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AN END TO UNPAID INTERNSHIPS IN LIGHT OF *LOPER BRIGHT*

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Internships are prime opportunities for budding professionals to gain experience and get their foot in the door. Every year, almost two million people in the United States work as interns.[1] This number continues to rise—from 17% of college graduates in 1992, to 50% in 2008, to 62% in 2023.[2]

However, many internships are unpaid. In fact, over close to half of Class of 2023 college seniors who took part in an internship during college were not paid for their work.[3] A fundamental problem results—while internships are meant to increase opportunity for young professionals, unpaid *internships price out too many of them.[4] Indeed, unpaid internships concentrate opportunity among the few who are able to work without pay.[5]*

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[1] ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 27 (2011).

[2] PERLIN, *supra* note 1, at 1; Mary Gatta, *The Class of 2023: Inequity Continues to Underpin Internship Participation and Pay Status*, NACE (Aug. 8, 2023), https://www.naceweb.org/diversity-equity-and-inclusion/trends-and-predictions/the-class-of-2023-inequity-continues-to-underpin-internship-participation-and-pay-status/ [https://perma.cc/2P6J-2VDE].

[3] Gatta, *supra* note 2.

[4] *See generally* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002).

[5] *See, e.g.*, *id.* at 218; *see also* John Yang, Why Unpaid Internships Still Exist Despite Hardships for Young Workers, PBS NEWS (Aug. 26, 2023, 17:40 ET) (identifying that paid interns receive more job offers and higher starting salaries than unpaid interns), https://www.pbs.org/newshour/show/why-unpaid-internships-still-exist-despite-hardships-for-young-workers [https://perma.cc/G97P-G2NN]; Gatta, *supra* note 2 ("Similar to previous classes, among Class of 2023 graduates, male students, white students, students who are not first generation, and students who are not Pell Grant recipients were more likely to participate in

This Note envisions the means to an end of the majority of unpaid internships. It summarizes the history of internships and discusses the trainee exception*, the legal loophole that, since 1947, has allowed employers to exploit the free labor of interns under the pretext that they are purely training them. This Note further postulates that the Supreme Court's ruling in* Loper Bright*,*[6] *which put an end to* Chevron *deference, demarcates the issue of intern pay as especially ripe for litigation—judges are now empowered to decide whether to follow an existing Department of Labor (DOL) fact sheet, which has promoted this* trainee exception *loophole, or propose a new test altogether.*

Considering these issues which plague the law that governs internships, and in light of Loper Bright*, this Note subsequently proposes a novel* de minimis beneficiary test: *if the employer obtains even a de minimis benefit from the intern's presence, the intern must be considered an* employee*, instead of an* intern*, under relevant employment law. This test would conciliate the sparring employment law viewpoints of recent presidential administrations. It would further provide a viable workaround for a presently fractured and paralyzed Congress. Additionally, it would rectify legal malformations tied to the current model of internships, such as the fact that interns, currently viewed under the law as non-employees, are not legally protected against gender- and race-based discrimination in the workplace—the right to be free from the same is guaranteed by Title VII of the Civil Rights Act.*

Ultimately, this Note aims to advocate for internships that are in line with established labor practices of the modern day. By pushing for updates to a common law stuck in a bygone era, it advances a future where budding professionals of every background can partake in the intellectual and social training that internships provide while being fairly compensated for their contributions.

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internships than other groups of students . . . [i]n terms of who gets paid internships, the same inequities persist.").

[6] Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

INTRODUCTION

In June of 2022, the Biden White House announced that, for the first time in history, White House internships would be paid.[7] This followed many years of unpaid internships at the White House, with no room for interns to negotiate.[8] Upon garnering the funding to pay interns from Congress through a bipartisan spending bill,[9] the White House launched the newly paid program with a press release that included the following:

> Too often, unpaid federal internships have been a barrier to hardworking and talented students and professionals, preventing them from contributing their talents and skills to the country and holding them back from federal career

[7] Biden White House, Biden-Harris Administration Announces the First Session of the White House Internship Program, Administration Will Pay Interns for the First Time in History (June 2, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/06/02/biden-harris-administration-announces-the-first-session-of-the-white-house-internship-program-administration-will-pay-interns-for-the-first-time-in-history/ [https://perma.cc/7ELR-LA2X].
[8] *See* Ximena Bustillo, *For years White House interns have not been paid. That will soon change*, NPR (June 2, 2022, 10:17 ET) (prior to this bipartisan bill signed into law by President Biden in March 2022, there were no funds allocated to pay interns) https://www.npr.org/2022/06/02/1102593139/white-house-interns-paid [https://perma.cc/EFD7-XTPJ].
[9] *Id.*

> advancement opportunities. This significant milestone of paying White House interns will help remove barriers to equal opportunity for low-income students and first-generation professionals at the beginnings of their careers . . . .[10]

In my role at the White House, I and my team led this program during its rollout. We were excited about increasing access to a prestigious program. In the past, while some interns could afford to take an unpaid opportunity, others—such as working parents—could not, even in the name of gaining experience.

We hoped this significant move would prompt subsequent administrations to follow suit in paying their interns. Ultimately, something else occurred. Within the first 100 days of President Trump's second administration, he announced that internships at the White House would once again be unpaid.[11]

This flip-flopping does not speak as much to politics as it does to the troublesome unpredictability of the law governing internships. That the White House Internship Program—a program squarely in the public eye—can about-face between being paid and unpaid at the drop of a hat points to the fact that this area of law requires increased stability and predictability. Therefore, this Note advocates for the judiciary as the promulgator of a new test in this realm—which is now feasible due to the Supreme Court's ruling in *Loper Bright*.

Many legal scholars and others have long raised flags that unpaid internships are intrinsically inequitable, and that paid internships serve to increase opportunity, while unpaid internships serve to concentrate it among the few who are privileged enough to work without pay.[12] Desirable unpaid internships "are overwhelmingly for the wealthy and well-connected—to an extent that would be shocking if it involved regular jobs."[13] Further, students who take part in paid internships have higher starting salaries than those who take part in unpaid internships.[14]

But not all students are represented the same in paid internships. Notably, Black, Hispanic, and first-generation students have been underrepresented in paid internships, while white, male, and continuing-generation students are disproportionately overrepresented.[15] This almost inevitably leads to similar results in the workforce. As an

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[10] Biden White House, *supra* note 7.
[11] FAQs, THE WHITE HOUSE, https://www.whitehouse.gov/internships/faq/ [https://perma.cc/9LWV-KAH9] (last visited Apr. 23, 2025).
[12] *See* Yamada, *supra* note 4, at 218 (discussing inequities inherent in unpaid internships); *see also* Yang, *supra* note 5 (same).
[13] PERLIN, *supra* note 1, at xiv.
[14] *Unpaid Internships and the Need for Federal Action*, NACE, https://naceweb.org/about-us/advocacy/position-statements/position-statement-us-internships [https://perma.cc/78Q8-6EJN] (last visited Dec. 22, 2024).
[15] *Id.*

example, there have historically been barriers to employment in the federal government for many minority constituencies.[16]

Importantly, employment law does not afford critical legal protections to unpaid interns because they are not considered employees.[17] This results in the dismissal of harassment claims and other workplace rights claims, further highlighting inequities in the justice system intertwined with the issue of intern pay.[18] Unsurprisingly, legal scholars have described unpaid internships as exploited labor.[19]

Conversely, paid internships succeed in many areas where unpaid internships fall short. An analysis of the National Association of Colleges and Employers internship data from 2011 to 2015 found that college students who had paid internship experience, compared to those with only unpaid internship experience, were almost two times as likely to receive a job offer upon graduation.[20] Additionally, NACE's 2019 Student Survey reported that "[s]tudents with a paid internship received nearly 50 percent more job offers than those who had either an unpaid internship or no internship."[21] Furthermore, the median starting salary for paid interns is $20,000 higher than that of unpaid interns.[22]

Unpaid interns additionally are without the funds to take advantage of traditional networking opportunities that are meant to come with the gig. How can an unpaid intern network at a happy hour event when they cannot afford to buy a drink? This is why,

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[16] For example, the Biden-Harris Administration issued an Executive Order partly designed to "establish[] a government-wide initiative to advance diversity, equity, inclusion, and accessibility in all parts of the Federal workforce" in order to "advance opportunity for communities that have historically faced employment discrimination and professional barriers, including: people of color; women; first-generation professionals and immigrants; individuals with disabilities; LGBTQ+ individuals; Americans who live in rural areas; older Americans who face age discrimination when seeking employment; parents and caregivers who face employment barriers; people of faith who require religious accommodations at work; individuals who were formerly incarcerated; and veterans and military spouses." Biden White House, *Fact Sheet: President Biden Signs Executive Order Advancing Diversity, Equity, Inclusion, and Accessibility in the Federal Government* (June 25, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-president-biden-signs-executive-order-advancing-diversity-equity-inclusion-and-accessibility-in-the-federal-government/ [https://perma.cc/6FBU-9SVT].

[17] *See* Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947) (holding that trainees of a railroad company are not employees under relevant law). For a more full discussion of this landmark case, see Section III.

[18] *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535 (2d Cir. 2016).

[19] *See, e.g.*, David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 229 (1998).

[20] Danielle K. Held, *The Internship Gap: The Relationship Between Internship Salary and The Probability of Receiving a Job Offer* (Apr. 10, 2016) (M.A. thesis, Georgetown University) (DigitalGeorgetown), https://repository.digital.georgetown.edu/handle/10822/1040792 [https://perma.cc/U2C4-HVU5].

[21] Nat'l Ass'n of Coll. and Emp., The 2019 Student Survey Report 1, 2 (2019), https://www.naceweb.org/uploadedfiles/files/2019/publication/executive-summary/2019-nace-student-survey-four-year-executive-summary.pdf [https://perma.cc/ZH4K-QX5V].

[22] For paid interns, $62,500; for unpaid interns, $42,500. Sarah Wood, *Unpaid Internships Remain Out of Reach for Many College Students*, U.S. NEWS AND WORLD REP. (July 10, 2023, 10:12 ET), https://www.usnews.com/education/best-colleges/articles/unpaid-internships-remain-out-of-reach-for-many-college-students [https://perma.cc/FKT2-JQFN].

importantly, housing stipends and/or tuition waivers, which are popular among some internship programs as a form of compensation, are a half-measure; networking opportunities, which constitute one of the main benefits of an internship,[23] are out of reach without pocket money.

This issue is decidedly not one-sided. There are many who argue in favor of unpaid internships. A 2012 survey found that nearly 40 percent of unpaid interns were subsequently offered full-time, paid positions with the employer they interned with.[24] One proponent of unpaid internships believes that, especially in a period of economic recession, there is no incentive for a business to hire inexperienced workers, since government regulations require minimum wages, and therefore, "[t]he rise of the [unpaid] internship is the market's finding the workaround to government regulations, evidence of the tendency of liberty to grow up like grass in the cracks of the sidewalks."[25] Pointedly, this critique of paid internships is from the point of view of the business, and does not seem to take into account whether or not an intern ought to receive any return for their labor. Likely of some relation, unpaid internships have fallen out of favor with the majority of Americans, especially younger Americans, who are the main participants in internships.[26]

Furthermore, the current test which governs whether interns should be considered employees under relevant employment law does not comport with the intent of *Walling v. Portland*[27]—the controlling employment law case—nor with the legislative intent of the Fair Labor Standards Act (FLSA). Therefore, this Note discusses why courts should promulgate a new test in light of the Supreme Court's decision in *Loper Bright*.[28] Because a court is no longer required to show deference to a government agency's interpretation of an ambiguous statute, we find ourselves in an era where every ruling that stems from ambiguities in statutes can turn into an issue of first impression, the result being that courts need not adopt agency guidance on an issue that is not explicitly set forth in law.

The upshot here is that courts can chart a new path—a more equitable path truer to the intent of *Walling*. Because today's Congress is very unlikely to have enough votes to

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[23] *See id.* ("Internships aren't just about access to opportunity for careers. [They are] also about access to social mobility.") (internal quotations omitted).

[24] *See* Jack L. Newhouse & Deborah L. Jacobs, *Unpaid Intern Lawsuits May Reduce Job Opportunities*, FORBES (Sept. 24, 2013, 6:28 AM), https://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities/ [https://perma.cc/8ZRS-KU6Z] (referring to a 2012 National Association of Colleges and Employers survey). However, this post-internship employment percentage is higher with paid internships (38.3 percent versus 64 percent). *Id.*

[25] Jeffrey Tucker, *War on Internships: Should Unpaid Internships Be Regulated?*, THE CHRISTIAN SCI. MONITOR (Apr. 7, 2010) https://www.csmonitor.com/Business/The-Circle-Bastiat/2010/0407/War-on-internships-Should-unpaid-internships-be-regulated [https://perma.cc/763H-NAXR].

[26] *See* #UnpaidIsUnfair, NACE CENTER, https://www.naceweb.org/unpaid [https://perma.cc/SM95-5QG4] (last visited Nov. 7, 2025).

[27] Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

[28] Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

pass an amendment to FLSA, the common law can and should provide an alternate avenue of recourse—a *de minimis beneficiary test* to replace the outdated current test.

I. BACKGROUND

Every year, almost two million Americans work as interns.[29] Many young people see internships as a way to get their foot in the door of an industry, pay their dues, or network within their desired field.[30] Seventy to seventy-five percent of students at four-year universities participate in at least one internship.[31]

The scope of internships is also expanding; while internships were previously seen as an undertaking solely for college students, internships and, relatedly, apprenticeships, have expanded into high schools and graduate schools.[32] All the while, companies save more than $600 million each year by not paying their interns.[33]

Despite common assumptions, interns' work is not always rudimentary or menial. Many interns have provided concrete value to their company. For example, a Spotify intern conceived of the multi-million-dollar idea for Spotify Wrapped.[34] Additionally, over 60% of college students nationally undertook an internship while pursuing their bachelor's degree.[35] Even given the current trend of declining confidence in higher education,[36] more and more students are seeking internships.

In college, a student's major has some effect on whether their internship will be unpaid or paid, and there is significant disparity between majors.[37] For example, up to 87% of engineering and computer science internships are paid, while only 43% of arts and humanities internships are paid.[38] Overall, as many as 50% of internships in the United States are unpaid or paid below the federal minimum wage.[39] In this regard, the modern internship has been described as a "dream solution for employers, allowing them to 'test-drive' young workers for little or no cost."[40]

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[29] PERLIN, *supra* note 1.
[30] *See id.* at 23.
[31] *Id.* at 26.
[32] *Id.* at 27.
[33] PERLIN, *supra* note 1, at book cover.
[34] Whizy Kim, *The Intern Who Created Spotify Wrapped's Story Format Never Got Her Due*, REFINERY29 (Dec. 4, 2020), https://www.refinery29.com/en-us/2020/12/10208481/jewel-ham-artist-spotify-wrapped-internship [https://perma.cc/XYR5-KYU9].
[35] Gatta, *supra* note 2.
[36] Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLUP (July 11, 2023), https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx [https://perma.cc/KA35-SKN4].
[37] PERLIN, *supra* note 1.
[38] *Id.*
[39] *See id.* at 28.
[40] *Id.* at 29.

The modern internship started in hospitals.[41] Starting in 1905, medical students who graduated from their four-year programs were encouraged by the American Medical Association to take a one-year internship under a more experienced physician before practicing medicine.[42] By 1932, 95% of medical graduates participated in an internship.[43] Soon, the practice of internships bled from medicine to other fields.[44]

The Coronavirus pandemic also altered the dynamics of internships, with many internships during that time shifting from in-person to fully remote or hybrid.[45] Moreover, during this same timeframe, remote internships were more likely to be unpaid compared to in-person internships.[46]

Overall, 53% of interns obtained their internship through their personal network, including 43% of remote interns and 60% of in-person interns.[47] This disparity highlights that while a significant number of internships nowadays are completed remotely, the long-existing equity problems surrounding paid internships remain.[48]

II. THE FAIR LABOR STANDARDS ACT AND INTERN PAY

In order to understand the law governing internships, a summary of the Fair Labor Standards Act (FLSA) and the relevant case law which stems from it is necessary. FLSA was enacted in 1938 by Congress and signed into law by Franklin D. Roosevelt as part of the New Deal.[49] Coming out of the Great Depression, FDR intended to spread working hours among the labor class to lower the unemployment rate and get people back to work; previously, fewer workers working more hours had led to high unemployment.[50] With more workers employed, each worker would have more time off to spend on family obligations and social life.[51]

FLSA established a federal minimum hourly wage and imposed an overtime premium system on employees, to be paid out at one and one-half of the workers' hourly rate if a worker worked more than forty hours in a seven-day consecutive workweek.[52]

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[41] *Id.* at 30.
[42] *Id.*
[43] *Id.* at 29–30.
[44] *Id.* at 32.
[45] AnnElizabeth Konkel, *Remote Internships Jump During Pandemic*, INDEED (Apr. 27, 2021), https://www.hiringlab.org/2021/04/27/remote-internships-jump-during-pandemic/#sendgrid_mc_email_subscribe [https://perma.cc/4FLU-W7VT].
[46] *Id.*
[47] Brandon Busteed, *It's Time To Ban Unpaid Internships*, FORBES (Dec. 10, 2021), https://www.forbes.com/sites/brandonbusteed/2021/05/20/its-time-to-ban-unpaid-internships/ [https://perma.cc/496X-QJJ6].
[48] *See id.*
[49] MARION G. CRAIN ET. AL, WORK LAW: CASES AND MATERIALS 677 (4th ed. 2020).
[50] *Id.*
[51] *See id.*
[52] 29 U.S.C. § 207.

FLSA defines an "employee" as "any individual employed by an employer."[53] It defines "[e]mploy" as "to suffer or permit to work."[54] Critically, because this minimum wage and overtime requirement codified by FLSA only exists for employees, and interns are not considered employees under the law, interns can be unpaid under FLSA.[55]

Today, the federal minimum wage constitutes the baseline wage for all covered employees and can be superseded by state minimum wage laws, many of which set a higher minimum wage than the federal minimum wage.[56]

FLSA is still good law—to this day, it is the "primary wage and hour statute applicable to most workers."[57] It also regulates "oppressive child labor," defined as employment of a child under 16 years by a nonparent, or employment of a child between 16 and 18 years in an occupation the Secretary of Labor has declared to be "detrimental to their health or well-being."[58] Examples include logging and coal mining.[59] There is also a subminimum youth "opportunity wage" that is still in effect, allowing employers to pay those under 20 years $4.25 per hour, provided certain conditions are met.[60]

III. ANALYSIS OF CASE LAW

In *Walling*, decided in 1947, the DOL sought to enforce FLSA's intern provisions against the Portland Terminal Company in order to force the company to backpay their brakeman trainees.[61] In order for one to become a brakeman at Portland Co., they had to undergo a training program with the company, which lasted between seven and eight days.[62] During this training, the trainees were not compensated for their time.[63] The question at hand was whether the trainees were employees under FLSA during this training period.[64]

Throughout the training, the trainees "learn[ed] the routine activities by observation" before they were "gradually permitted to do actual work under close scrutiny."[65] In analyzing the trainees' claim, the Court noted that the trainees were primarily engaged in learning, which benefitted the trainees more than it benefitted the company.[66]

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[53] *Id.* § 203(e)(1).
[54] *Id.* § 203(g).
[55] CRAIN ET. AL, *supra* note 49.
[56] SARAH A. DONOVAN & ELLEN M. LECHMAN, CONG. RSCH. SERV., RL43792, STATE MINIMUM WAGES: AN OVERVIEW (2025), https://www.congress.gov/crs-product/R43792.
[57] CRAIN ET. AL, *supra* note 49.
[58] *Id.* at 687; 29 U.S.C. § 203(l).
[59] CRAIN ET. AL, *supra* note 49, at 687.
[60] *Id.* at 686.
[61] Walling v. Portland Terminal Co., 330 U.S. 148, 148 (1947).
[62] *Id.* at 149.
[63] *Id.* at 150.
[64] *Id.*
[65] *Id.* at 149.
[66] *Id.* at 152–53.

The Court also noted that the trainees' work was closer to an educational experience than a work experience, in part because Portland Co. did not gain any "immediate advantage" from the trainees' work.[67] Vitally, the Court noted that the trainees did not make the company's work more efficient but, instead, often impeded it.[68] The Court subsequently ruled in favor of Portland Co., concluding that the trainees were not employees under FLSA.[69]

Walling is still binding precedent regarding how to interpret the intern versus employee question under FLSA. In fact, the DOL cites *Walling* in its fact sheet.[70] Though the case is indeed good law, its circumstances speak to an American economy and society of the past—one that scarcely exists in the here and now. Today, most interns are in college or are about to enter college, not quasi-apprenticing before entering a trade.[71] Further, intern law derived from *Walling*, decided in 1947, strands interns outside the shelter created by the federal workplace protections enacted in the 70-odd years since, such as the Civil Rights Act and Americans with Disability Act.[72] For these reasons, the Court's analysis in *Walling* is outdated, and an updated test would be beneficial.

The case law stemming from FLSA has further developed in recent years. In *Glatt*, decided in 2015, two unpaid interns of Fox Searchlight Studios demanded the studio backpay them for their work on the film *Black Swan*.[73] The interns argued, under the *Walling* precedent and the DOL's guidance, that they should be classified as employees because their work—including menial tasks such as copying documents and running errands—primarily benefitted the company rather than their own educational experience. Ultimately, the upshot of *Glatt* was that the Second Circuit adopted its own primary beneficiary test, which was skewed toward the employer's interest (i.e., where the intern is not an employee under the law).[74] Under this test, the intern is an employee when the intern's contribution to the employer's operation is greater than the "tangible and intangible

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[67] *Id.* at 153.
[68] *Id.* at 150.
[69] *Id.* at 153.
[70] *DOL Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, WAGE & HOUR DIV., DEP'T OF LAB. (updated Jan. 2018), https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships#2 [https://perma.cc/H6JT-MDQM].
[71] *Unpaid Internships and the Need for Federal Action* NACE, https://www.naceweb.org/about-us/advocacy/position-statements/position-statement-us-internships [https://perma.cc/AEY6-R7Q7] (last visited Oct. 15, 2025) ("Internships are one of the most effective recruiting tools employers use to identify and hire early careers college graduates.").
[72] Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection—Reforming the Regulation of Student Internships*, Policy Memo #160, ECON. POL'Y INST. (2010) https://www.epi.org/publication/pm160/ [https://perma.cc/EL7Q-UB8G].
[73] Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 531 (2d Cir. 2016).
[74] *Id.* at 535–36.

benefits" the intern receives.[75] Subsequently, the DOL updated its fact sheet to accord with this Second Circuit test; the DOL's fact sheet retains the *Glatt* test to the present day.[76]

Nonetheless, the common law has come to an inflection point, delivered by the Court's ruling in *Loper Bright*. Under this new standard, courts must act as quasi-lawmakers and use independent judgment in determining how to best interpret the law.[77] Therefore, courts can no longer give *Chevron* deference to the DOL's fact sheet. This inflection point signifies that the time is ripe for a court to promulgate a new test, if and when presented with an opportune case or controversy.

IV. EXISTING DEPARTMENT OF LABOR GUIDANCE

Indeed, the Supreme Court's ruling in *Loper Bright*, which put an end to *Chevron* deference, demarcates the issue of intern pay as especially ripe for litigation—judges are now empowered to decide whether to follow existing DOL guidance, which has promoted the *trainee exception* loophole, or whether to propose a new test altogether.

This existing DOL guidance is in the form of a fact sheet titled "Internship Programs Under the Fair Labor Standards Act."[78] The fact sheet, which can be found on the DOL's website, lists seven factors that should be examined in determining whether an intern meets the *trainee exception* of FLSA, which would exempt the employer from any obligation to pay the intern.[79] If after examining the factors, it is determined that the intern is the primary beneficiary of the arrangement, the intern is considered an employee under relevant labor law.[80] If it is determined that the employer is the primary beneficiary of the arrangement, the intern is not considered an employee and falls into the *trainee exception*.[81]

As discussed in Section III, *Analysis of Existing Case Law*, this seven-factor test is called the primary beneficiary test and comports with relevant case law, namely *Glatt*.[82] The seven factors include: (1) the extent to which the intern and employer each understand that there is no express or implied expectation of compensation; (2) the extent to which the internship provides training that is similar to what would be provided in an education environment, including clinical and hands-on training; (3) the extent to which the internship is tied to the intern's formal education program [if one exists] by integrated

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[75] *Id.* at 535.
[76] *DOL Fact Sheet #71*, *supra* note 70.
[77] Margaret Burger et. al, *Supreme Court's Loper Bright decision impact — FAQs*, MERCER (Sept. 16, 2024), https://www.mercer.com/en-us/insights/law-and-policy/supreme-court-s-loper-bright-decision-impact-faqs/#:~:text=After%20Loper%20Bright%2C%20challenges%20will,best%20interpretation%20of%20a%20law [https://perma.cc/8J25-GG3W].
[78] *DOL Fact Sheet #71*, *supra* note 70.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

coursework or by academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by adhering to the intern's academic calendar [again, provided they are in school]; (5) the extent to which the internship's length is limited to the period in which the internship is beneficial to the intern's learning; (6); the extent to which the intern's work complements, instead of replaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the extent to which the intern and the employer have a mutual understanding that the internship is not a promise of a paid job by the employer at the conclusion of the internship.[83]

If the intern is deemed an employee under relevant labor law, then FLSA entitles them to receive the minimum wage and, if applicable, overtime pay.[84] Courts analyze these factors flexibly, with no single factor deemed determinative.[85] Currently, the federal minimum wage, which is set by Congress, is $7.25 per hour, and this rate has remained unchanged since 2009.[86] A discussion of the stagnating minimum wage and the "Fight for 15" is beyond the scope of this Note.[87]

V. THE CIRCUIT SPLIT: DIFFERENT TESTS FOR THE 'INTERN VS. EMPLOYEE' QUESTION

The DOL has thrown its weight behind the primary beneficiary test.[88] However, circuit courts, when faced with the employee versus intern distinction, have interpreted *Walling* in various ways, resulting in a number of common law tests.[89]

The Fourth Circuit uses the primary beneficiary test in a slightly modified form.[90] The Fifth Circuit first applies a three-part test, considering "(1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any *immediate* benefit from the trainee's work."[91] The court then applies the primary beneficiary test to see if both tests reach the

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[83] *Id.*
[84] *Id.* Of note, the most an intern can recoup if they prevail in court is backpay of minimum wage and, if applicable, overtime pay, without an opportunity to retroactively negotiate a salary. *Id.*
[85] *Id.*
[86] 29 U.S.C. § 206. For a history of minimum wage increases along with historical context for the increases, see *History of Changes to the Minimum Wage* Law, WAGE & HOUR DIV., U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/minimum-wage/history [https://perma.cc/4RLU-HK2Y] (last visited Apr. 10, 2025).
[87] For a thorough discussion of this topic, see Yannet Lathrop, *Data Brief: Impact of the Fight for $15: $68 Billion in Raises, 22 Million Workers*, NAT'L EMP. L. PROJECT (Nov. 2018).
[88] *See DOL Fact Sheet #71*, *supra* note 70 (adopting the primary beneficiary test).
[89] Andrew Mark Bennett, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 305 (2011).
[90] *See* McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989).
[91] Donovan v. Am. Airlines, 686 F.2d 267, 271–72 (5th Cir. 1982) (citing Wirtz v. Wardlaw, 339 F.2d 785 (4th Cir. 1964)).

same conclusion.[92] The Tenth Circuit applies the primary beneficiary test, but only takes the results to be "relevant but not conclusive."[93] When federal courts apply the primary beneficiary test, they apply the six parts as factors to consider in a totality of the circumstances analysis rather than the all-or-nothing approach that the DOL uses.[94] In each case, the burden is on the intern to show that they meet the requirements to fit within FLSA's employee designation.[95]

In synthesizing takeaways from cases across the circuits, Andrew Mark Bennett has found that courts generally hold that there is no employment relationship (i.e., the intern fits within FLSA's *trainee exception*) when the work of the intern immediately benefits the employer.[96] Additionally, Bennett found that the training period generally lasted longer in internships than in employment, with the former training period lasting up to an entire summer and the latter training period lasting significantly shorter.[97]

VI. LACK OF LEGAL STANDING FOR INTERNS

Unpaid internships also create a legal malformation—a lack of standing[98] for interns to bring claims as employees.[99] Employee claims cover the "legal rights of the workplace," including the right to be free from age-, gender-, and race-based discrimination.[100] Employees can additionally benefit from the protections of general workplace statutes, such as the Family and Medical Leave Act, which gives employees the right to take unpaid, job-protected leave, and the National Labor Relations Act, which gives employees the right to join unions and engage in collective bargaining.[101] Critically, interns cannot benefit from these statutes because they are not categorized as employees under the law.[102]

This is doubly troubling because there is evidence that interns are more likely to face sexual harassment in the workplace than regular employees.[103] David Yamada argues that that "[s]tudent interns now exist in a legal void, falling between the cracks of legal

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[92] *See id.* at 271–73.
[93] *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993).
[94] *Id.*
[95] Bennett, *supra* note 92.
[96] *Id.* at 307.
[97] *Id.*
[98] Legal standing refers to whether a party is granted the ability to bring a lawsuit in court. *Standing*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/standing [https://perma.cc/SGU3-LGHK] (last visited Feb. 1, 2025).
[99] PERLIN, *supra* note 1, at 78.
[100] *Id.* at 78–79.
[101] Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 458 (1995); Rita Gail Smith, *Protection of Individual Action As "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369 (1983).
[102] PERLIN, *supra* note 1, at 79.
[103] PERLIN, *supra* note 1, at 82. The study in question was a group study of female interns studying mass communication or medicine. *Id.*

protections for workers and legal protections for students."[104] Furthermore, in many cases, interns' claims that would otherwise be robust are dismissed for lack of legal standing.[105]

Workplace protections such as these should not allow any group of individuals to fall between the cracks. Indeed, an intern deserves the opportunity to be heard on the merits of their case, the same as any other individual. To rectify this legal malformation, interns should be categorized as employees under the law. A *de minimis beneficiary test*, which I discuss further below, can accomplish this.

VII. THE DEATH OF *CHEVRON* DEFERENCE

The Supreme Court's recent overturning of *Chevron* deference provides ripe ground upon which lower courts have the opportunity to reevaluate intern law. In *Chevron*, the Court set out a two-part framework for courts to follow when reviewing an agency's interpretation of a statute that it administers.[106] As the first step, the reviewing court was to determine whether Congress has "directly spoken to the precise question at issue."[107] But if the court concluded that the statute was silent with respect to the specific issue in question, the court could choose to defer to the agency's interpretation of the statute.[108] Essentially, this signified that courts could defer to administrative agencies' interpretation of unclear statutes, which is logical, as these agencies often have the subject matter expertise to understand how to best carry out the statute's mandate.

The Court reasoned in subsequent decisions that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[109]

Chevron deference, as it was termed, was the law of the land from 1984 until 2024. During this period, courts gave *Chevron* deference to DOL Fact Sheet #71, holding that the fact sheet was entitled to deference because it was "promulgated by the agency charged with administering FLSA and [was] a reasonable application of it . . . ."[110]

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[104] Yamada, *supra* note 4, at 217.
[105] PERLIN, *supra* note 1, at 79; *see, e.g.*, O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997).
[106] Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842 (1984), overruled by Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
[107] *Id.*
[108] *Id.* at 843.
[109] Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996); *see also* Cuozzo Speed Technologies, LLC v. Lee, 579 U.S. 261, 276–77 (2016).
[110] Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 CIV. 6784 WHP, 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *and vacated and remanded*, 791 F.3d 376 (2d Cir. 2015), opinion amended and superseded, 811 F.3d 528 (2d Cir. 2016), *and vacated and remanded*, 811 F.3d 528 (2d Cir. 2016) ("By contrast, the DOL factors have support in *Walling*. Because they were promulgated by the agency charged with administering FLSA and are a reasonable application of it, they are entitled to deference.").

Pertinently, *Chevron* was overruled by the Court in *Loper Bright*, wherein the Court decided that *Chevron* deference could not be reconciled with the Administrative Procedure Act (APA).[111] In its reasoning, the Court pointed to a conflict of interest that is intrinsic when agencies are given deference to decide the scope of their own authority.[112]

The Court reasoned that, to vanquish this conflict of interest, statutory interpretation must be left to the courts, which should utilize "the traditional tools of statutory construction—the tools courts use every day," to resolve statutory ambiguities.[113] Indeed, the Court declared that "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[114] In this way, the Court reasoned, courts could arrive at the "single, best meaning" of the statute at hand.[115]

VIII. HOW *LOPER BRIGHT* CHANGES THE INTERNSHIP CALCULUS

Under *Loper Bright*, the analysis of the primary beneficiary test looks quite different than it previously did under *Chevron* deference.

No regulation codifies the primary beneficiary test, and the most binding guidance that exists currently is DOL Fact Sheet # 71.[116] This fact sheet outlines the seven prongs of the primary beneficiary test.[117] It further directs that the decision regarding whether an intern is an employee under FLSA must be made on a case-by-case basis.[118] Importantly, it asserts that "courts have described the 'primary beneficiary test' as a flexible test," where "no single factor is determinative."[119]

Under *Chevron*, DOL Fact Sheet #71 merited deference from the courts.[120] Moreover, the Supreme Court has held generally that courts can give weight to agency guidance.[121] In *Skidmore*, the Court held that it "consider[s] that [an agency's] rulings,

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[111] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 369 (2024).
[112] *Id.* at 373.
[113] *Id.*
[114] *Id.* at 413.
[115] *Id.* at 400.
[116] *DOL Fact Sheet #71, supra* note 73. As a contrast, the Economic Realities test, which courts use to distinguish whether someone is an employee or an independent contractor, was codified into federal regulation in 2024. 29 C.F.R. Parts 780, 788, and 795 (2024), https://www.govinfo.gov/content/pkg/FR-2024-01-10/pdf/2024-00067.pdf [https://perma.cc/8MAQ-VN8D].
[117] *DOL Fact Sheet #71, supra* note 73.
[118] *Id.*
[119] *Id.*
[120] Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993); Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 CIV. 6784 WHP, 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *and vacated and remanded*, 791 F.3d 376 (2d Cir. 2015), opinion amended and superseded, 811 F.3d 528 (2d Cir. 2016), *and vacated and remanded*, 811 F.3d 528 (2d Cir. 2016)*; see also* Cody Elyse Brookhouser, *Whaling on Walling: A Uniform Approach to Determining Whether Interns Are "Employees" Under the Fair Labor Standards Act*, 100 IOWA L. REV. 751 (2015).
[121] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

interpretations and opinions . . . 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,"[122] with the degree of deference courts should provide depending on "the thoroughness evident in [the agency's] 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."[123] Subsequently, when assessing what level of deference to give an agency's ruling, the Fifth Circuit added that a court should ensure that an agency's actions fall within a "zone of reasonableness" and ensure that it "has reasonably considered the relevant issues and reasonably explained the decision."[124]

Because courts have found DOL Fact Sheet #71 to be a reasonable application of FLSA, courts have—to this point—granted DOL Fact Sheet #71 *Chevron* deference.[125]

However, this analysis looks quite different in light of *Loper Bright.* The Court's decision in *Loper Bright* creates ambiguity relating to how much deference, if any, a court is able to give DOL Fact Sheet #71. Legal analysts have noted that after *Loper Bright*, challenges to agency interpretations in court will most likely have an easier time succeeding.[126] In this new world, courts will no longer be able to defer to an agency's reasonable interpretation of the law and instead must act as quasi-lawmakers themselves, using independent judgment in determining how to best interpret the law.[127]

As such, this issue is ripe for litigation. If circumstances arose similar to those in *Glatt*,[128] *Loper Bright* gives courts the leeway to promulgate a different test—one which skews toward categorizing interns as employees. Therefore, a new test, molded by the common law with judges acting as quasi-lawmakers, can be developed if and when a relevant case or controversy presents itself.

The *de minimis beneficiary test* I propose better fits the contours of modern employment law practices than do the myriad current tests. Further, the *de minimis beneficiary test* is more aptly crafted for today's era, contrasting with the Court's current interpretation of FLSA, which arose during the World War II era of *Walling*.[129]

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[122] *Id.* Notably, the Court, in overruling *Chevron*, held that *Skidmore* deference is once more the proper standard. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 394 (2024).
[123] *Skidmore*, 323 U.S. at 140.
[124] Fed. Commun. Comm'n v. Prometheus Radio Project, 592 U.S. 414, 423 (2021).
[125] *Glatt*, 293 F.R.D. at 532 ("By contrast, the DOL factors have support in *Walling*. Because they were promulgated by the agency charged with administering FLSA and are a reasonable application of it, they are entitled to deference.").
[126] Margaret Burger et. al, *Supreme Court's Loper Bright decision impact — FAQs,* MERCER (Sept. 16, 2024), https://www.mercer.com/en-us/insights/law-and-policy/supreme-court-s-loper-bright-decision-impact-faqs/#:~:text=After%20Loper%20Bright%2C%20challenges%20will,best%20interpretation%20of%20a%20law. [https://perma.cc/59YA-SREK].
[127] *Id.*
[128] For a discussion of the facts in *Glatt*, see Section III *Analysis of Case Law*.
[129] *See* Sections II *The Fair Labor Standards Act and Intern Pay* and III *Analysis of Case Law*.

Undeniably, *Loper Bright* represents a drastic departure from the previously established norm in administrative law.[130] Post *Loper Bright*, courts are the decision makers when an agency-directing statute is unclear. Nonetheless, some scholars assert that *Loper Bright* does not change the sequence of events courts undergo to decide an administrative law case.[131] These scholars believe that a *Chevron* deference and a *Loper Bright* delegation, while altered in name, will functionally work the same.[132] Regardless of whether this assertion holds true in years to come, the point still remains—*Loper Bright* plainly asserts that courts are to decide whether an agency has acted within its statutory authority.[133] Here, that means that courts decide whether to follow DOL Fact Sheet #71, or whether to propose a new test altogether.

IX. A SYSTEM THAT WORKS: APPRENTICESHIPS

As discussed herein, internships come with many deficiencies. But apprenticeships excel in many of the areas in which internships fall short. Apprenticeships are more strictly regulated, to the benefit of apprentices, and come with a more reliable promise of subsequent employment compared to internships. As such, modern apprenticeships provide a model upon which to base changes to the law governing internships.

Apprenticeships have existed since medieval times and possibly earlier.[134] Advocates describe them as a "supported journey during which an individual matures and becomes a recognized member of an occupational community" and as "an integral transfer of knowledge" traditionally associated with "trades where you learn with your hands and learn by doing."[135] The United States boasts a strong system of registered apprenticeships, which is overseen federally by the Office of Apprenticeships within the Department of Labor and within states by parallel state offices.[136] In contrast, there are no federal or state oversight offices for internships.[137]

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[130] Adrian Vermeule, *Chevron by Any Other Name*, THE NEW DIG. (Jun. 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/R4WR-7R8Y] ("Whereas *Chevron* was said to rest on a general presumption that gaps and ambiguities represented a delegation to agencies, judges will now have to decide, statute by statute and problem by problem, whether [delegation to an agency] is the best reading of the statute.").
[131] *See, e.g.*, *id.*
[132] *See, e.g.*, *id.*
[133] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024) ("Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").
[134] PERLIN, *supra* note 1, at 46.
[135] Jeffrey A. Cantor, *21st-Century Apprenticeship: Best Practices for Building a World-Class Workforce* 1 (2015) https://research-ebsco-com.ezproxy4.library.arizona.edu/c/6esxvs/ebook-viewer/epub/yjpfzbg3v5?route=details [https://perma.cc/64A8-T27G] (last visited January 30, 2025); PERLIN, *supra* note 1, at 44.
[136] PERLIN, *supra* note 1, at 45.
[137] PERLIN, *supra* note 1, at 44. Indeed, internships are "apprenticeship lite," with "no consistency or standard," and are often unstructured, with bare to no supervision. *Id.*

In the United States, only 0.3 percent of the workforce participate in registered apprenticeships, but this share increased across the latter half of the 20th century.[138] This increase largely resulted from Congress passing the Fitzgerald Act in 1937, which instructed the Department of Labor "to promote the furtherance of labor standards necessary to safeguard the welfare of apprentices" and to cooperate with the States in promoting these standards.[139] The Act established a national advisory committee, tasked with establishing minimum standards for apprenticeships.[140] More recent amendments to the Act prevent racial, ethnic, religious, age, and gender discrimination in apprenticeship programs.[141] As of 2011, there are nearly 500,000 active apprentices across the U.S.[142] Each year, nearly 200,000 new apprentices enter into 28,000 registered apprenticeship programs, which span greater than 1,000 skilled trades.[143] Critically, apprentices consistently earn greater than the minimum wage, with their wages increasing with time and skill level.[144] Apprentices also have standing to bring federal workplace protection claims which interns, in large part, are without.[145]

Indeed, although internships account for the bulk of the training of today's young professionals, apprenticeships constitute the better way forward. Ross Perlin aptly describes this paradox:

> [W]hite-collar America imagines apprenticeships in medieval or Victorian caricature—blacksmiths and carpenters keeping young ruffians in line—and misses the modern picture entirely. Are internships white-collar apprenticeships? The answer is yes and no: on the one hand, internships are clearly presented in the same spirit, as a way to launch young people into their careers; on the other hand, internships fall far short of the modern apprenticeship model in nearly every respect, despite the wealth and sophistication of white-collar firms and industries.[146]

Another advantage of apprenticeships is that which is promised to the apprentice afterward. Apprenticeships generally end with a stable job waiting for the apprentice on the other side.[147] On the other hand, interns can labor dutifully for the balance of their

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[138] Cantor, *supra* note 137; PERLIN, *supra* note 1, at 56.
[139] 29 U.S.C. § 50; *see also* PERLIN, *supra* note 1, at 55.
[140] 29 U.S.C. §§ 50–51.
[141] 29 C.F.R. § 30.1.
[142] PERLIN, *supra* note 1, at 45.
[143] *Id.*
[144] *Id.* at 46.
[145] *Id.* For a discussion of the legal malformations that surround internships, see Section VI *Lack of Legal Standing for Interns*.
[146] *Id.* at 45.
[147] *Id.* at 59.

internship without any guarantee of subsequent employment.[148] In this way, apprenticeships more aptly fit the moniker of job training programs, while internships "extend the fantasy" that interns can find a place in a field of their choosing "until it comes time to land a stable, comfortable, decently paying job."[149]

Interestingly, the situation in *Walling*, involving railroad brakemen trainees, more closely depicts a modern apprenticeship than a modern internship, because the railroad company guaranteed that the brakemen would be hired as employees after the training period.[150] The fact that apprenticeships nowadays are routinely compensated above the minimum wage, while internships are largely unpaid ventures that have continued to slither and slip through the statutory cracks, marks a stark misstep in the American jurisprudence. Internships were never meant to exist in the legal no-man's-land they find themselves in, but the national proclivity to kowtowing to corporations paired with corporations' desire to find the cheapest labor solution has led us to this point. Indeed, "[i]nternships have grown up in a permissive period, ill-disposed to regulation and blind to labor issues."[151]

X. THE SOLUTION? IMPLEMENTING A *DE MINIMIS BENEFICIARY TEST*

The deficiencies and legal malformations that infest the law governing internships, coupled with the opportunity courts have been granted by the Supreme Court's *Loper Bright* ruling, leads to the *de minimis beneficiary test*: if the employer obtains even a de minimis benefit from the intern's presence, the intern must be considered an employee, instead of an intern, under relevant employment law. This test should be viewed from the perspective of a reasonable person in the employer's position.

This *de minimis beneficiary test* constitutes a step forward for many reasons.

First, the *de minimis beneficiary test* is skewed towards interns being categorized as employees. As a result, the number of paid internships would grow, and fewer interns would be priced out.

Second, the *de minimis beneficiary test* provides a brightline rule that is predictable for employers.[152] Of paramount consideration for any employer overseeing an internship program is the ability to budget accurately and predictably: hiring managers and executives need to know how much they should budget to hire intern talent, just as they budget to hire

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[148] Petrina Darrah, *Do Internships Increase Employability?*, GVI (May 12, 2023), https://www.gviusa.com/blog/smb-do-internships-increase-employability/ [https://perma.cc/67DM-9SWD] (explaining that while candidates with internship experience generally are more likely to secure employment within six months of graduation, employment is not at all a certainty).
[149] PERLIN, *supra* note 1, at 59.
[150] *See generally* Walling v. Portland Terminal Co., 330 U.S. 148 (1947).
[151] PERLIN, *supra* note 1, at 58.
[152] *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 532 (2d Cir. 2016).

employee talent.[153] The *test* makes it easy to predict whether an intern must be categorized as an employee, and therefore, paid. Hiring managers and executives, equipped with the predictability the *de minimis test* provides, will additionally be less inclined to make the shortsighted decision of ending their internship programs when faced with the prospect of paying their interns.[154]

Third, a test adopted by a court into our common law would provide a viable workaround for a presently fractured and paralyzed Congress. There is widespread support for paying interns.[155] However, Congress is divided and is inefficient at passing legislation; it will likely remain this way for the foreseeable future.[156] Indeed, in 2019, a Congressional representative introduced H.R. 134, the Unpaid Intern Protection Act, but it quickly died in committee.[157]

After courts adopt the *test*, they would, in all likelihood, add ex-post carveouts to refine the *test* as it develops alongside the common law—the most obvious of which is that the intern can refuse employee status if they so choose. An intern may choose to refuse employee status for various reasons, including that under some United States visa programs, a visa holder must maintain student status and cannot work as an employee without specific authorization.[158] Carveouts such as this would ensure that the *test* fulfills the goal of categorizing interns as employees while ensuring that unintended consequences do not follow.

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[153] Annie Mueller, *The Cost of Hiring a New Employee*, INVESTOPEDIA (Apr. 30, 2024), https://www.investopedia.com/financial-edge/0711/the-cost-of-hiring-a-new-employee.aspx [https://perma.cc/L34W-PH8J].

[154] Companies choosing to end their internship programs rather than pay their interns has been at least somewhat of an issue post-*Glatt*. Conde Nast, for one, ended its internship program after *Glatt*. *See* Cara Buckley, *Sued Over Pay, Condé Nast Ends Internship Program*, N.Y. TIMES (Oct. 23, 2013), https://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html [https://perma.cc/LK6X-99PF].

[155] *See, e.g.*, Busteed, *supra* note 46; *see also* PAY OUR INTERNS (last visited Oct. 24, 2025) https://payourinterns.org/ [https://perma.cc/6XNC-G6DW].

[156] Aaron Tyler Mentzer, Polarized Policymaking: The Effect of Ideological Division on Legislative Outcomes in the United States Congress (2021) (Ph.D. dissertation, West Virginia University) https://researchrepository.wvu.edu/etd/10304/?utm_source=researchrepository.wvu.edu%2Fetd%2F10304&utm_medium=PDF&utm_campaign=PDFCoverPages [https://perma.cc/BJF8-PXR6].

[157] *See* H.R.134: Unpaid Intern Protection Act of 2019. This legislation attempted to close a loophole that bars unpaid interns from bringing employee claims and would thereby "prohibit[] employers from discriminating against unpaid interns on the basis of (1) race, color, religion, sex, national origin, or age; or (2) disability, if such intern can perform the essential functions of the position with or without reasonable accommodation." *Id.* It was introduced by Rep. Elijah Cummings (D-MD) in 2019 but quickly died in committee. *Id.*

[158] Jacob M. Monty, *The ABCs and 1-2-3s of Employer-Based Immigration Programs*, 27 NO. 4 TEX. EMP. L. LETTER 4 (2016); *see also Working in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERV. (last visited Apr. 23, 2025) https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment#:~:text=These%20visas%20are%20commonly%20known,program%2C%20or%20a%20vocational%20program [https://perma.cc/3QLE-JME3].

One potential drawback of the *test* is that interns would likely be paid only the Federal minimum wage, as FLSA does not require employers to pay above the minimum wage.[159] However, in order to stay competitive with other internship programs, employers would likely be forced to raise their pay due to marketplace demands, in the same way employers raise non-intern employee salaries to match those of competitors. Additionally, the federal minimum wage constitutes the baseline wage for all covered employees and can be superseded by state minimum wage laws, many of which set a higher minimum wage than the federal minimum wage.[160] In this way, intern salaries would likely reach a livable wage over time, with livable wages differing from city to city.

Therefore, through the common law, courts can put into play a workable and popular legal framework for categorizing interns as employees without necessitating congressional action. Then, down the road, Congress can take up the mantle to pass legislation mirroring the *de minimis beneficiary test*.

XI. ADVANTAGES OF THE *DE MINIMIS BENEFICIARY TEST* RELATING TO POLITICAL INSULATION OF RELEVANT EMPLOYMENT LAWS

The *de minimis beneficiary test* also serves to politically insulate the law governing internships from the whims of the any presidential administration. As discussed above, different presidential administrations often have different ideas about whether interns should be paid.[161] But if courts decide that interns should be categorized as employees, it does not matter whether or not the executive branch, and specifically the DOL, holds otherwise. Courts' decisions regarding who constitutes an intern, established in *Walling* and reserved to the courts to this day, supersedes any executive branch ruling on the matter.

Analysis of DOL internship guidelines under recent presidential administrations between 2013 and 2025 provides a relevant illustration. The Obama administration's Department of Labor stepped up its enforcement in regulating unpaid internships which violated federal labor law.[162] The Obama DOL's version of Fact Sheet #71, promulgated in 2013, constituted a six-factor test, all of which needed to be met in order to show the absence of an employment relationship and, consequently, for the intern to not be entitled

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[159] 29 U.S.C. § 206.
[160] DONOVAN & LECHMAN, *supra* note 59.
[161] *See Introduction*.
[162] Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010) https://www.nytimes.com/2010/04/03/business/03intern.html [https://perma.cc/D9YU-LA9M].

to minimum wage and overtime pay.[163] This version of Fact Sheet #71 accorded with *Glatt*, decided earlier that same year.[164]

Then, the first Trump administration's DOL issued a revamped Fact Sheet #71, which was more permissive to employers attempting to create legal unpaid internship programs.[165] This version of the fact sheet aligned with the Second and Eleventh Circuits, who rejected the Obama administration's mandatory six-prong test and instead took up a more flexible primary beneficiary test.[166]

Because the last decade-and-a-half of executive branch labor law guidance has fluctuated, adhering to this guidance an unenviable task. Further, in today's climate of ever-increasing political polarization,[167] subsequent presidential administrations are likely to perpetuate this pattern. This unpredictability is yet another reason the judiciary should promulgate the *de minimis beneficiary test*; there is no guarantee that the DOL's guidance will stay the same from even one World Cup[168] to the next. It is nonsensical that a legal schema which affects millions of young people can fluctuate so drastically depending on who is in office.

Another reason courts should adopt the *de minimis beneficiary test* is that interns, especially young women interns, have been shown to lack strong salary negotiation skills compared to more experienced workers.[169] Along these lines, young interns may not know

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[163] Carol A. Poplawski, *Be Careful with Unpaid Interns: The Six-Factor Checklist You Need*, OGLETREE DEAKINS (Aug. 19, 2013), https://ogletree.com/insights-resources/blog-posts/be-careful-with-unpaid-interns-the-six-factor-checklist-you-need/ [https://perma.cc/KQ3U-5BMM].

[164] Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 CIV. 6784 WHP, 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *and vacated and remanded*, 791 F.3d 376 (2d Cir. 2015), *opinion amended and superseded*, 811 F.3d 528 (2d Cir. 2016), *and vacated and remanded*, 811 F.3d 528 (2d Cir. 2016); Poplawski, *supra* note 166.

[165] *U.S. Court System Teaches the DOL a Lesson; Then DOL Decides to Give Credit to Student Interns Rather Than Pay*, OGLETREE DEAKINS (Oct. 1, 2015), https://ogletree.com/international-employment-update/articles/march-2018/united-states/2018-03-08/u-s-court-system-teaches-the-dol-a-lesson-then-dol-decides-to-give-credit-to-student-interns-rather-than-pay/ [https://perma.cc/J9EZ-YYGC].

[166] *Id.*; *see A New Internship Standard—The Second Circuit's Seven-Factor Test and What it Means for Your Company*, OGLETREE DEAKINS (Jul. 13, 2015), https://ogletree.com/insights-resources/blog-posts/a-new-internship-standard-the-second-circuits-seven-factor-test-and-what-it-means-for-your-company/ [https://perma.cc/E39P-CY88]; *Is the Six-Factor Test Still Good? Eleventh Circuit Endorses Modified Intern Test*, OGLETREE DEAKINS (Oct. 1, 2015), https://ogletree.com/insights-resources/blog-posts/is-the-six-factor-test-still-good-eleventh-circuit-endorses-modified-intern-test/?_gl=1%2A1t4ien2%2A_up%2AMQ..%2A_ga%2AMTE1Mzg3NjIwOS4xNzM4MzgxNzcw%2A_ga_V4WT9JNBFT%2AMTczODM4MTc2OS4xLjAuMTczODM4MTc2OS4wLjAuMA [https://perma.cc/BC9G-KVVK].

[167] *See* Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSRCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/PMJ6-J7TW].

[168] The FIFA (Men's) World Cup and Women's World Cup are held once every four years. *See World Cup*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/sports/World-Cup-football [https://perma.cc/Z8UB-C5ZB] (last visited Apr. 23, 2025).

[169] *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003).

how to negotiate to receive pay and benefits, or even whether they can. The law should not rely on interns to negotiate up from an unpaid position. Rather, courts should adopt the *test*, which would serve to categorize the majority of interns as employees.

XII. THE INSTITUTIONAL CHOICE QUESTION

As discussed throughout this Note, at the core of this issue is a question of institutional choice: should the executive branch, the legislative branch, or the judicial branch decide how to resolve the intern pay issue?

This current answer to this question is the executive branch, but this is not the correct answer. We have seen how the executive as decisionmaker causes troublesome unpredictability in this arena.[170] Presidential administrations swing in ideology from one to the next, and the DOL's guidance tends to swing in tandem.[171]

The legislative branch cannot resolve this issue because it is fractured and paralyzed.[172] Even though Congress *should* pass legislation to categorize interns as employees, it is unlikely to do so anytime soon.

That leaves the judiciary as the best answer to this institutional choice question. Indeed, because courts are no longer required to show deference to the DOL's interpretation of an ambiguous statute, they can and should promulgate this new *test*.

CONCLUSION

Internships are beneficial to young professionals and to employers, but they fail to comport with established employment law practices of the modern day. As a fix, the proposed *de minimis test* would designate the vast majority of interns as employees under relevant labor law.

In accomplishing this, the *test* would address the inequity inherently intertwined with unpaid internships; provide a bright-line test that is predictable for employers; conciliate the sparring labor law viewpoints of recent presidential administrations; serve as a viable workaround for a presently fractured and paralyzed Congress; and rectify legal malformations tied to the current model of internships.

Most importantly, the *de minimis test* would provide a pathway for abundantly more interns to be categorized as employees. It is past time to bring internships into the modern age—one where budding professionals of every background are paid fairly for their work.

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[170] *See* Section XI *Advantages of the* De Minimis Beneficiary Test *Relating to Political Insulation of Relevant Employment Laws*.
[171] *See id.*
[172] *See* Section X *The Solution? Implementing A De Minimis Beneficiary Test*.