Intern's Lament: Distinguishing an Employee and an Intern Under the Fair Labor Standards Act

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ABSTRACT

Internships occupy an important role in the American education experience, as approximately two-thirds of all students complete an internship at some point in their education. Yet, the law has failed to meaningfully define what qualifies a person for intern status and what rights and responsibilities accompany such status. Despite ample attention from the legal community, there is still no uniform standard on who should be considered an intern. The Supreme Court has not created a standard regarding who qualifies as an intern, despite other decisions under the Fair Labor Standards Act (FLSA) guiding circuit courts. Although the United States Department of Labor has issued fact sheets on what defines an "intern," courts owe the guidance little, if any, deference. Several circuit courts have created standards on differentiating interns from employees, but varying outcomes result in a lack of clarity.

In addition to the problem of determining who is an intern, the failure to definitively answer that question has caused several problems. First, interns and employers sometimes do not know of their legal rights and responsibilities. Additionally, the failure to regulate unpaid internships has led to students from lower socioeconomic backgrounds being underrepresented in internships because these students cannot afford to participate in unpaid internships. Since unpaid internships correlate with worse career outcomes and lower perceived quality of internship experiences, these regulatory failures affect the lives of the many students who complete unpaid internships.

After considering Supreme Court decisions that examine the FLSA, Department of Labor guidance on internships, and the circuit court decisions that have created competing, inconsistent standards for how to

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distinguish an employee and an intern, the time has come for Congress to amend the FLSA to definitively answer the question of who qualifies as an intern.

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I. INTRODUCTION

Over the past several decades, internships have become a staple of the American job market.[1] As of 2016, ninety-two percent of employers reported having some sort of "formal internship program."[2] However, only

1. *See* David C. Yamada, *Mass Exploitation Hidden in Plain Sight: Unpaid Internships and the Culture of Uncompensated Work*, 52 IDAHO L. REV. 937, 938 (2016) [hereinafter Yamada, *Mass Exploitation*].

2. *See* ANDREW CRAIN, NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS ("NACE") FOUND., UNDERSTANDING THE IMPACT OF UNPAID INTERNSHIPS ON COLLEGE STUDENT CAREER DEVELOPMENT AND EMPLOYMENT OUTCOMES 11 (2016). The National Association of Colleges and Employers is commonly referred to as "NACE." This Comment uses the common name NACE to refer to the National Association of Colleges and Employers.

sixty percent of those programs compensate their interns.[3] One scholar of the American intern market suggested that there is a direct correlation between unpaid internships and "an expanding, exploitative economic culture of uncompensated work."[4] To halt the expansion of "exploitative" unpaid internships, this Comment recommends that Congress should amend the Fair Labor Standards Act (FLSA).[5]

To understand the problems associated with unpaid internships, it is helpful to define what intern status entails.[6] There are many different definitions of the term "intern," but all definitions generally agree on one feature: internships are connected with education.[7] The internship-education connection is verified by a study from the National Association of Colleges and Employers ("NACE"),[8] which reported that approximately two-thirds of college students participate in an internship at some point in their schooling.[9]

However, internship benefits expand beyond educational merits.[10] The NACE study also revealed a correlation between internships and better career outcomes.[11] The perceived value of internships to employers and students is evidenced by the number of companies that offer internships and the number of students that participate.[12]

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3. *See id.* ("60.8 percent of interns were paid . . . .").

4. Yamada, *Mass Exploitation*, *supra* note 1, at 937–938.

5. *See infra* Part III.

6. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2015) (beginning its legal analysis with definitions of terms examined); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1207 (11th Cir. 2015) (same); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025 (10th Cir. 1993) (same).

7. *See Position Statement: U.S. Internships*, NACE, [hereinafter NACE, *Position Statement*] https://bit.ly/36K0CCS (last updated Aug. 2018) (defining an internship as "a form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting."); *see also* Nancy O'Neill, *Internships as a High-Impact Practice: Some Reflections on Quality*, 12 PEER REV. (Fall 2010), https://bit.ly/3mCunMA (using the Council for the Advancement of Standards in Higher Education's definition of internship: "a deliberat[e] form of learning" that balances doing, application, and feedback); *see also Intern*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an intern as "[a]n advanced student or recent graduate who is apprenticing to gain practical experience before entering a specific profession.").

8. *See About Us*, NACE, https://bit.ly/39PygYK (last visited June 22, 2021) (explaining that NACE is a "professional association" composed of college career service professionals, recruiting professionals, and "business solution providers" dedicated to studying hiring trends and the interaction between education and employment).

9. *See* CRAIN, *supra* note 2, at 9.

10. *See id.* at 11.

11. *See id.* Over fifty-six percent of undergraduate students that completed an internship received at least one job offer at graduation, as opposed to thirty-seven percent of students that had no internship experience. *See id. See also infra* Section II.E (contrasting the benefits received by paid and unpaid interns).

12. *See* CRAIN, *supra* note 2, at 9.

Despite broad recognition of an internship's hypothetical value, questions remain about whether these internship programs adequately compensate their interns.[13] Interns are often asked to complete menial labor that would otherwise be performed by paid employees.[14] Menial labor tasks, like fetching tea,[15] are outside of the educational purpose that internships are intended to fulfill.[16] Additionally, the Department of Labor (DOL) states that if an intern displaces employees by performing work that would normally be accomplished by an employee, that intern should be considered an employee rather than an intern.[17] Thus, under the DOL standard, inappropriately classifying employees as interns deprives interns of the wages they would be legally entitled to under the FLSA if they were properly classified as employees for this work.[18]

The law views interns and employees as distinct.[19] Under the FLSA, employees are entitled to compensation, while interns are not.[20] Additionally, interns are often excluded from the purview of discrimination statutes that protect employees.[21] Despite the variances between employees and interns in guaranteed compensation and protections, no uniform test exists to determine whether the work completed as part of an internship entitles an intern to employee status.[22]

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13. *See* Utpal Dholakia, *Why Unpaid Internships Are Unethical*, PSYCH. TODAY (Aug. 16, 2019), https://bit.ly/397FlDG.

14. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 532 (2d Cir. 2015) (describing one of the interns' responsibilities of copying, scanning, and filing documents and another intern's responsibilities of fetching tea for the film director); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1142 (9th Cir. 2017) (describing the beauty school students' responsibilities that included doing administrative duties in the salon).

15. *See Glatt*, 811 F.3d at 532.

16. *See* ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 85 (2012) (stating that menial work such as stuffing envelopes or passing out flyers is "not what an internship's supposed to be").

17. *See* U.S. DEP'T OF LAB., WAGE AND HOUR DIV., FIELD OPERATIONS HANDBOOK, 10b11(b) (2016) [hereinafter DEP'T LAB., FIELD HANDBOOK].

18. *See* 29 U.S.C. § 206(a) (describing the minimum wage for employees). The classification of "intern" or "employee" matters to a worker because employees have many more protections than interns under the current Federal law. *See* 29 U.S.C. § 203(e) (including employees in the Fair Labor Standards Act, but not interns); 29 U.S.C. § 152(3) (including employees in the National Labor Relations Act, but not interns); 29 U.S.C. § 2611(2) (including employees in the Family and Medical Leave Act, but not interns).

19. *See* sources cited *supra* note 18.

20. *See* 29 U.S.C. § 206(a) (providing the federal minimum wage, which does not currently apply to interns); *see also* sources cited *supra* note 18.

21. *See* Yamada, *Mass Exploitation*, *supra* note 1, at 946–47 ("Federal employment discrimination statutes require an individual to be an employee, and a lack of compensation may preclude an intern from meeting the standard for employee status.").

22. *Compare* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2015) (holding that a primary beneficiary test was the correct approach to determine if a worker is an employee or an intern and creating its own list of factors to consider), *with* Solis v. Laurelbrook Sanitarium, 642 F.3d 518, 529 (6th Cir. 2011) (holding that a different primary beneficiary test correctly weighs competing considerations), *and* Reich v. Parker

The disparity in workplace rights of employees and interns has caused a litany of litigation because many interns desire the compensation and protections that accompany employee status.[23] Several circuit courts have addressed how to determine whether practical work performed during educational programs entitles students to employee status,[24] but only one circuit court has specifically addressed how to determine whether an intern should be granted employee status.[25] Additionally, the DOL has provided guidance on when an intern should be considered an employee.[26] However, circuit court decisions are not binding authority on circuits that have not determined what work entitles an intern to employee status and pay,[27] and the DOL's guidance regarding interns is not binding authority in any jurisdiction.[28] Therefore, many interns and employers remain unsure of whether interns should be classified as employees and what type of work activities grant employee status and require compensation.[29]

Section II of this Comment will discuss the legal authority on internships.[30] This legal authority includes Supreme Court decisions that guide intern pay requirements,[31] DOL guidance,[32] the circuit court

Fire Protection Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993) (holding that weighing the DOL factors in a totality of the circumstances determination properly determines employee status in light of Supreme Court decisions).

23. *See* Yamada, *Mass Exploitation*, *supra* note 1, at 946–47.

24. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1202 (11th Cir. 2015); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1141 (9th Cir. 2017); *Laurelbrook Sanitarium*, 642 F.3d at 520; Nesbitt v. FNCH, Inc., 908 F.3d 643, 645 (10th Cir. 2018); Hollins v. Regency Corp., 867 F.3d 830, 832 (7th Cir. 2017).

25. *See Glatt*, 811 F.3d at 532–33. The distinction between interns and student workers is important because, although many educational programs have a practical work component, internships are usually practical work obtained through a separate entity. *See* NACE, *Position Statement*, *supra* note 7 (noting that internships appear "in a professional setting").

26. *See* DEP'T LAB., FIELD HANDBOOK, *supra* note 17; U.S. DEP'T OF LAB., WAGE AND HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter DEP'T LAB., 2010 FACT SHEET]; U.S. DEP'T OF LAB. WAGE AND HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2018) [hereinafter DEP'T LAB., 2018 FACT SHEET].

27. *See* Barbara Bintliff, *Mandatory v. Persuasive Cases*, 9 PERSPS.: TEACHING LEGAL RSCH. & WRITING 83, 84 (2001) ("Court of appeals decisions are persuasive authority in other circuits, both for other courts of appeals and for lower courts.").

28. *See Glatt*, 811 F.3d at 536 (explaining *Skidmore* deference); *see also infra* Section II.B.

29. *See* William Soule, Comment, *Learning through Experience: Borrowing Lessons from Abroad to Understand the Legality of Unpaid Internships in America*, 2017 U. CHI. LEGAL F. 767, 795 (2017) ("The laws surrounding unpaid internships in the United States are a confusing mess of precedent and government suggestions that hold little coherence.").

30. *See infra* Sections II.A–C.

31. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 152–153 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301–02 (1985).

32. *See* DEP'T LAB., FIELD HANDBOOK, *supra* note 17; DEP'T LAB., 2010 FACT SHEET, *supra* note 26; DEP'T LAB., 2018 FACT SHEET, *supra* note 26.

decision addressing when an intern should be considered an employee,[33] and circuit court decisions addressing when practical work performed as part of a student's education entitles that student to employee status.[34] Section II will then discuss wage and hour laws[35] and how those laws and other legal authorities regarding interns affect internship dynamics, specifically focusing on the impact on unpaid interns.[36] In Section III, this Comment will argue that the inconsistent application of whether a worker is an employee or intern, coupled with a lack of mandatory guidance on the issue, calls for the United States Congress to amend the FLSA by creating a national standard to determine a worker's status as an employee or an intern and to identify that worker's legal rights and responsibilities.[37] The proposed amendments include a formal definition of "intern," including a threshold requirement of being enrolled in an accredited educational program.[38] The proposed amendments to the FLSA should also include a tiered wage and hour system that will help balance intern and employer interests, while allowing students from lower socioeconomic backgrounds greater access to the internship market.[39] Section IV will offer concluding remarks.[40]

II. BACKGROUND

To address the issues around internships, particularly unpaid internships, it is helpful to first understand what qualifies an individual for intern status and what qualifies an individual for employee status.[41] Understanding who can be an intern is an important step in addressing the issues therein because a legal standard would not be helpful if nobody

33. *See Glatt*, 811 F.3d at 536.

34. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011); Nesbitt v. FCNH, Inc., 908 F.3d 643, 646–47 (10th Cir. 2018); Hollins v. Regency Corp., 867 F.3d 830, 836 (7th Cir. 2017).

35. *See* 29 U.S.C. § 206(a) (stating the federal minimum wage); *see also* 29 U.S.C. § 213(a)(8) (exempting employees of newspapers with limited circulation from minimum wage laws); 29 U.S.C. § 213(a)(15) (exempting babysitters from minimum wage laws); 29 U.S.C. § 213(a)(19) (exempting certain baseball players from minimum wage laws).

36. *See infra* Section II.E.

37. *See infra* Part III.

38. *See infra* Section III.A.

39. *See infra* Section III.A.

40. *See infra* Part IV.

41. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2015) (beginning its legal analysis with the statutory definition of the term employee); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1207 (11th Cir. 2015) (same); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025 (10th Cir. 1993) (same).

could ascertain who that standard applies to.[42] Therefore, this Section will consider the way that Federal common law, statutory law, and DOL guidance have been applied by courts to differentiate an intern from an employee.[43] Additionally, this Section will discuss American wage and hour laws[44] and the issues created, especially for unpaid interns, because of the current law.[45]

A. The Fair Labor Standards Act

Differentiating an employee from an intern begins with how statutory law defines the terms.[46] The Fair Labor Standards Act (FLSA) defines an "employee" as "any individual employed by an employer."[47] This "bare bones" definition[48] has been aptly described by courts as "far from a model of clarity"[49] and "provid[ing] little guidance."[50]

Unlike the term "employee," the term "intern," does not appear in the definition section of the FLSA.[51] In the United States Code's entirety, the term intern is defined only once.[52] Further, the statute defining the term intern refers only to interns for a member of the House of Representatives.[53] The statute states that its intern definition only applies to "use[s] in th[at] section," which suggests that this definition does not apply when determining interns' wage entitlements under the FLSA.[54]

The Restatement of Employment Law[55] similarly lacks a clear definition of what work responsibilities an individual must have to be considered an intern.[56] Rather, the Restatement's attempt at defining an "intern" simply clarifies when an intern does not qualify as an employee.[57] Due to unclear statutory definitions of the terms "employee" and "intern," a confusion that the Restatement fails to clarify, an examination of the

42. *See* Julie Pelegrin, *What do You Mean By That? Definitions in the Statutes*, COLO. LEGISOURCE (July 31, 2014), https://bit.ly/2MXL3kK (stating that courts will have to guess what a statutory term means if it is not defined).
43. *See infra* Sections II.C.1–4.
44. *See infra* Section II.D.
45. *See infra* Section II.E.
46. *See* cases cited *supra* note 41.
47. 29 U.S.C. § 203(e)(1).
48. *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1143 (9th Cir. 2017).
49. Velarde v. GW GJ, Inc., 914 F.3d 779, 783 (2d Cir. 2019).
50. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025 (10th Cir. 1993).
51. *See* 29 U.S.C. § 203.
52. *See* 2 U.S.C. § 5321(c)(2).
53. *See id.*
54. *See* 2 U.S.C. § 5321(b).
55. RESTATEMENT OF EMPLOYMENT LAW § 1.02 cmt. g. (AM. LAW INST. 2015).
56. *See id.*
57. *See id.* ("Interns who provide services without compensation or a clear promise of future employment generally are not employees for purposes of this Restatement.").

common law origins of the terms will be helpful to understand what divides an employee from an intern.[58]

B. Origins of the Common Law Rule of Who Qualifies as an Intern: Evolution of Walling v. Portland Terminal Co.

Although the confusion on when a worker has employee status or intern status has led to an abundance of litigation,[59] virtually all courts deciding the issue name *Walling v. Portland Terminal Company*[60] as the analysis's proper starting point.[61] *Portland Terminal* not only inspires the common law rule for when workers do not have to be paid under the trainee exception,[62] but *Portland Terminal* also serves as the basis for the DOL's Field Operations Handbook[63] and the DOL's 2010 Fact Sheet regarding intern wages.[64]

Portland Terminal is recognized as the foundation of intern wage laws.[65] In *Portland Terminal*, the United States Supreme Court created the trainee exception to Wage and Hour laws under the FLSA.[66] *Portland Terminal* involved a lawsuit against the Portland Terminal Company by trainees who participated in a company-run "course of practical training [provided] to prospective yard brakemen."[67] Upon satisfactory completion of the course, Portland Terminal added these trainees to its list of potential

58. *See infra* Section II.B.

59. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533 (2d Cir. 2015); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1207 (11th Cir. 2015); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1142–43 (9th Cir. 2017); Nesbitt v. FCNH, Inc., 908 F.3d 643, 646 (10th Cir. 2018); Hollins v. Regency Corp., 867 F.3d 830, 832 (7th Cir. 2017); *see also* Jay Rahman, Note, *The Second Circuit's New Approach in Determining When Unpaid Interns are Employees Under the Fair Labor Standards Act*, 2017 U. ILL. L. REV. 2077, 2101 (2017).

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

61. *See Glatt*, 811 F.3d at 534; *Schumann*, 803 F.3d at 1208; *Benjamin*, 877 F.3d at 1143; *Nesbitt*, 908 F.3d at 646; *Hollins*, 867 F.3d at 835.

62. *See Benjamin*, 877 F.3d at 1143. Under the trainee exception, if the "circumstances surrounding [the trainees'] activities on the premises of the employer" suggest that the trainee is not an employee, an employer does not have to pay the trainee worker. *See* DEP'T LAB., FIELD HANDBOOK, *supra* note 17. In 2010, the Wage and Hour Division of the Department of Labor issued guidance that the trainee exception, as described in the Field Operations Handbook, applies to interns as well. *See* DEP'T LAB., 2010 FACT SHEET, *supra* note 26.

63. *See Schumann*, 803 F.3d at 1208 ("The Department of Labor ('DOL') refers . . . to *Portland Terminal* in its Field Operations Handbook's guidance on identifying whether a trainee or a student is an 'employee' under the FLSA.").

64. *See* DEP'T LAB., 2010 FACT SHEET, *supra* note 26.

65. *See Glatt*, 811 F.3d at 534; *Schumann*, 803 F.3d at 1208; *Benjamin*, 877 F.3d at 1143; *Nesbitt*, 908 F.3d at 646; *Hollins*, 867 F.3d at 835.

66. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947); *see also* sources cited *supra* note 62 (discussing the trainee exception).

67. *Portland Terminal*, 330 U.S. at 149.

employees.[68] In the event of an opening, the company would hire exclusively from the list of trainees who had completed the program.[69] During the program, which lasted seven to eight days, the trainees would be assigned to work with a specific "yard crew" that would teach the trainee the relevant skills to perform that yard crew's duties.[70] After initially learning by observation, the trainee would then "gradually [be] permitted to do actual work under close scrutiny."[71] Prior to a collective bargaining agreement[72] between the company and its exclusive bargaining agent, trainees received no compensation for their time spent in the course.[73] The trainees claimed that, during the course of their training, they acted as employees, as defined by the FLSA, and therefore, they deserved wages from the Portland Terminal Company.[74] The Supreme Court held that the trainees were not employees under the FLSA.[75] The Court reasoned that Congress did not intend for the FLSA to be used to punish companies for providing free trainings that primarily benefit workers.[76] Additionally, the Court explained that the facts of this particular case suggested that the employer received no "immediate advantage" from the trainees' work.[77] The Court relied on the following facts to reach the decision that the trainees were not employees under the FLSA[78]: the applicants for job openings were not considered unless they have completed the training,[79] the training was done under close supervision,[80] the trainees did not displace employees,[81] and the trainees' work "d[id] not expedite the company business."[82] Thus, the Court concluded that the trainees were not entitled to wages because the trainees were not employees under the FLSA.[83]

68. *See id.* at 150.
69. *See id.*
70. *See id.* at 149.
71. *Id.*
72. *See Collective Bargaining Agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a collective bargaining agreement as "[a] contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances").
73. *See Portland Terminal*, 330 U.S. at 150. After the collective bargaining agreement, the trainees received four dollars per day for the training period if the trainees were deemed to be competent. *See id.*
74. *See id.* at 149.
75. *See id.* at 153.
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.* at 149.
80. *See id.*
81. *See id.* at 149–50.
82. *Id.* at 150.
83. *See Portland Terminal*, 330 U.S. at 153.

While *Portland Terminal* inspired the modern rule for separating employees from interns,[84] other Supreme Court decisions have added important interpretations on how comparable FLSA claims should be decided.[85] Since *Portland Terminal*, the Supreme Court has stated that the proper method for determining whether a worker is an employee under the FLSA is to consider the economic reality[86] of the relationship between the employer and worker.[87] Additionally, the Supreme Court stated that the determination of whether a worker should be classified as an employee depends on the totality of all activities, as opposed to specific factors.[88] Therefore, courts consider whether, under the totality of the circumstances, the economic reality of the employer-worker relationship suggests that the worker is an employee or an intern.[89]

In addition to Supreme Court guidance, the Wage and Hour Division[90] of the DOL has also published fact sheets on internships.[91] However, proper consideration of DOL input requires identifying what the guidance is and what level of deference the guidance is owed.[92] While the guidance's substance usually evolves with the change of presidential administrations,[93] DOL guidance has consistently received *Skidmore* deference[94] at best.[95]

Prior to the issuance of the Fact Sheets, the DOL had provided guidance on how to distinguish between trainees and employees in its

84. *See* Benjamin v. B & H Educ., Inc., 877. F.3d 1139, 1143 (9th Cir. 2017).

85. *See* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

86. *See Economic-Realities Test*, BLACK'S LAW DICTIONARY (11th ed. 2019) (explaining that the economic realities test seeks to "determine[] the true nature of a business transaction or situation by examining the totality of the commercial circumstances").

87. *See Tony & Susan Alamo Found.*, 471 U.S. at 301.

88. *See Rutherford Food Corp.*, 331 U.S. at 730.

89. *See Benjamin*, 877 F.3d at 1147 ("[T]he courts evaluated the totality of the circumstances of each case as the Supreme Court has directed.").

90. *See Wage and Hour Division*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that the Wage and Hour Division is "[t]he division of . . . the U.S. Department of Labor responsible for enforcing the Fair Labor Standards Act").

91. *See* DEP'T LAB., 2010 FACT SHEET, *supra* note 26; DEP'T LAB., 2018 FACT SHEET, *supra* note 26.

92. *See* MITCHELL STEIN, ADMINISTRATIVE LAW § 51.01 (6th ed. 2020).

93. *Compare* DEP'T LAB., 2010 FACT SHEET, *supra* note 26, *with* DEP'T LAB., 2018 FACT SHEET, *supra* note 26.

94. *Skidmore* deference refers to when a court need only give agency guidance deference to the extent that the court finds the guidance persuasive. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The Supreme Court has stated that *Skidmore* deference is owed when agency guidance is issued in "formats such as opinion letters" or other forms that do not go through administrative rule-making procedures. *See* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

95. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015); *see also* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011).

Field Operations Handbook.[96] The Field Operations Handbook provides a list of factors for courts to consider when determining whether a worker is an employee, a student, or a trainee.[97] In 2010, the Wage and Hour Division adapted the factors from the Field Operations Handbook to apply to internships in Fact Sheet #71.[98] Thereby, providing guidance on whether a worker is an intern or an employee.[99] The 2010 version of Fact Sheet #71 provides that, if the six factors enumerated are all satisfied, "'for-profit' private sector internships or training programs" are permitted to allow interns to work without compensation.[100] Under the 2010 version of Fact Sheet #71, a worker can be considered an intern if:

> 1. The internship . . . is similar to training which would be given in an educational environment;
>
> 2. The internship experience is for the benefit of the intern;
>
> 3. The intern does not displace regular employees, but works under close supervision of existing staff;
>
> 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
>
> 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
>
> 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[101]

Courts consider the six factors found in both the Field Operations Handbook and the 2010 version of Fact Sheet #71 to be reiterations of the Supreme Court's reasoning in *Portland Terminal*.[102]

In 2018, the Wage and Hour Division under the Trump Administration DOL issued an updated version of Fact Sheet #71.[103] Instead of the traditional six-factor approach derived from *Portland Terminal*, the updated fact sheet adopts, verbatim, the factors from the Second Circuit's decision in *Glatt v. Fox Searchlight Pictures*.[104] Despite

96. *See* DEP'T LAB., FIELD HANDBOOK, *supra* note 17.
97. *See id.*
98. *See* DEP'T LAB., 2010 FACT SHEET, *supra* note 26.
99. *See id.*
100. *See id.*
101. *Id.*
102. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2015); *see also* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015).
103. *See* DEP'T LAB., 2018 FACT SHEET, *supra* note 26.
104. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2015) (listing the factors the court adopted); *see also* DEP'T LAB., 2018 FACT SHEET, *supra* note 26. For a discussion of the *Glatt* test factors, see *infra* Section II.C.1.

the update in DOL guidance, Fact Sheet #71 still only receives deference to the extent that a court finds it persuasive, fueling ambiguity over intern classification.[105]

C. The State of Internships Today

After examining how the Supreme Court and various DOL administrations have distinguished interns from employees,[106] it is helpful to consider how courts have interpreted the precedents and relevant guidance on who is an employee and who is an intern.[107] This guidance is helpful because, under the current Federal law, only workers that qualify as employees can claim entitlement to compensation.[108] Six circuit courts have issued opinions regarding student and intern workers' entitlement to wages.[109] Of those six circuits, only one circuit has explicitly addressed wage entitlement as applied to interns.[110] The other five circuit courts addressed wage entitlements of student workers.[111] The Second, Eleventh, and Ninth Circuit courts determine an intern or student worker's entitlement to wages under the Second Circuit's primary beneficiary test,[112] first formulated in *Glatt*, which this Comment will refer to as the *Glatt* test.[113] The Sixth, Tenth, and Seventh Circuits have issued opinions using three separate standards.[114] The Sixth Circuit, in *Laurelbrook Sanitarium*, adopted a primary beneficiary test distinct from the *Glatt* test, which this Comment will refer to as the *Laurelbrook* test.[115] In contrast, the Tenth Circuit's approach relied on the DOL's factors from the Field Operations Handbook to complete a totality of the circumstances

105. *See Glatt*, 811 F.3d at 536.

106. *See supra* Section II.B.

107. *See infra* Sections II.C.1–4.

108. *See* 29 U.S.C. § 206(a) (providing the federal minimum wage, which does not currently apply to interns).

109. *See Glatt*, 811 F.3d at 538; *see also* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011); Nesbitt v. FCNH, Inc., 908 F.3d 643, 646–47 (10th Cir. 2018); Hollins v. Regency Corp., 867 F.3d 830, 836 (7th Cir. 2017).

110. *See Glatt*, 811 F.3d at 532–33.

111. *See Schumann*, 803 F.3d at 1202; *Benjamin*, 877 F.3d at 1141; *Laurelbrook Sanitarium*, 642 F.3d at 520; *Nesbitt*, 908 F.3d at 645; *Hollins*, 867 F.3d at 832.

112. A primary beneficiary test weighs factors to determine whether the employer or the worker is the primary beneficiary of their relationship. *See Glatt*, 811 F.3d at 536; *Laurelbrook Sanitarium*, 642 F.3d at 525–26.

113. *See Glatt*, 811 F.3d at 536–37; *see also Schumann*, 803 F.3d at 1211–12; *Benjamin*, 877 F.3d at 1146.

114. *See Laurelbrook Sanitarium*, 642 F.3d at 529; *see also Nesbitt*, 908 F.3d at 646–47; *Hollins*, 867 F.3d at 836.

115. *See Laurelbrook Sanitarium*, 642 F.3d at 529.

analysis.[116] Finally, the Seventh Circuit has taken an approach separate from any other circuit court.[117]

1. The *Glatt* Test

The most recent frontier of the fight for student and intern workers' rights is in the federal courts of appeals across the country.[118] The Second Circuit's decision in *Glatt* is the first decision in the recent push for interns' wage rights.[119]

When called upon to evaluate the DOL guidance in Fact Sheet #71, the Second Circuit explicitly rejected the guidance, stating that the DOL's test was "too rigid."[120] The court also stated that the proper test to determine whether a worker is an intern or an employee "is whether the intern or the employer is the primary beneficiary of the relationship."[121] The court held that, to identify the primary beneficiary, courts should weigh the following non-exhaustive factors:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

116. *See Nesbitt*, 908 F.3d at 646–47.

117. *See Hollins*, 867 F.3d at 836.

118. *See Glatt*, 811 F.3d at 532–33; *see also Schumann*, 803 F.3d at 1202; *Benjamin*, 877 F.3d at 1141–42; *Laurelbrook Sanitarium*, 642 F.3d at 519; *Nesbitt*, 908 F.3d at 644; *Hollins*, 867 F.3d at 831.

119. *See* Yamada, *Mass Exploitation*, *supra* note 1, at 939–40; *see also Glatt*, 811 F.3d at 534.

120. *See Glatt*, 811 F.3d at 536.

121. *Id.*

> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[122]

The court reasoned that the use of the seven-factor test provides to courts a flexible approach for determining the economic reality of the relationship.[123] The court explained that its factor test is the correct approach because it reflects the "central feature of the modern internship"—a connection to a formal education.[124]

Months after the Second Circuit's decision in *Glatt*, a similar question of whether students working in clinical programs should be considered employees and subject to minimum wage laws arose in the Eleventh Circuit in *Schumann v. Collier Anesthetics, P.A.*[125] The Eleventh Circuit, like the Second Circuit, rejected the DOL's guidance, finding it unpersuasive under *Skidmore* deference.[126] The Eleventh Circuit believed that the DOL's interpretation of *Portland Terminal* did not apply to the issue presented in *Schumann*.[127] The court determined that it should decide the issue "directly from *Portland Terminal* and not from the DOL's interpretation of [*Portland Terminal*]."[128] Therefore, the court held that the *Glatt* test was the proper approach.[129]

The latest circuit court to explicitly adopt the *Glatt* test was the Ninth Circuit in *Benjamin v. B & H Education*.[130] Distinguishably from *Glatt* and *Schumann*, the court in *Benjamin* was considering whether a cosmetology student could be entitled to wages for practical work performed.[131] The court reasoned that the *Glatt* test "best capture[d] the Supreme Court's

122. *Glatt*, 811 F.3d at 536–37.

123. *See id.* at 537.

124. *See id.* Ultimately, the court vacated the district court decision and remanded the case to the lower court to weigh the newly enumerated factors. *See id.* at 538.

125. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1202 (11th Cir. 2015). The students in *Schumann* were required under state law to work a certain number of hours prior to being eligible to state certification. *See id.* at 1203.

126. *See id.* at 1209.

127. *See id.* at 1203 ("[W]ith all due respect to the Department of Labor, it has no more expertise in construing a Supreme Court case than does the Judiciary.").

128. *Id.* at 1209.

129. *See id.* at 1212. The court remanded the case to the district court to apply the *Glatt* test factors. *See id.* at 1215. On remand, a jury found in favor of the students, determining that they were employees as defined by the FLSA. *See* Liz Freeman, *Former Nurse Anesthetist Students Win Judgment Against Wolford College*, NAPLES DAILY NEWS (May 7, 2017, 6:31 PM), https://bit.ly/34nII75.

130. Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017).

131. *See id.* at 1142.

economic realities test in the student/employee context."[132] After weighing the *Glatt* test factors, the court held that the students were not employees under the FLSA.[133] The court reasoned that the hands-on training the students received made them the primary beneficiaries of the relationship because the work allowed them to accumulate hours legally required in order to sit for the state licensing exam.[134] Further, the court noted that the outcome of the case would have likely been the same even if the court analyzed the issue under the DOL's Fact Sheet #71 test.[135]

2. The *Laurelbrook* Test

Although the Second, Eleventh, and Ninth circuits adopted the *Glatt* factors,[136] the *Glatt* test is not the only test that is a primary beneficiaries test.[137] In fact, the Sixth Circuit decided *Solis v. Laurelbrook Sanitarium & School*[138] under a "primary beneficiaries test" before the *Glatt* lawsuit's filing.[139] Unlike the plaintiffs in the Second,[140] Eleventh,[141] and Ninth Circuits cases discussed above,[142] the plaintiffs in *Laurelbrook Sanitarium* were high school students.[143] The school's religious mission required students, among other things, to perform four hours of practical work per day for no compensation.[144]

In *Laurelbrook Sanitarium*, the Sixth Circuit decided that a primary beneficiary test was the most efficient method for "discerning employee status in learning or training situations."[145] The *Laurelbrook* test differs from the *Glatt* test because the Sixth Circuit relied on the six factors from the DOL's Field Operations Handbook.[146] However, rather than using the Field Operation Handbook's six factors as a list of requirements, as the DOL suggests, the Sixth Circuit used the factors to answer the question of which party was the primary beneficiary of the relationship.[147] The court

132. *Id.* at 1147.
133. *See id.* at 1148.
134. *See id.* at 1147–48.
135. *See id.* at 1148.
136. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2015); *see also* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015); *Benjamin*, 877 F.3d at 1147.
137. *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011).
138. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011).
139. *See id.* at 529.
140. *See Glatt*, 811 F.3d at 532–33.
141. *See Schumann*, 803 F.3d at 1202.
142. *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1142 (9th Cir. 2017).
143. *See Laurelbrook Sanitarium*, 642 F.3d at 520.
144. *See id.* at 520–21.
145. *Id.* at 529.
146. *See id.*
147. *See id.*

supported its decision by looking to *Portland Terminal*, which noted the importance of the primary beneficiary inquiry.[148] After stating the framework of the *Laurelbrook* test, the Sixth Circuit affirmed the district court's finding that the students were not employees under the FLSA.[149] The Sixth Circuit reasoned that the experience and knowledge the students gained outweighed the benefit the school derived from the students' free labor.[150]

3. The Tenth Circuit's Standard

The Tenth Circuit's interpretation of whether a worker is an employee or intern is the closest, thus far, to following the DOL's guidance.[151] However, when the Tenth Circuit, in *Nesbitt v. FCNH, Inc.*,[152] was presented with the issue of how to classify a student worker for the first time after *Glatt*, the court was already bound by its decision in *Reich v. Parker Fire Protection District*.[153]

In *Reich*, the Tenth Circuit adopted the DOL's six factors from the Field Operations Handbook, but only "as an assessment of the totality of the circumstances," as opposed to the "strict" application suggested by the DOL.[154] Despite the Tenth Circuit embracing the DOL's six factors, the court in *Reich*[155] and *Nesbitt* did not classify the workers as employees.[156] In *Reich*, the court reasoned that the workers signed up for a training program that they knew would only be eligible for compensation once the workers completed the program.[157] Under the DOL factors, the knowledge that work would be performed without compensation suggested the worker is not an employee.[158] In *Nesbitt*, the court reasoned that the

148. *See id.*; Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947) ("Accepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the Act's meaning."); *see also* DEP'T LAB., FIELD HANDBOOK, *supra* note 17 (listing one of the factors as whether "[t]he training is for the benefit of the trainees or students").

149. *See Laurelbrook Sanitarium*, 642 F.3d at 531–32.

150. *See id.* at 530–31.

151. *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993); *see also* Nesbitt v. FCNH, Inc., 908 F.3d 643, 646–47 (10th Cir. 2018).

152. Nesbitt v. FCNH, Inc., 908 F.3d 643 (10th Cir. 2018).

153. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993). *See Nesbitt*, 908 F.3d at 647–48 ("[E]ven if we were inclined to adopt [*Glatt*], '[u]nder the doctrine of stare decisis, this panel cannot overturn the decision of another panel of this court.'" (quoting United States v. Meyers, 200 F.3d 715, 720 (10th Cir. 2000))). *Reich* was decided before *Glatt* or the Obama Administration's 2010 publication of Fact Sheet #71, so the Tenth Circuit could not have considered those authorities. *See Reich*, 992 F.2d at 1025–26.

154. *Reich*, 992 F.2d at 1026–27; *see also* DEP'T LAB., FIELD HANDBOOK, *supra* note 17.

155. *See Reich*, 992 F.2d at 1029.

156. *See Nesbitt*, 908 F.3d at 649.

157. *See Reich*, 992 F.2d at 1029.

158. *See id.*; *see also* DEP'T LAB., FIELD HANDBOOK, *supra* note 17.

students did not act like employees and the students' benefit of accumulating hours toward the requirement for state licensure outweighed the employer's benefit of free labor.[159]

4. The Seventh Circuit's Standard

The Seventh Circuit, in *Hollins v. Regency Corporation*,[160] departed from all other circuit court approaches to determine whether a worker is an employee or an intern.[161] Similar to *Benjamin*,[162] *Hollins* involved a cosmetology student who sued her beauty school alleging that she deserved wages under the FLSA.[163]

In determining whether the plaintiff was an employee of the beauty school under the FLSA, the Seventh Circuit examined Fact Sheet #71[164] and the *Glatt* test.[165] Rather than adopt either approach, the court held that the students were not employees because "the fact that students pay not just for the classroom time but also for the practical-training time is fundamentally inconsistent with the notion that during their time [doing practical work] the students were employees."[166] Notably, the Seventh Circuit limited its holding to the specific facts of the *Hollins* case.[167] Thus, this decision does not suggest that workers paying for an educational program will have to overcome a presumption that they are not an employee.[168]

D. Wage & Hour Laws

The legal authorities on how to distinguish employees and interns[169] are not the only aspect of unpaid internships to be considered.[170] Analyzing

159. *See Nesbitt*, 908 F.3d at 648.

160. Hollins v. Regency Corp., 867 F.3d 830 (7th Cir. 2017).

161. *Compare Hollins*, 867 F.3d at 836, *with* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 537 (2d Cir. 2015), *and* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011), *and Nesbitt*, 908 F.3d at 646–47.

162. *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1142 (9th Cir. 2017).

163. *See Hollins*, 867 F.3d at 831.

164. *See id.* at 835.

165. *See id.* at 836.

166. *Id.*

167. *See id.* at 837.

168. *See id.* at 837.

169. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301–02 (1985); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533 (2d Cir. 2015); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1207 (11th Cir. 2015); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1143 (9th Cir. 2017); Nesbitt v. FCNH, Inc., 908 F.3d 643, 646 (10th Cir. 2018); *Hollins*, 867 F.3d at 834–35; *see also* DEP'T LAB., FIELD HANDBOOK, *supra* note 17; DEP'T LAB., 2010 FACT SHEET, *supra* note 26; DEP'T LAB., 2018 FACT SHEET, *supra* note 26.

170. *See* Yamada, *Mass Exploitation*, *supra* note 1, at 946–47 (discussing how unpaid internships intersect with employment discrimination law); David C. Yamada, *The*

the laws' effects on internships necessitates an inquiry into who qualifies as an intern and what pay, if any, an intern is entitled to.[171] Historically, Congress answers questions of wage entitlements in the form of wage and hour laws.[172] In addition to broad provisions regarding minimum wage and maximum hours, Congress has created exemptions to the FLSA for situations that the broader provisions do not adequately address.[173] Employees who are exempt from minimum wage and maximum hour laws include employees of newspapers with limited circulation,[174] babysitters,[175] and baseball players.[176]

Beyond specific professions addressed by wage and hour exemptions, the overtime provision of the FLSA has created a system where an employee is entitled to a higher wage once that employee has worked a certain number of hours per week.[177] Under the FLSA, any employee who works greater than forty hours per week is entitled to one and one-half times that employee's regular rate of pay.[178]

Examining the legislative history of overtime laws reveals several justifications for such provisions.[179] First, overtime laws are intended to compensate workers for an "increased risk of workplace accidents they might face from exhaustion or overexertion."[180] Second, overtime laws can lower unemployment rates by allowing broader distribution of work

Employment Law Rights of Student Interns, 35 CONN. L. REV. 215, 218–19 (2002) [hereinafter Yamada, *Employment Law Rights*] (discussing the societal costs of internships).

171. *See* David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L.J. 357, 359 (2016) [hereinafter Yamada, *Legal and Social Movement*] (discussing the intersection of unpaid interns and Wage and Hour laws).

172. *See* 29 U.S.C. § 206(a) (providing the federal minimum wage); *see also* 29 U.S.C. § 207(a) (providing the federal maximum hours per week without overtime pay); 29 U.S.C. § 213(a)(8) (creating an exception to the minimum wage and maximum hours laws for employees of newspapers with limited circulation); 29 U.S.C. § 213(a)(15) (creating an exception to the minimum wage and maximum hours laws for babysitters); 29 U.S.C. § 213(a)(19) (creating an exception to the minimum wage and maximum hours laws for certain baseball players).

173. *See* 29 U.S.C. § 213(a)(8) (exempting employees of newspapers with limited circulation from the minimum wage and maximum hours laws); 29 U.S.C. § 213(a)(15) (exempting babysitters from the minimum wage and maximum hour laws); 29 U.S.C. § 213(a)(19) (exempting certain baseball players from the minimum wage and maximum laws).

174. *See* 29 U.S.C. § 213(a)(8). The newspaper circulation must have a circulation of less than four thousand newspapers to qualify for this exemption. *See id.*

175. *See* 29 U.S.C. § 213(a)(15).

176. *See* 29 U.S.C. § 213(a)(19). To qualify for this exemption, the baseball player must receive a salary equal to or greater than the equivalent of the minimum wage for forty hours worked. *See id.*

177. *See* 29 U.S.C. § 207(a).

178. *See id.*

179. *See* Parker v. NutriSystem, Inc., 620 F.3d 274, 279 (3d Cir. 2010) (citing Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1175–76 (7th Cir. 1987)).

180. *Id.*

hours.[181] Third, overtime laws disincentivize employers from overworking their employees by increasing wage entitlements for overtime workers.[182] Finally, the FLSA's overtime laws serve the FLSA's broader purpose of ensuring a "fair day's pay for a fair day's work[,]" and to protect workers from "the evil[s] of overwork [and] underpay."[183]

Furthermore, the FLSA's overtime laws are consistent with the Supreme Court's interpretation of the FLSA's purpose: "to aid the unprotected, unorganized and lowest paid of the nation's working population."[184] Surely, interns are among the lowest paid workers in the country and, in some cases, interns pay to work.[185] Understanding wage and hour laws is an important aspect of analyzing internships because the educational and labor-based duality of internships has led legal scholars to suggest specialized approaches to compensate interns.[186]

E. How Current Laws are Shaping the Internship Market

In addition to noting the existence of specialized wage and hour laws, it is important to consider how wage and hour laws, as well as legal authority on who qualifies as an intern, have impacted the internship market.[187] Wage and hour laws do not currently affect internships, as especially seen in the approximately forty percent of internships that do not compensate participants.[188] Discussing the large percentage of unpaid internships is important because unpaid internships can lead to inferior career outcomes,[189] provide less meaningful experiences,[190] and often exclude students from lower socioeconomic backgrounds.[191]

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181. *See id.*

182. *See id.*

183. *Id.* (quoting Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981)).

184. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).

185. *See* PERLIN, *supra* note 16, at 145–50 (discussing private companies that charge thousands of dollars for internship placements, many of which are unpaid).

186. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377 (discussing a possible intern wage solution of a sliding scale based on the company's finances); *see also* Mark Swiech, Note, *You'll Never Work in This Town Again: Employment Economics, and Unpaid Internships in the Entertainment and Media Industries*, 49 LOY. L.A. L. REV. 475, 498–99 (2016) (discussing a possible solution to the exploitation of unpaid internships through a "sliding scale" that sets an inverse relationship between the company's revenues and the number of unpaid interns the company can have).

187. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 375 (discussing the current landscape of the internship market); Yamada, *Employment Law Rights*, *supra* note 170, at 217–18 (discussing the current landscape of the internship market).

188. *See* CRAIN, *supra* note 2, at 11.

189. *See id.* at 18.

190. *See id.*

191. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–19.

Unpaid internships correlate with unfavorable career outcomes[192] and inferior internship experiences.[193] A study from NACE found that undergraduate students who completed an unpaid internship in their final year of school were more likely to be unemployed after graduation than those who completed paid internships.[194] In addition, paid interns were ten percent more likely than unpaid interns to rate their internship experience as "extremely beneficial."[195] The correlation between paid internships and positive career outcomes and internship experiences suggests that unpaid interns receive fewer educational benefits than paid interns.[196]

Notwithstanding evidence of unpaid internships' lesser quality, access to internships, both paid and unpaid, remains an issue for students of lower socioeconomic backgrounds.[197] Unpaid internships prevent students with lower socioeconomic backgrounds from equitably participating because these students, unlike their economically advantaged peers, cannot afford to work for free.[198] It follows that because students from lower socioeconomic backgrounds have a less meaningful opportunity to participate in internships, which correlates with better

192. *See* CRAIN, *supra* note 2, at 18.

193. *See id.* at 5.

194. *See id.*; *see also* Andrew Soergel, *Paid Interns More Likely to Get Hired*, U.S. NEWS & WORLD REP. (May 5, 2015), https://bit.ly/3kw0dsn ("65.4 percent of the class of 2014 who had completed a paid internship at a for-profit company received a job offer prior to graduation. In contrast, only 39.5 percent of students who had unpaid internships received a job offer [prior to graduation] . . . .").

195. *See* CRAIN, *supra* note 2, at 5.

196. *See id*. at 12 (noting that paid internships "result in students rating their experience more highly, reduce stress levels . . . and signal the importance of the commitment to all parties"). Paid internships have been shown to be more beneficial for both interns and employers. *See* Lloyd Ambinder & LaDonna M. Lusher, *Paid Internships Benefits Interns and Employers*, U.S. NEWS & WORLD REP. (Apr. 23, 2014, 2:30 PM), https://bit.ly/3bc2nfd; *see also* Virginia & Ambinder LLP, *It Pays to Pay: 3 Reasons Why Employers Benefit From Paying Interns*, FINDSPARK.COM, https://bit.ly/35dsC15 (last visited June 22, 2021). *But see* Beth Taylor, *Opinion: Internships Should Not Be Paid*, PAYSCALE (Aug. 19, 2013), https://bit.ly/392aLeJ ("If [employers] must pay [interns] . . . then internships may become a thing of the past.").

197. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–19. Several other demographics are also historically underrepresented in unpaid internships. *See First-Generation Students Underrepresented in Internships*, NACE (Aug. 21, 2020), https://bit.ly/3cpLvAB (stating that first-generation students are underrepresented in unpaid internships); *Women are Underrepresented Among Paid Interns*, NACE (Aug. 7, 2020), https://bit.ly/33McXVf (stating that women are underrepresented in unpaid internships); *Racial Disproportionalities Exist in Terms of Intern Representation*, NACE (July 24, 2020), https://bit.ly/2ZR8QpG (stating that people who identify as a racial minority are underrepresented in unpaid internships).

198. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–19; *see also* Siri Hedreen, *Work Experience or Free Labor? Learn What Makes Unpaid Internships Legal*, BUS. NEWS DAILY (Oct. 14, 2020), https://bit.ly/2XcBOyv ("[U]npaid internships create a vicious circle: They reward students who are already economically advantaged while ramping up the competition for everyone else.").

career outcomes,[199] then those students' social mobility later in life is hindered.[200]

The broad issues surrounding unpaid internships suggest that internship standards should be nationalized to some extent. However, to date, no national standard dictates whether an intern should be considered an employee and thus be entitled to compensation.[201] The lack of a national standard has created a "confusing mess of precedent and government suggestions that hold little coherence."[202] Further, the confusion has resulted in increased litigation[203] and an inability for students from lower socioeconomic backgrounds to proportionally participate in the internship market.[204]

III. ANALYSIS

The lack of mandatory authority for circuits that have not faced an intern wage entitlement dispute has created confusion regarding which workers qualify as interns and what rights flow from intern status.[205] A court faced with the novel issue of whether a worker is an intern or an employee must decipher inconsistent circuit court interpretations and ambiguous federal guidance.[206] The Supreme Court decisions that guide the analysis of who is an intern are not determinative because the Court has not directly addressed who qualifies as an intern.[207] Further, the DOL Fact Sheets do not bind courts because the Fact Sheets receive *Skidmore*

199. *See* CRAIN, *supra* note 2, at 18.

200. *See* Jessica L. Curiale, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1560 (2010) ("For those that cannot afford to work for free, the expectation of internship experience is a glass ceiling preventing them from upward social mobility.").

201. *See* sources cited *supra* note 22; *see also* Bintliff, *supra* note 27, at 84 (stating that circuit court opinions do not have to be followed in other circuits).

202. Soule, *supra* note 29, at 795; *see also* Rachel P. Willer, Note, *Waging the War Against Unpaid Labor: A Call to Revoke Fact Sheet #71 in Light of Recent Unpaid Internship Litigation*, 50 U. RICH. L. REV. 1361, 1383 (2016) (stating that a legislative rule would make internship laws easier to follow).

203. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 374 (stating that an approach lacking objectivity cannot be consistently applied and "invites further litigation").

204. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–19; *but see How to Live While Working in an Unpaid Internship*, CHRON (Sept. 4, 2020), [hereinafter *Living While Working*] https://bit.ly/2L6BkHW (stating that a part-time unpaid internship is more feasible because you have time to find paid work as well).

205. *See* Soule, *supra* note 29, at 795.

206. *See supra* Section II.C (discussing the circuit court decisions regarding how to distinguish employees and interns or student workers).

207. *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1143–44 (9th Cir. 2017) (considering Supreme Court opinions when determining how to best distinguish employees and interns); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 522 (6th Cir. 2011) (same); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993) (same).

deference—meaning courts will follow DOL guidance only if they find the guidance persuasive.[208] Finally, the decisions of the circuit courts are not binding on each other when deciding how to determine if a worker is an employee or an intern as a matter of first impression due to the rules of *stare decisis*.[209] Thus, the circuits that have not faced this issue must wade through the remaining ambiguity.[210]

The lack of a clear standard from the courts suggests that a different source of legal authority must be enacted because "doing the same thing over and over again and expecting different results" is insanity.[211] Thus, this Comment argues that, to resolve wage disputes between employers and interns, Congress should amend the FLSA by adding a clear definition of the term "intern" and imposing a tiered wage and hour system for workers who can be classified as interns under the amended FLSA.[212] This tiered wage and hour system is intended to either compensate interns for their hours worked or encourage employers to limit unpaid interns' workloads so that unpaid interns can simultaneously pursue paid employment.[213] Such changes would align with the purpose of the FLSA,[214] eliminate confusion surrounding internship laws,[215] allow students from lower socioeconomic backgrounds greater access to the internship market,[216] and create more meaningful internship experiences without substantially harming the internship market.[217]

208. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2015); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

209. *See* Bintliff, *supra* note 27, at 84 (stating that circuit court opinions do not have to be followed by courts in other circuits).

210. *See* Soule, *supra* note 29, at 779 ("[C]larity within the law seems out of reach when only considering the precedent laid forth by the courts of the United States.").

211. Esther Hyun, *How to Stop Wasting Your Time When Networking*, 33 GPSOLO 46, 49 (2016).

212. *See infra* Section III.A. Under the tiered wage and hour system, interns would be allowed to work twenty hours per week unpaid, but if the work went beyond the first twenty hours, the intern would be entitled to compensation. *See infra* Section III.A.

213. *See* Jessica Greenvald, Note, *The Ongoing Abuse of Unpaid Interns: How Much Longer Until I Get Paid*, 45 HOFSTRA L. REV. 673, 701 (2016) (suggesting a regulatory twenty-hour cap on unpaid internships).

214. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945); *see also infra* Section III.B.

215. *See* Rahman, *supra* note 59, at 2101 (stating that a clear standard would benefit interns by enabling interns to determine when compensation should be given); *see also infra* Section III.C.

216. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–19; *see also infra* Section III.D.

217. *See* Ambinder & Lusher, *supra* note 196; *see also infra* Section III.E.

A. Recommendation for Amendments to the Fair Labor Standards Act

Currently, internships have no explicit education requirement, despite an educational component in every definition of the term "intern."[218] To rectify this, the proposed definition of intern in the FLSA would incorporate a threshold requirement of belonging to an accredited educational program.[219] Without an educational requirement in the definition of intern, recent graduates or people transitioning to different careers later in life are also completing unpaid internships, just to get a foot in the door.[220] Recent graduates and workers who transition careers usually have no connection to an educational program. Therefore, employers should not be allowed to offer unpaid educational internships to recent graduates and career-transitioning workers. Thus, this Comment proposes the following definition of the term "intern": A student associated with an accredited educational program who receives experiential learning through an entity outside of that student's educational program, regardless of whether that work is performed in exchange for academic credit.[221]

After amending the FLSA to define the term intern, this Comment also recommends that Congress create a wage and hour system for interns. The recommendation includes a tiered wage and hour system that would strike a proper balance between employer and worker interests.[222] Under this system, there would be no required wage for the first twenty hours per week of an internship.[223] Then, upon the twentieth and one-tenth hour, the intern would be entitled to either one-half the current state minimum wage or the federal minimum wage, whichever is less.[224] The proposed intern

218. *See supra* note 7 for different definitions of the term intern.

219. *See* Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 647 (2001) (stating the importance of a clear definition for comprehending terms).

220. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 532 (2d Cir. 2015) (discussing Plaintiff Footman, who had recently graduated at the time of his internship); *see also* Yamada, *Mass Exploitation*, *supra* note 1, at 949.

221. *See supra* note 7 (offering various definitions of the term "intern"). The proposed definition is merely a possible definition formed by examining other definitions of the term intern. *See* sources cited *supra* note 7.

222. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377; *see also* Swiech, *supra* note 186, at 498–99.

223. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377; *see also* Swiech, *supra* note 186, at 498–99.

224. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377; *see also* Swiech, *supra* note 186, at 498–99. For example, in a state that has a fifteen dollar minimum wage, the intern wage would be seven dollars and twenty-five cents per hour (the current federal minimum wage). *See* 29 U.S.C. § 206(a). However, in a state such as Illinois, which has an eleven-dollar minimum wage, the intern wage would be five dollars

wage would be backdated to all of the hours for that week.[225] The proposed wage and hour system seeks to allow employers who cannot afford paid interns the opportunity to continue offering educational opportunities, while also valuing interns' labor and creating opportunities for students from lower socioeconomic backgrounds.[226] This Comment suggests the following language for the wage and hour system: Every employer may allow an intern who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, to work up to twenty hours per week with no compensation. Upon the twentieth and one-tenth hour, the employer shall pay the intern not less than the federal minimum wage, as defined under Section 206 of the Fair Labor Standards Act, or one-half the minimum wage of the state or territory in which the intern performs, whichever is less.[227]

The proposed wage and hour system includes an exemption to balance workers' and employers' rights.[228] The exemption to the intern wage and hour system addresses students that are working as part of an hour requirement of state-regulated licensure or certification.[229] For example, in *Schumann*, state law required the student nurse anesthetists to complete a certain number of hours before they were qualified to practice.[230] Under this exemption, students in programs leading to state regulated licensure or certification would be able to elect to work more hours, enabling them to meet the hour requirement without forcing the employer to pay for the added hours.[231] Therefore, this Comment proposes the following language for the exemption: The provisions [defining the wage and hour system for interns] shall not apply with respect to students

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and fifty cents per hour (one-half the Illinois minimum wage). *See* 820 Ill. Comp. Stat. 105/4(a)(1).

225. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377; *see also* Swiech, *supra* note 186, at 498–99.

226. *See* Yamada, *Mass Exploitation*, *supra* note 1, at 949 (noting that the *Glatt* court intentionally did not consider the "increasingly common practice of offering [unpaid] postgraduate internships and fellowships" when rooting its holding in the "educational nature of internships").

227. *See* 29 U.S.C. § 206(a). The proposed language is merely a suggestion formed by looking at the minimum wage for employees as defined in the FLSA. *See id.*

228. *See* Samuel C. Goodman, Note, *One of These Interns is Not like the Others: How the Eleventh Circuit Misapplied the "Tweaked Primary Beneficiary" Test to Required Clinical Internships*, 70 U. MIAMI L. REV. 1302, 1339–41 (2016) (recognizing a difference between interns and students in programs that require clinical work).

229. *See id.*

230. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015).

231. *See* Goodman, *supra* note 228, at 1339–41. This exception to the proposed wage and hour system would not foreclose a finding that the clinical students are employees under the FLSA. *See* Freeman, *supra* note 129 (discussing the trial court's finding that the plaintiffs from *Schumann* are employees under the FLSA).

who are performing practical work that is required prior to state required licensure or certification.[232]

Incorporating a definition of intern in the FLSA along with a wage and hour system specifically for interns would alleviate many of the struggles that unpaid interns face.[233] Therefore, this Comment suggests that Congress should amend the FLSA to include interns.[234]

B. Adding Protections for Interns is Consistent with the FLSA's Purpose and Framework

Amending the FLSA to include protections for interns fits within the FLSA's statutory purpose.[235] As the Supreme Court noted in *Brooklyn Savings Bank v. O'Neil*,[236] the FLSA's purpose is to "aid the unprotected, unorganized and lowest paid of the nation's working population."[237] Since a worker could not be paid less than an unpaid intern,[238] including interns in the FLSA would serve the FLSA's statutory purpose by aiding the country's lowest paid workers.[239]

Additionally, the framework to protect interns already exists within the FLSA.[240] The FLSA includes a provision that allows the Secretary of Labor to create special wage rules for students.[241] Although the current provision delegates the creation of these student provisions to the Secretary of Labor, the Fact Sheets that the DOL has promulgated have proved unimpactful due to the level of deference owed.[242] The presence of the student wage provisions in the FLSA, marking Congress's recognition of the importance, and the limited impact of DOL Fact Sheets suggests that Congress would be justified in taking intern wages into its own hands.[243]

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232. *See* 29 U.S.C. § 213(a). The proposed language is merely a suggestion formed by looking at the current exemptions under the FLSA. *See id.*

233. *See infra* Sections III.B–E.

234. *See infra* Sections III.B–E.

235. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).

236. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697 (1945).

237. *Id.* at 707 n.18.

238. *Contra* PERLIN, supra note 16, at 145–50 (discussing private companies that charge thousands of dollars for internship placements, many of which are unpaid, thus leaving those internship participants in a worse financial state than interns who are simply unpaid).

239. *See Brooklyn Sav. Bank*, 324 U.S. at 707 n.18.

240. *See* 29 U.S.C. § 214.

241. *See id.*

242. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

243. *See* 29 U.S.C. § 214. Congress's ability to legislate in this area is evidenced by their delegation to DOL regarding "learner" and "student" wages. *See id.* Congress would not have been able to make that delegation if it did not have the power to legislate in that area. *See* DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 9–11 (2018).

C. A National Standard for Internships Allows for Greater Compliance with Internship Laws

Creating a national intern standard would make the rights and obligations under internship laws more cognizable.[244] The lack of a uniform approach for classifying interns,[245] coupled with the level of deference the DOL's Fact Sheet is entitled to,[246] leaves intern status as a subjective and impossible-to-predict standard.[247] In turn, the ambiguity creates more litigation over whether a worker qualifies as an intern or an employee.[248]

A uniform standard describing who qualifies for intern status would allow interns with no legal knowledge to understand what rights and obligations interns have under the law.[249] Adding a clear definition of the term "intern" to the FLSA would also allow interns to understand their substantive legal rights.[250] If an intern's substantive rights are made clear, the volume of legal claims arguing that interns should be considered employees would likely decrease because there would be fewer disputes about whether a worker is an intern or an employee.[251]

D. A Wage and Hour System for Interns Would Allow Students from Lower Socioeconomic Backgrounds Greater Access to the Internship Market

In addition to including "intern" in the definition section of the FLSA, the proposed tiered wage and hour system[252] would ensure that interns

244. *See* Willer, *supra* note 202, at 1383 ("[A] legislative rule will put employers on notice to better predict their compliance with the broad and vague language of the FLSA and will eliminate judicial deference to non-binding interpretive rules.").

245. *See* sources cited *supra* note 22.

246. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2015); *see also Skidmore*, 323 U.S. at 140.

247. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 374 (stating that an approach lacking objectivity cannot be consistently applied and "invites further litigation").

248. *See id.*

249. *See* Rahman, *supra* note 59, at 2101. Notice of the enumerated rights could be broadly disseminated through a legislative mandate, similar to those that already exist in the FLSA. *See* 29 U.S.C. § 218b.

250. *See* Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988) ("A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances.").

251. *See* McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir. 1990) (stating that a rule of law that "allows the parties to be certain of their rights and obligations" reduces litigation); *see also* Yamada, *Legal and social Movement*, *supra* note 171, at 374 (stating that an approach lacking objectivity cannot be consistently applied and "invites further litigation").

252. *See supra* Section III.A.

actually receive the benefits of being included in the FLSA.[253] A tiered wage and hour system for interns is proposed to recognize economic barriers for employers while allowing students from lower socioeconomic backgrounds to engage in more internship opportunities.[254]

Under the current system of internships, where approximately forty percent of internships are unpaid, many students from lower socioeconomic backgrounds are precluded from participating due to financial constraints.[255] However, under the proposed wage and hour system for interns,[256] if an intern is working twenty hours or less per week, the unpaid intern would be more able to accommodate paid employment.[257] The proposed tiered wage and hour system seeks to allow interns to either receive compensation for more hours worked in an internship or limit the hours devoted to the internship.[258] Additionally, the intern wage, similar to overtime pay, recognizes the "increased risk of workplace accidents they might face from exhaustion or overexertion" due to having to work an additional job to support the unpaid intern.[259] If the intern was to work more hours, the intern would be entitled to more pay.[260] Limiting internship hours enables the intern to obtain practical experience while also preventing economic harm to interns.[261] Consequently, creating a system prohibiting interns from working full-time without pay would allow students from lower socioeconomic backgrounds a greater opportunity to participate in the internship market.[262]

E. A Wage and Hour System for Interns Increases the Quality of Internship Experiences

The proposed wage and hour system would make internship experiences more valuable for students.[263] A study from NACE found that paid interns tend to rate their internships higher than unpaid interns.[264]

253. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377; *see also* Swiech, *supra* note 186, at 498–99.

254. *See* Yamada, *Legal and Social Movement*, *supra* note 175, at 377; *see also* Swiech, *supra* note 186, at 498–99.

255. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–19.

256. *See supra* Section III.A.

257. *See Living While Working*, *supra* note 204 (asserting that a part-time unpaid internship makes it easier to find paid work to support oneself rather than having to balance a full-time internship with paid work).

258. *See* Greenvald, *supra* note 213, at 701 (suggesting a regulatory twenty-hour cap on unpaid internships).

259. *See* Parker v. Nutrisystem, Inc., 620 F.3d 274, 279 (3d Cir. 2010) (citing Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1175–76 (7th Cir. 1987)).

260. *See* Greenvald, *supra* note 213, at 701.

261. *See id.*

262. *See id.*; *see also Living While Working*, *supra* note 204.

263. *See* CRAIN, *supra* note 2, at 5.

264. *See id.*

Moreover, if interns are paid, internships tend to be an enhanced experience for both parties.[265] The employer, for example, would be able to draw a more diverse and experienced intern pool.[266] A more competitive intern pool also benefits the economy by encouraging competition between businesses for interns.[267] Further, compensating interns raises internship quality and incentivizes productivity because paid internships are more likely to lead to full-time employment.[268] Thus, the tiered wage and hour system creates more beneficial experiences for the employer and intern.[269]

In addition to the benefits derived from a tiered wage and hour system, the proposed system is unlikely to harm the current internship market.[270] The current internship market will sustain limited damage because the types of internships that may be eliminated due to the added financial demand of the new wage and hour system are likely the least sought after internships.[271] Although codifying the proposed wage and hour system for interns could create a loophole for employers to offer nineteen-hour-per-week internships, which would not be covered under the proposed wage and hour system,[272] using that loophole as an argument against internship reform disregards the current reality of internships.[273] As internship programs currently operate, there are no guidelines on who can be an intern and employers can have interns work more than forty hours per week with no pay as long as they are not considered an "employee."[274] Thus, the lack of uniform guidelines creates pathways for employers to exploit free labor.[275]

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265. *See* Ambinder & Lusher, *supra* note 196.

266. *See* Virginia & Ambinder LLP, *supra* note 196.

267. *See* Ambinder & Lusher, *supra* note 196 ("The economy also benefits from paid internships . . . [which] would also generate competition amongst businesses competing for talented new recruits . . . .").

268. *See* Ambinder & Lusher, *supra* note 196 ("[Students] fortunate enough to land a paid internship are more likely to gain a full-time job offer . . . than those who complete an unpaid internship.").

269. *See id.* (discussing the benefits of paid internships for employers, interns, and the economy).

270. *See* PERLIN, *supra* note 16, at 208 (stating that the first internships to be eliminated through a required intern wage would be the least valued internships).

271. *See id.*

272. *See supra* Section. III.A. Under the proposed wage and hour system, an internship could be unpaid for the first twenty hours per week. *See supra* Section. III.A.

273. *See* 29 U.S.C. § 206(a) (describing the federal minimum wage, which does not apply to interns); *see also, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 532 (2d Cir. 2015) (describing Plaintiff Glatt's fifty-hour per week unpaid internship).

274. *See* 29 U.S.C. §§ 206(a), 207(a).

275. *See* Yamada, *Mass Exploitation*, *supra* note 1, at 937–938 (suggesting that unpaid internships correlate with "an expanding, exploitative economic culture of uncompensated work").

Some suggest that creating pathways where interns must be compensated will cause employers to eliminate internship opportunities altogether.[276] However, one American internship market scholar noted, "[w]hile it's true that some individual employers might balk at paying minimum wage and feel moved to cut their programs, this would only separate the wheat from the chaff—the internships that are least valued by employers and interns alike are the ones that would disappear first."[277] Providing recognition for the value of labor in exchange for the least valued internships is an issue worthy of Congress's attention.[278]

IV. CONCLUSION

Although internships continue to be a large part of the American job market,[279] many issues persist surrounding internship laws.[280] Two of these issues are the prevalence of unpaid internships and the dearth of benefits that accompany unpaid internships when compared to paid internships.[281] In addition to the discrepancy in benefits between paid and unpaid internships, unpaid internships prevent equitable participation by students from lower socioeconomic backgrounds.[282] Further, difficulty remains in determining when a worker is an intern or an employee. Difficulty in classification exists because no national standard exists for determining when a worker should be considered an intern.[283] However, this Comment recommends that amending the FLSA to include interns may alleviate many of the issues faced by interns.

The proposed amendments to the FLSA, which are rooted in two substantive changes, will rectify the intern classification issue as well as the issues tied to unpaid internships.[284] First, the term "intern" should be defined in the FLSA.[285] Second, Congress should implement a tiered wage and hour system for interns in the FLSA.[286] Including interns in the FLSA is consistent with the FLSA's purpose, stated by the Supreme Court as

276. *See* Taylor, *supra* note 196 ("If [employers] must pay [interns] . . . then internships may become a thing of the past.").

277. PERLIN, *supra* note 16, at 208.

278. *See* CRAIN, *supra* note 2, at 5.

279. *See* Yamada, *Mass Exploitation*, supra note 1, at 937.

280. *See supra* Section II.E.

281. *See* CRAIN, *supra* note 2, at 11 (stating that unpaid internships correlate with worse career outcomes than paid internships); *see also id.* at 5 (stating that unpaid interns rate their internship experience less positively than paid interns rate theirs).

282. *See* Yamada, *Employment Law Rights*, *supra* note 170, at 218–219.

283. *See* sources cited *supra* note 22.

284. *See supra* Section III.A.

285. *See* Cavanaugh, *supra* note 219, at 647 (stating the importance of a clear definition for comprehending terms).

286. *See* Yamada, *Legal and Social Movement*, *supra* note 171, at 377; *see also* Swiech, *supra* note 186, at 498–99.

providing protections for the lowest paid workers in the country.[287] Additionally, creating a national standard around what constitutes an internship would allow straightforward expectations of those involved with internships and broad compliance with the law.[288] A tiered wage and hour system would allow for more equitable participation in the internships by students from lower socioeconomic backgrounds.[289] Additionally, a tiered wage and hour system would increase the quality of internships because paid internships are associated with better experiences for both employers and interns.[290]

While interns and internships have received attention from the Supreme Court, various DOL administrations, and multiple circuit courts, there is still no uniform standard.[291] The Supreme Court has not explicitly addressed who qualifies for intern status, which has enabled lower courts to apply inconsistent standards.[292] Additionally, because this DOL guidance is only given *Skidmore* deference, lower courts follow the guidance only if the court is persuaded by its merits.[293] Further, circuit courts are not bound by the decisions of other circuit courts that have addressed how to differentiate employees and interns.[294] Therefore, the strongest path forward for ensuring a discernible national standard of who can be an intern and what rights and responsibilities attach to intern status is for Congress to amend the FLSA to provide a definition of the term "intern" and create a tiered wage and hour system for interns.

287. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).

288. *See supra* Section III.C.

289. *See supra* Section III.D.

290. *See supra* Section III.E.

291. *See* sources cited *supra* note 22.

292. *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1143–44 (9th Cir. 2017) (considering Supreme Court opinions when determining how to best distinguish employees and interns); *Laurelbrook Sanitarium*, 642 F.3d at 522 (same); *Reich*, 992 F.2d at 1027 (same).

293. *See* sources cited *supra* note 94.

294. *See* Bintliff, *supra* note 27, at 84.