager, so it's best to remember their studies are primary.").

[144] Max Kingsbeck, *Student First, RA Second?*, ORACLE (Mar. 18, 2020), https://hamlineoracle.com/7581/news/student-first-ra-second (reporting that one Hamline University RA felt that "it felt like when I had classes or homework, or I needed to miss a Monday meeting if anything came before Reslife stuff, we were really reprimanded for it"); Zogg, *supra* note 140 ("We've got some [student equipment managers] working for us a couple of days a week and we have to work around class schedules.").

[145] Laura Owens, *Student Managers Contribute to University Athletics*, CRIMSON WHITE (Feb. 12, 2010), https://thecrimsonwhite.com/756/sports/student-managers-contribute-to-university-athletics/ (reporting that managers at the University of Alabama must be finished with classes by a certain time of day in order to report to work).

[146] Savannah Tate, *Student Football Managers: The Unsung Workers of UCLA Football*, DAILY BRUIN (Nov. 10, 2016, 11:57 AM), https://dailybruin.com/2016/11/10/student-football-managers-the-unsung-workers-of-ucla-football (interviewing a student football manager who loses sleeps to stay on top his duties and classes); Kingsbeck, *supra* note 144 (reporting that though weekly time commitments vary depending on duty hours, one RA complained that "her bosses simply did not respect her time, especially when she was not on duty").

[147] Kim Miller, Fred Danner & Ruth Staten, *Relationship of Work Hours with Selected Health Behaviors and Academic Progress Among a College Student Cohort*, 56 J. AM. COLL. HEALTH 675, 675 (2010).

[148] *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 511 (E.D. Pa. 2021).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

5. Extent to Which the Duration Is Limited to the Time It Provides the Intern with Meaningful Educational Benefits

At least one court has suggested that while an internship or training program may initially provide strong educational benefits, the program can cease to be beneficial when time is spent performing noneducational work.[149] At this point, the workers should be compensated for their noneducational labor.[150] While courts' acceptance of intangible benefits makes this distinction challenging (if the main benefits of a program are the intangible leadership benefits, how can you measure whether a student worker has "maxed out" these benefits?), student workers, if their position remains unchanged without new responsibilities, could argue that their programs have ceased to offer meaningful academic benefits. How RAs and equipment managers fare on this prong will likely differ from program to program. Student workers whose work programs provide opportunity for promotion (e.g., an equipment manager program where freshmen start on laundry duty and seniors take on more supervisory roles) are less likely to succeed on this element than student workers who have no opportunity for promotion.

6. Extent to Which the Intern's Work Complements Work by Paid Employees

Many student workers have strong arguments regarding this factor. Many student worker positions are investments of time as well as physical labor. Take, for example, student equipment managers: they unload and pack up equipment for practices and games, do laundry daily, and check inventory[151]—all tasks that would otherwise have to be performed by paid employees. Similarly, in *Marshall v. Regis Educational Corp.*, the Tenth Circuit acknowledged that "some" of the work performed by RAs "which facilitate[d] the effective management of the resident-halls" "could be performed by non-students" in their absence.[152] Though the *Marshall* court ultimately decided against classifying the RAs as employees, this acknowledgement—combined with the fact that in the forty years since *Marshall* was decided, RAs have become even more essential to their universities in ensuring

[149] Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1215 (11th Cir. 2015).

[150] *Id.*

[151] *See, e.g.*, *Equipment Student Team Managers*, UNIV. OF S. FLA. (Aug. 26, 2011), https://gousfbulls.com/news/2011/8/26/205090114.aspx.

[152] 666 F.2d 1324, 1327 (10th Cir. 1981).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

compliance with federal law and avoiding liability[153]—supports the argument that RAs are a substitute for more competitively paid labor, one of the wrongs the FLSA was designed to protect against.[154] Thus, RAs and equipment managers will likely succeed on this prong.

7. Extent to Which the Intern Understands They Are Not Entitled to a Job After Completion

This final factor weighs against student workers. Student workers of interest in this Note pursue positions that are, by design, only offered to university students. Upon completion or graduation, the vast majority of student workers do not have any expectation that they will continue to work for Residence Life or their university's athletic department. This factor is compounded by the fact that many student workers become involved in activities that are unrelated to their majors, which they do not intend to pursue careers in.[155]

C. Who Is the Primary Beneficiary?

The ultimate issue that the *Glatt* factors attempt to answer is who receives the primary benefit from the work relationship—the worker or the employer? Student workers certainly offer economic benefit to their universities: some of these benefits are short-term benefits (like checking sports equipment); some exist in the longer term (promoting safety to residents); and some are more attenuated—perhaps an RA's role in forging and introducing the university culture to residents, for example, promotes the university to prospective students and creates off-campus and alumni connections.[156]

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[153] *See generally* Christie M. Letarte, *Keepers of the Night: The Dangerously Important Role of Resident Assistants on College and University Campuses*, 2 KY. J. HIGHER EDUC. POL'Y & PRAC., Dec. 2013 (arguing that as agents, RAs may expose their universities to liability through tort law).

[154] *See* 83 CONG. REC. 7309 (1938) (statement of Rep. William Fitzgerald) (opining that the FLSA's protections are necessary to prevent businesses from relocating and/or hiring workers more willing to work longer hours for less).

[155] *See, e.g.*, Zogg, *supra* note 140 (acknowledging that most student managers "won't pursue a career as an Equipment Manager").

[156] *See, e.g.*, MARK GARRETT COOPER & JOHN MARX, MEDIA U: HOW THE NEED TO WIN AUDIENCES HAS SHAPED HIGHER EDUCATION 167 (2018) ("Similarly, classrooms, studios, and labs could incubate off-campus startups or connect student media workers with nonprofit organizations. In these ways, student immaterial labor supported new networks linking universities to off-campus media enterprises of widely various sorts.").

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

While student workers have compelling arguments supporting their status as employees, the ultimate result will likely come down to a court's willingness to accept intangible benefits when the student confers tangible economic benefits to the university. While a few courts have expressed reluctance to accept intangible benefits, the Sixth Circuit has considered intangible benefits to be an important element of education.[157] Because many student work experiences are promoted to students as opportunities to develop leadership skills, improve time management, and become better problem solvers,[158] the acceptance of intangible benefits can be, and indeed has been, fatal to FLSA recognition.[159] While intangible benefits are accepted in the *Glatt* analysis, recognition of student workers as employees will likely be fragmented.

IV. WHAT'S NEXT FOR STUDENT WORKERS?

As discussed in the previous section, the current legal environment is not a complete barrier to FLSA protection for student workers, but it also is not necessarily hospitable. Student workers face a fair number of barriers, from the Department of Labor's classification of student workers as non-employees[160] to some courts' willingness to weigh receipt of intangible benefits against the tangible benefits that student workers give to their universities.[161] Student workers have a couple of avenues available to them: (1) persuading courts to use an adapted version of the primary beneficiary test that excludes intangible benefits from analysis and (2) unionization.

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[157] *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 531 (6th Cir. 2011). *But see* Johnson v. NCAA, 556 F. Supp. 3d 491, 511–12 (E.D. Pa. 2021) (concluding that the plaintiffs' "participation in interscholastic athletics . . . does not provide them with significant educational benefits").

[158] *See, e.g.*, *Be An RA—Resident Assistant*, SHIPPENSBURG UNIV., https://www.ship.edu/life/housing/residence-programs/residence_hall_employment/beanra/ (last visited May 7, 2024) ("The RA position builds a wide variety of invaluable skills such as time and project management, peer conflict mediation, teamwork skills, budget management, creativity, and problem solving.").

[159] *See Solis*, 642 F.3d at 532; Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1327 (10th Cir. 1981) (holding that RAs were not employees because even though the RAs performed labor that might otherwise be performed by paid employees, the program was designed to be educational and thus no employee-employer relationship existed).

[160] *See* discussion *supra* Section II.B.

[161] *See* discussion *supra* Section II.C.3.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

A. Adapted Primary Beneficiary Test

As discussed previously, the most fatal aspect of the *Glatt* test may be the educational factors, if courts consider intangible benefits. Thus, student workers should argue that there is a clear distinction between tangible and intangible benefits. Tangible benefits are linked to a course of study, with the student receiving something tangible as a result, such as licensure or eligibility for licensure, like the nurse anesthetist trainees in *Schumann*.[162] In contrast, an intangible benefit is one that cannot be measured or quantified, such as networking connections, improved work ethic, leadership experience, or time management skills. By drawing this distinction—and highlighting the clear difference in cost to universities when they deliver intangible benefits in comparison to when they deliver tangible benefits—student workers can lay the groundwork for a version of the primary beneficiary test that fits their circumstances.

When a university receives a tangible benefit from student labor, student workers should argue that only tangible educational benefits received by them in return should be considered when courts weigh whether a student worker is an employee. Student workers should point to the broad goals of the FLSA and the expansive language used by the drafters, cited by the Court to support liberal constructions of the FLSA's terms,[163] in order to argue that the allowance of intangible benefits in FLSA analysis essentially provides an opt-out for employers who sufficiently cloak student work opportunities in vague promises of leadership experience. This is not to say that the intangible benefits received by student workers are not real (though in some cases the benefits touted may be nonexistent), but rather that the receipt of these intangible benefits should not be a deciding factor against employee status.

Coercion and exploitation, two of the evils which the FLSA was designed to protect against,[164] are not entirely absent from the university and student-worker relationship. Each year, students take on increasingly large amounts of debt to obtain

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[162] Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015) ("This case . . . concerns a universal clinical-placement requirement necessary to obtain a generally applicable advanced academic degree and professional certification and licensure in the field.").

[163] Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 296 (1985) ("The Court has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction,' *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959), recognizing that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.").

[164] *See* 29 U.S.C. §§ 202, 206(a), 207(a)(1) (establishing a minimum wage and forty-hour workweek).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

economic opportunities in the future.[165] The burden to attend college is the greatest among those who are already economically underprivileged.[166] College graduates face increasing competition in the job market, creating pressure for students to build their resumes through internships and extracurriculars.[167] Student workers should argue that even if part of the reason they take on university work experiences is for the enrichment and opportunity the experience provides, the dispositive fact is that they receive these benefits, but rather that these benefits are (1) meager in comparison to the actual tangible benefits they confer to their schools and (2) obtained in a coercive environment that the FLSA was designed to protect against.

An adapted version of the primary beneficiary test would likely lead to far greater recognition of many university student workers as employees. Universities will likely argue that adopting a test that makes student workers more likely to be FLSA employees will undermine the existence of the programs: they will become too costly to run and students will no longer benefit from them as educational experiences.[168] While this is persuasive, student workers have a few counterarguments. Namely, they can argue that eschewing intangible benefits does not undermine other aspects of the test, which requires the student worker to confer a tangible (likely cost-saving) benefit to their university and which disfavors work experiences that are closely tied to the student's formal education program.[169] Additionally, student workers can argue that the expense of FLSA recognition is not an acceptable reason to deny FLSA recognition: after all, the FLSA imposes a cost on employers which prevents them from paying employees as cheaply as possible. If the chief concern of the FLSA were to maximize the economic profits of employers, neither the minimum wage nor the FLSA's overtime requirements would exist. Finally, student workers may be able to appeal to their universities directly and

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[165] *Student Debt Has Increased Sevenfold Over the Last Couple Decades. Here's Why.*, PETER G. PETERSON FOUND.: FISCAL BLOG (Oct. 26, 2021), https://www.pgpf.org/blog/2021/10/student-debt-has-increased-sevenfold-over-the-last-couple-decades-heres-why.

[166] *See* WILLIAM ELLIOTT & MELINDA LEWIS, ASSETS & EDUC. INITIATIVE, STUDENT LOANS ARE WIDENING THE WEALTH GAP: TIME TO FOCUS ON EQUITY 9 (2013).

[167] *See, e.g.*, Roulin & Bangerter, *supra* note 127.

[168] *See generally* Jim Thelen, *Labor Cost Pressures in Higher Ed Call for Proactive Labor Strategy*, LITTLER: ASAP (July 17, 2023), https://www.littler.com/publication-press/publication/labor-cost-pressures-higher-ed-call-proactive-labor-strategy (predicting that increased labor costs from worker activism will require universities to reassess how they allocate resources).

[169] *See* discussion *supra* Section II.C.3.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

argue that even if FLSA recognition would lead to a reduced size of programs, the pool from which the programs hire could become more equitable, because students who cannot afford to work without minimum wage or overtime protections could pursue those positions.[170]

B. Unionization

Student workers who fail to win FLSA recognition could still further their goals by pursuing unionization and bargaining with their universities, which has been made possible by a recent National Labor Relations Board ruling classifying undergraduate and graduate student workers as employees under the National Labor Relations Act ("NLRA").[171] In *Trustees of Columbia University in the City of New York*, the National Labor Relations Board did for the NLRA what the Wage and Hour Division has failed to do for the FLSA—recognize that student status does not mean that that the student is not also a statutorily protected employee.[172] Though the Trump Department of Labor attempted to overrule *Columbia* by attempting to promulgate a rule that would have excluded college students from NLRA protection, it failed to do so and, thus, *Columbia* remains the law of the land.[173] Recognition as an employee under the NLRA affords student workers a different protection than employee status under the FLSA would. NLRA protection provides the opportunity for collective bargaining and protects workers from certain unfair labor practices;[174] it does not create a base level of compensation for workers or guarantee that their organizing efforts will improve wages or working conditions.

Nevertheless, there is power in a union. At Grinnell College, the undergraduate student organizing committee "secured a base wage increase from $8.50 an hour to $10.40, just-cause employment, [and] a grievance procedure" for dismissed

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[170] *See* Jenny M. Stuber, Class, *Culture, and Participation in the Collegiate Extra-Curriculum*, 24 SOCIO. F. 877, 895–96 (2009) (discussing how financial resources influence students' involvement in extracurriculars and internships).

[171] *Trs. of Columbia Univ.*, 364 N.L.R.B. 1080, 1080 (2016).

[172] *Id.*

[173] Radu Stochita, *For Undergrads, the Best Extracurricular Is a Labor Union*, NATION (Oct. 7, 2022), https://www.thenation.com/article/politics/student-undergraduate-labor-organizing/.

[174] *Employee Rights*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights (last visited May 7, 2024); *Employer/Union Rights and Obligations*, NAT'L LAB. RELS. BD.: ABOUT NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations (last visited May 7, 2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu

workers.[175] Increased unionization nationwide has incentivized some colleges to "increase stipends voluntarily, often citing the need to stay competitive."[176] And, even before a contract secures gains, mere recognition of a union affords student workers a seat at the bargaining table.[177] Outside of higher education, the benefits of unionization are apparent: unionized workers enjoy a premium in pay in comparison to non-unionized workers, unions help to narrow the gender and racial wage gaps, unionized workplaces are more likely to give workers paid leave, and enforcement of health and safety laws are stronger in union workplaces.[178] Though not a solution for a lack of FLSA protection, unionization provides a mechanism for student workers to gain comparable benefits to what they would receive if they were protected under the FLSA.

V. CONCLUSION

The recent shift in the social and legal landscape has made it more likely that courts will have to address the blurry line between students and workers. Though student workers face threshold challenges, most notably the *Wage and Hour Division's Field Operations Handbook*, student workers like Resident Assistants and equipment managers have colorable arguments under the *Glatt* primary beneficiary test that they are, indeed, employees of their universities under the FLSA. These arguments would be strengthened if courts abandoned intangible benefits in the *Glatt* calculation. Student workers, should they get their day in court, should highlight the imbalanced relationship between student workers and their universities to argue against the use of intangible benefits in determining employee status. Finally, even if courts remain reluctant to do so, student workers should not lose hope and should instead pursue other mechanisms for protection where the law has been more favorable to their status as employees, such as unionization.

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[175] *One Big Union: Grinnell College Student Workers File for Campus-Wide Union; College Agrees to Respect Election Results*, UNION OF GRINNELL STUDENT DINING WORKERS (Mar. 4, 2022), https://www.ugsdw.org/2022/03/04/one-big-union/.

[176] Kate Marijolovic, Julian Roberts-Grmela & Eva Surovell, *Graduate Students Win Pay Raises as Union Efforts Surge*, CHRON. OF HIGHER EDUC. (Jan. 11, 2023), https://www.chronicle.com/article/graduate-students-win-pay-raises-as-union-efforts-surge.

[177] *See id.* ("As benefits improve through collective bargaining, other institutions are going to have to match it to be able to attract people to participate in their graduate program."); 29 U.S.C. §§ 158(a)(5), 159(a).

[178] *Data Center*, U.S. DEP'T OF LAB.: WORKER ORG. RES. & KNOWLEDGE CTR., https://www.workcenter.gov/data-center/ (last visited May 7, 2024).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2024.1024
http://lawreview.law.pitt.edu