HOLDING EMPLOYERS ACCOUNTABLE FOR HARASSMENT OF UNPAID INTERNS

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ABSTRACT

Having exploded in popularity in recent decades, internships exist across a variety of industries and at all levels of education, including high school, undergraduate, and graduate school. Internships are also available for other workers outside of the school setting, such as recent graduates and young people looking for training and experience. Unfortunately, being labeled an "intern" rather than an "employee" carries numerous legal implications, especially for the unpaid intern. One fallout for the unpaid intern is the inability to hold the employer legally responsible for any harassment the intern experiences during their internship.

As this Article shows, most courts have held that Title VII applies only to workers who receive remuneration for their work, such as wages or other financial benefits, leaving unpaid interns unprotected by the law. Courts have also rejected Title IX claims in such cases because most employers who host internships do not operate an "educational program or activity" under the statute. In addition, state law claims like negligence or breach of contract face many obstacles, and few states have enacted state laws for this situation. As a result, students who are sexually harassed during an unpaid internship, even one required by their degree, often have no remedy against the employer hosting their internship, the primary beneficiary of their free labor, and the entity most responsible for preventing the harassment. This should not be.

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As this Article shows, the lack of meaningful remedies for intern harassment is a true legal loophole long overdue for closure. This Article considers potential solutions for the unpaid intern, including redefining what it means to be an employee under Title VII and indemnification agreements in contracts between educational institutions and employers. In the end, it proposes a federal statute that would clearly outlaw harassment of interns and impose liability on employers who fail to prevent or adequately address it.

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INTRODUCTION

Most students today have completed or have considered completing an internship as part of their academic journey. Although once limited to the medical field, internships exist across a variety of industries and at all levels of education, including high school, undergraduate, and

graduate school.[1] Internships are also available for other workers outside of the school setting, such as recent graduates and young people looking for training and experience.[2]

Internships can vary tremendously in the extent to which they focus on academics or employment.[3] However, internships often include a mix of each component. As one court recently stated, "[t]he purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting."[4] Unfortunately, being labeled an "intern" rather than an "employee" carries numerous legal implications, especially for the unpaid intern. One fallout for the unpaid intern is the inability to hold the employer legally responsible for any harassment the intern experiences during their internship. This Article examines this issue.

In one exemplary case, undergraduate student Bridget O'Connor was required to complete an unpaid internship to complete her college degree.[5] To fulfill this requirement, O'Connor was placed at Rockland Psychiatric Center in New York, where a Rockland employee sexually harassed her.[6] She complained about the harassment, but Rockland officials simply brushed it aside.[7] O'Connor then sued Rockland for sexual harassment under federal statutes commonly used to combat sexual harassment in employment and education: Title VII of the Civil Rights Act of 1964 (employment) and Title IX of the Education Amendments of 1972 (education).[8]

1. Elizabeth Heffernan, Note, *"It Will Be Good for You," They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims*, 102 IOWA L. REV. 1757, 1761–62 (2017).

2. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 532–33 (2d Cir. 2016) (examining unpaid wages claims of three unpaid interns, each of whom did not obtain school credit for their work).

3. *See infra* notes 44–46 and accompanying text; *see also Glatt*, 811 F.3d at 535 (stating that "internships are widely supported by educators and by employers looking to hire well-trained recent graduates," but recognizing that "employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience").

4. *Glatt*, 811 F.3d at 537.

5. O'Connor v. Davis, 126 F.3d 112, 113 (2d Cir. 1997). According to the court, her unpaid internship was considered "work study" for financial aid purposes. *Id.* However, this is not the same as being paid for her work.

6. *Id.* at 113–14.

7. *See id.* at 114.

8. *Id. See generally* Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (making it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); Education Amendments of 1972 § 901(a), 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be

The district court granted Rockland's motion for summary judgment, and the Second Circuit Court of Appeals affirmed.[9] On the Title VII claim, the Second Circuit ruled that the statute only protects employees, not unpaid interns, leaving O'Connor unprotected.[10] Under Title IX, the court ruled that Rockland did not operate the type of "education program or activity" necessary for Title IX to apply.[11] Accordingly, O'Connor's claims were dismissed against Rockland—the very entity that controlled the internship experience, employed the harasser, benefited from O'Connor's work, and looked the other way when the harassment was reported—without any inquiry into the merits of those claims.[12]

Despite acknowledging that O'Connor's collegiate success was "dependent to some degree on successfully completing her internship with Rockland" and that this "made her vulnerable to continued harassment," the *O'Connor* court concluded that "it is for Congress" to provide an appropriate remedy in a case such as this.[13] In the nearly thirty years since *O'Connor*, Congress has not amended Title VII to cover claims like O'Connor's.[14] In addition, other federal circuit courts have considered similar claims and have mostly agreed that Title VII applies only to workers who receive remuneration for their work, such as wages or other financial benefits, leaving unpaid interns unprotected by the law.[15] Courts have also continued to reject Title IX claims in such cases.[16] In addition, state law claims like negligence or breach of contract face many obstacles. As a result, students who are sexually harassed during an unpaid internship, even one required by their degree, often have no remedy against the employer hosting their internship, the primary

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

9. *O'Connor*, 126 F.3d at 113.

10. *See id.* at 115–16.

11. *Id.* at 119. According to the court, the entity in question must have a "primary purpose" to educate. *Id.* at 118. Here, however, Rockland had no educational mission, no tuition, no teachers, and no course of study for its volunteer workers. Rockland also did not operate the type of "mixed employment-training" of a teaching hospital. *Id.* (citing Lipsett v. Univ. of P.R., 864 F.2d 881, 897 (1st Cir. 1988)). Finally, the nearby university's "education program" could not be imputed to Rockland simply because O'Connor was a student at the former while she volunteered with the latter. *See id.* at 117.

12. *See id.* at 119.

13. *Id.*

14. *See* Sacchi v. IHC Health Servs., Inc., 918 F.3d 1155, 1159 (10th Cir. 2019) (declining the invitation to conclude that all interns are protected by Title VII, the ADA, and the ADEA, and stating, "[e]ven if a laudable goal, this is a task for Congress").

15. *See infra* Section II.C.

16. *See infra* Part III.

beneficiary of their free labor, and the entity most responsible for preventing the harassment.[17] This should not be.

As this Article shows, the lack of meaningful remedies for intern harassment is a true legal loophole long overdue for closure—one that a simple statutory sewing job could fix and protect millions of future interns. Before examining this Article's proposal, Part I discusses the rise of internships in America and the prevalence of unpaid internships in today's higher education environment. The next several sections analyze the various legal claims an unpaid intern might pursue against an employer for sexual harassment and expose deficiencies in each one. Starting with federal protections, Part II examines Title VII claims of unpaid interns, and Part III addresses Title IX claims. Next, state law claims are examined. Part IV identifies a handful of state statutes that protect interns from harassment. Part V examines potential tort claims against an employer for sexual harassment of an intern, including negligence and intentional tort claims. Finally, Part VI summarizes potential contractual remedies for interns.

This Article exposes major limitations and drawbacks for each of these claims. For Title VII, this Article reveals that even when an unpaid intern is subjected to unwelcome sexual harassment, most courts will reject their Title VII claim simply because the intern is unpaid, as the statute only protects employees, who by nature receive compensation in exchange for their work. Likewise, most courts will reject a Title IX claim of sexual harassment against an employer because most employers who host internships do not operate the type of educational program or activity required by Title IX, making them exempt from the law. In addition, while some states have statutes that explicitly protect interns from employer harassment, very few states have adopted such laws, leaving most interns unprotected in this manner. As for potential tort claims, few courts have endorsed pure negligence claims against employers in the context of sexual harassment. Also, the doctrine of respondeat superior is limited to torts committed in the scope of employment, which most courts read to exclude sexual harassment. Finally, for the unpaid student intern, contractual remedies are often limited by the lack of a contract between the student's school and their internship host, or by the lack of effective language within such a contract when one exists.

Given these deficiencies, Part VII considers potential solutions for the unpaid intern, including redefining what it means to be an employee

17. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 180 (3d Cir. 2024) (noting the "accurate presumption that unpaid interns all perform work for their employers").

under Title VII, indemnification agreements in contracts between educational institutions and employers, and federal legislation specifically designed for this issue. In the end, this Article proposes a federal statute, adapted from the state statutes discussed in Part IV, that would clearly outlaw harassment of interns and impose liability on employers who fail to prevent or adequately address it.

I. THE NATURE AND PREVALENCE OF UNPAID INTERNSHIPS

Internships are pervasive, as they provide valuable experience for students and job seekers while allowing employers to reduce costs and see whether the intern is a good fit for the organization.[18] Among their many benefits, internships give students a glimpse into workplace realities, offer mentoring and networking opportunities, help them discover new passions and talents, enhance resumes, and serve as pathways to full-time employment.[19]

Today, internships exist across a variety of industries and for students at all levels of education.[20] This was not always the case. In his book, *Intern Nation*, Ross Perlin traces the origins and history of the modern internship.[21] As Perlin explains, the first interns in America were medical students in the late 1800s to early 1900s.[22] At that time, the term "internship" was tied solely to hospitals, where aspiring doctors were interned (or confined) within hospital walls for one or two years of apprenticeship-style training after completing four years of study.[23] By

18. *See* Heffernan, *supra* note 1, at 1762 ("The number of internships in the modern employment world has exploded because of '[the] employers' desire to hold down costs and students' eagerness to gain experience for their résumés.'"); *see also* Expert Panel, Forbes Hum. Res. Council, *The Importance of Internships and The Invaluable Relationships They Bring*, FORBES (Aug. 12, 2022, at 08:15 ET), https://www.forbes.com/sites/forbeshumanresourcescouncil/2022/08/12/the-importance-of-internships-and-the-invaluable-relationships-they-bring/ [https://perma.cc/QSS6-KH5L] (discussing the benefits of internships); Beth Braccio Hering, *Why Are Internships So Important?*, CNN (Apr. 14, 2010), https://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important/index.html [https://perma.cc/63Q2-CFEM]
("The hope of gaining an advantage for future employment has increased both the number and quality of internship applications.").

19. Gregory S. Bergman, Note, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 554 (2014); *see also* Expert Panel, *supra* note 18 (listing eleven specific benefits of internships for students); Hering, *supra* note 18 (discussing the benefits of internships for students and for employers).

20. Heffernan, *supra* note 1, at 1761.

21. ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY xvi (updated paperback ed. 2012).

22. *See id.* at 30.

23. *Id.*

1914, it was estimated that 75–80% of medical graduates completed an internship, and that number climbed to 95% by 1932.[24] In the 1920s and 1930s, the more advanced medical "residency" took hold, and the "internship" came to denote only the first year of clinical training after medical school.[25] In 1975, the Accreditation Council of Graduate Medical Education officially dropped the term "internship"; by then, other fields had instituted the internship experience, and the association between interning and medicine disappeared.[26]

Politics was the first field beyond medicine to adopt the internship experience.[27] At the federal level, the National Institute of Public Affairs developed an early model that began in 1935 with thirty recent college graduates for broad training in public administration in the nation's capital.[28] The interns completed one year of unpaid work, and the program helped pave the way for placements in the federal government.[29] In 1946, the use of political interns began to increase with the passage of the Legislative Reorganization Act of 1946, which brought in new waves of federal government employees for lawmakers and congressional committees.[30] By 1956, over forty different internship programs existed at the state and municipal levels, including both paid and unpaid positions.[31]

In the 1960s, students caught up in the social and political movements of the time began to demand school credit in exchange for donating their time to social causes.[32] Schools responded by increasing their levels of experiential education.[33] At this time, internships proliferated in teaching, social work, psychology, criminal justice, and journalism.[34] By 1979, "a national survey of undergraduate sociology departments found that more than half supported internship programs" or "field-work placements."[35]

According to Perlin, "[t]he adoption of internships in other industries followed fast and furious, decisively picking up steam in the 1980s and 1990s, the period when they became standard operating procedure."[36] By

24. *Id.* at 30–31.
25. *Id.* at 31.
26. *Id.*
27. *Id.* at 32.
28. *Id.*
29. *Id.* at 32–33.
30. *Id.* at 33.
31. *Id.*
32. *Id.* at 34.
33. *See id.*
34. *Id.*
35. *Id.* at 35.
36. *Id.* at 34.

the turn of the new millennium, 92% of business schools had established internship programs, and many reported that the majority of their students participated in internships.[37] In 2001, a report on sports management programs found that more than three-quarters of these programs required students to complete an internship.[38]

Before long, interns were found in Silicon Valley and in retail companies like Target and Gap.[39] Target went from having no interns before 2006 to over one thousand interns just a few years later.[40] Today, internships exist in a variety of fields and industries, including law, medicine, finance, marketing, social media, engineering, communications, journalism, and sports.[41] According to Perlin, large, for-profit companies, as well as non-profits, government offices, and small for-profit companies offer unpaid internships.[42] In short, most employers of a substantial size "have more or less formal internship programs of one kind or another," often the result of college recruitment efforts by company human resources personnel.[43]

Although the actual internship experience for any given intern can vary, internships fall into two categories: academic-style and employment-style.[44] In the academic-style internship, there is typically some "structured and deliberate reflection contained within learning agendas and objectives," along with coursework and grades.[45] As Perlin notes, however, employers today "are most likely to recognize internships as flexible, temporary work arrangements for young people," and often use the employment-style internship with a focus on "productivity, not personal development."[46]

37. *Id.* at 35.
38. *Id.* at 35–36.
39. *Id.* at 36.
40. *Id.*
41. *See* Hannah Nicholes, Note, *Making the Case for Interns: How the Federal Courts' Refusal to Protect Interns Means the Failure of Title VII*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 80, 92–93 (2014). In his current position, this Author helps coordinate internships for college students. In that role, he has regular access to current student internship job postings across a variety of industries through Handshake. *See* HANDSHAKE, https://joinhandshake.com/ [https://perma.cc/RP65-E993] (last visited Feb 18, 2026). A review of recent job postings shows that many of those jobs are unpaid.
42. PERLIN, *supra* note 21, at 26–27 (citing PHIL GARDNER, INTERN BRIDGE, THE DEBATE OVER UNPAID COLLEGE INTERNSHIPS (2011)).
43. *Id.* at 40.
44. *See id.* at 24. Although there is no universally accepted definition of each internship type, this article uses these two terms to provide clarity and context to the discussion. *See id.*
45. *Id.* at 25 (quoting MICHAEL TRUE, STARTING AND MAINTAINING A QUALITY INTERNSHIP PROGRAM 2 (7th ed. 2011)).
46. *Id.*

Regardless of their form, one key aspect of many internships is that interns actively contribute to and participate in the organization's work alongside the business's employees.[47] In many cases, interns perform the same work as employees but are often unpaid or paid very little. To highlight this dynamic, Perlin focuses on Disney World's internship program, where each year up to eight thousand young people work full-time—often for minimum wage—across Disney's forty square miles of central Florida property.[48] According to Perlin, "[t]he work they perform is identical to what permanent employees do, and there's no added supervision, training, or mentoring on the job."[49] "[T]raining and education are clearly afterthoughts: the kids are brought in to work"—cleaning hotel rooms, performing custodial work, parking cars, carrying luggage, scanning tickets, and corralling visitors waiting in line for rides—taking what would otherwise be full-time jobs.[50]

In the legal profession, law students who intern for judges often assist a judge and their clerks in their daily work of analyzing motions and arguments, conducting legal research, and writing opinions.[51] At law firms, interns likewise assist attorneys in research and writing projects for actual clients in real cases.[52] Although legal interns do not take the lead on cases or writing court opinions, the work they perform is valuable nonetheless. Similar internships exist in politics.[53]

While it is difficult to present precise data on the total number of internships in America today, estimates suggest that over 20% of college students complete an internship, representing over four million student

47. *See* Nicholes, *supra* note 41, at 93–94; Lauren Fredericksen, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 271 (2013) (noting that unpaid interns "frequently provide the employer with work similar to a regular, entry-level, full-time paid employee").

48. PERLIN, *supra* note 21, at 2–3.

49. *Id.* at 3.

50. *See id.* at 1–3, 9, 16.

51. *See* Alexandra Muskat, *Why You Should Consider a Judicial Internship*, LAW SCH. TOOLBOX (Mar. 11, 2019), https://lawschooltoolbox.com/why-you-should-consider-a-judicial-internship/ [https://perma.cc/G7AS-VJNT] (describing judicial internships as mini-judicial clerkships); *cf.* Emma Case Beasley, *What is it Really Like to Be a Judicial Clerk?*, LAW SCH. TOOLBOX (Oct. 8, 2018), https://lawschooltoolbox.com/what-is-it-really-like-to-be-a-judicial-clerk/ [https://perma.cc/M8RG-CA4V] (describing the role of a judicial clerk).

52. *What Do Interns at Law Firms Do? How to Impress Your Firm*, ALTLAW (Sep. 19, 2023), https://blog.trustarray.com/blog/what-do-interns-at-law-firms-do-how-to-impress [https://perma.cc/D8JN-QB5H].

53. One example is the Utah State Legislature Intern Program, where college students from various universities serve as paid interns providing legislators assistance with their legislative-related duties during the general session. *See Legislative Intern Program: Program Overview*, UTAH STATE LEG., https://le.utah.gov/legservices/internProgram.htm [https://perma.cc/6JTQ-9E8Z] (last visited Nov. 25, 2025).

interns per year.[54] More importantly, the number of *unpaid* internships has increased in recent years.[55] According to Gregory Bergman, "[a]s of 2012, one-third to one-half of the 1.5 million internships were unpaid."[56] Professor David Yamada reported similar numbers in the early 2000s and stated that "many, if not most, student interns work for free."[57] More recent estimates from 2022 and 2023 indicate that two in five internships in the United States are unpaid, equating to nearly 1.66 million unpaid interns in America in 2023.[58] The percentage of unpaid internships is even higher in certain high-demand industries, such as entertainment and politics.[59]

In short, unpaid internships are pervasive. In addition, "[w]omen [a]re significantly more likely to be engaged in an unpaid internship (77%),"[60] leaving unpaid female interns particularly vulnerable to harassment.[61] Accordingly, the potential liability of employers for alleged sexual harassment of unpaid interns is a significant issue worthy of consideration.[62]

54. Andrew Fennell, *Internship Statistics U.S.*, STANDOUT CV (Mar. 4, 2025), https://standout-cv.com/usa/internship-statistics [https://perma.cc/4RT4-9U9B].

55. *See* Heffernan, *supra* note 1, at 1762 (reporting that in 2008, "the number of unpaid internships increased following the economic recession," and that "[a]round 20% of large, for-profit companies have unpaid internships"); Fredericksen, *supra* note 47, at 264 (noting "[t]he pervasiveness of unpaid student internships in today's working economy").

56. Bergman, *supra* note 19, at 554–55 (citing Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), https://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/ [https://perma.cc/M76H-D22X]).

57. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 218 (2002) (citing Dawn Gilbertson, *Earning It; Glamorous Internships With a Catch: There's No Pay*, N.Y. TIMES (Oct. 19, 1997), https://www.nytimes.com/1997/10/19/business/earning-it-glamorous-internships-with-a-catch-there-s-no-pay.html (on file with Rutgers U. L. Rev.)) (referencing data suggesting that, as of 2002, "many, if not most, student interns work for free," and "[i]t is commonly estimated that at least 50% of all internships are unpaid").

58. Fennell, *supra* note 54.

59. Yamada, *supra* note 57, at 218.

60. PERLIN, *supra* note 21, at 27 (citing GARDNER, *supra* note 42).

61. *See* Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95, 113–14 (2000) ("[A] student intern is in a position of immense vulnerability and powerlessness vis-à-vis her supervisors, mentors, and co-workers in an external placement; she depends on them for good work assignments, evaluations, successful completion of her undergraduate degree, and contacts or recommendations leading to future employment in the field.").

62. Along with the issue addressed in this Article, another key issue for unpaid interns is the extent to which they might be entitled to compensation under the Fair Labor Standards Act. *See, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535 (2d Cir. 2016) (analyzing whether unpaid interns should be paid as employees under the FLSA).

II. TITLE VII'S APPLICATION TO UNPAID INTERNS

If an intern receives payment for their time and services, they will likely fit within Title VII's definition of employee, allowing them to sue their internship host and employer under the statute.[63] Accordingly, this Part focuses on unpaid internships and shows how most courts have rejected Title VII claims of unpaid interns, a result many scholars have criticized.[64] Before doing so, the subsections to follow first provide an overview of Title VII harassment claims.

A. Title VII Harassment Claims

Title VII makes it unlawful for an employer to discriminate against any individual because of their sex, a protection that includes sexual harassment targeting members of one sex.[65] Sexual harassment claims

63. Taylor J. Freeman Peshehonoff, Comment, *Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce*, 72 OKLA. L. REV. 479, 494 (2020).

64. Other articles discussing the plight of unpaid interns under Title VII include the following: *Id.* at 494–503 (discussing this issue and concluding that the remuneration requirement imposed by courts almost always leaves unpaid interns without protections from discriminatory and harassing behaviors); Heffernan, *supra* note 1, at 1761–88 (discussing how the various tests courts employ to determine employee status inadequately protect unpaid interns and arguing that the Supreme Court should adopt a modified version of the primary beneficiary test when evaluating whether interns are employees under Title VII); David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L.J. 357, 381–85 (2016) (discussing this issue and stating that there is no "valid argument that would deny interns the baseline protections of personal dignity provided by employment discrimination laws"); Yamada, *supra* note 57, at 238–48 (discussing this issue and arguing that one way to protect interns from harassment is to amend the employment discrimination statutes to cover interns, regardless of whether they are compensated); Nicholes, *supra* note 41, at 90–92 (arguing that rather than focusing on whether an intern satisfies the control-based test for determining employee status, courts should instead "look to Title VII's express purposes: eliminating discriminatory hiring practices, workplace discrimination, and preventing further discrimination"); Jared Collins, Note, *If It Looks Like a Duck, Swims Like a Duck, and Quacks Like a Duck, Then It Probably Is a Duck: Interns Look and Act Like Employees Yet Lack Basic Protections*, 57 SUFFOLK U. L. REV. 365, 383–89 (2024) (arguing that student interns should be protected under the discrimination laws); Fredericksen, *supra* note 47, at 264–74 (arguing that Title VII should be expanded to protect unpaid interns).

65. 42 U.S.C. § 2000e-2(a)(1); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 ("[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."); *id.* at 66 ("[C]ourts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78–80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or

come in two basic types: quid pro quo and hostile work environment.[66] Under the quid pro quo theory, Title VII is violated when an employer takes adverse employment action against an employee in retaliation for that employee's refusal to respond to their supervisor's sexual advances.[67] Quid pro quo harassment would occur, for example, when an employee is demoted in response to her refusal to grant her supervisor a requested sexual favor.[68] Under the hostile work environment theory, Title VII might be violated—even in the absence of a tangible employment action—based on acts that create a discriminatorily hostile work environment, such as inappropriate sexual remarks and actions directed at members of one sex.[69]

Although the precise elements may vary by jurisdiction, for an employer to be liable for sexual harassment under a hostile work environment theory, a plaintiff must typically prove each of the following elements:

> (1) the plaintiff is a member of a protected group (i.e., a male or female);
>
> (2) the plaintiff was subjected to unwelcome sexual harassment;
>
> (3) the harassment was based on the plaintiff's sex;
>
> (4) the harassment was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and
>
> (5) the employer knew or should have known of the harassment and failed to take appropriate action.[70]

The typical student intern case of sexual harassment will often involve a supervisor's inappropriate sexual statements and actions—such as invitations for sexual activity and offensive physical touching—

conditions of employment to which members of the other sex are not exposed."); Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 433–34 (5th Cir. 2013) ("Title VII prohibits sexual harassment that takes the form of a tangible employment action, such as a demotion or denial of promotion, or the creation of a hostile or abusive working environment.").

66. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998).

67. *See id.* at 751–52; Vance v. Ball State Univ., 570 U.S. 421, 429 (2013).

68. *See Burlington Indus.*, 524 U.S. at 751 ("Cases based on threats which are carried out are referred to often as *quid pro quo* cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.").

69. *Meritor*, 477 U.S. at 64–67.

70. *See, e.g.*, Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc).

that are unwelcome to the intern and largely ignored by the employer. One recent example is *Weglinski v. State of Utah*, a Title VII lawsuit filed by Sonia Weglinski, a nineteen-year-old college student in Utah, alleging sexual harassment during her internship for a Utah state senator.[71] According to the allegations in Weglinski's complaint, during her sophomore year in college, Weglinski worked for the Utah Legislature as a Legislative Intern during the 2022 session, and was assigned to work for longtime state senator, Gene Davis.[72] According to Weglinski, as early as 2016, the State of Utah, the Utah State Legislature, and others were aware of Davis's harassment of other female employees, but they took no official action on the victim's complaints.[73] Weglinski applied for her internship position less than one year after the media reported the allegations of one of those previous women.[74]

According to Weglinski, throughout the 2022 session, Davis "utilized his status as her assigned supervising legislator and as a mentor to sexually harass and groom [her] in the form of inappropriate and unwelcome touching, comments, and other interactions."[75] Examples included Davis allegedly putting his arm around Weglinski's waist, touching her feet while she sat in a reclining chair in Davis's office, pressuring her to drink alcohol with him at his home, and playing a show with inappropriate sexual scenes during a meeting at Davis's home.[76] Weglinski's internship ended in March 2022, and she complained of the harassment on social media in August 2022, after Davis lost his reelection campaign.[77]

A subsequent investigation by the Utah Legislature concluded that Davis had likely violated its sexual harassment policy.[78] In December 2023, Weglinski sued the State of Utah, the Utah State Legislature, and the state's Office of Legislative Research and General Counsel ("OLRGC"), alleging that "[b]y failing to reasonably address sexual harassment that they were aware of, Defendants . . . continued to perpetuate a culture where powerful legislators are permitted to harass young, female interns and other employees."[79] Weglinski's complaint

71. *See* Complaint at 2–3, Weglinski v. Utah, No. 2:23-cv-00910 (D. Utah dismissed June 2, 2025).

72. *Id.* at 3.

73. *See id.* at 3–7 (describing these allegations and stating that nothing was done to correct this harassing behavior).

74. *Id.* at 7.

75. *Id.* at 8–9.

76. *Id.*

77. *Id.* at 10.

78. *See id.* at 10–11.

79. *Id.* at 11.

included two counts: a hostile work environment claim under Title VII against the Utah State Legislature and the OLRGC, and a similar claim against Davis and another individual defendant under 42 U.S.C. § 1983.[80] Weglinski and Davis agreed to a settlement in May 2025 that would pay Ms. Weglinski $25,000.[81] As a part of this agreement, Davis "expressly denied" any liability for the claims brought in the lawsuit.[82]

B. Title VII's Employment Limitation

As plaintiffs know full well, a hostile work environment claim is not easy to prove because of the high bar courts have set for such claims, particularly for the severe or pervasive element.[83] Beyond that, courts have ruled that only employees, not independent contractors nor certain unpaid workers, may bring claims of sexual harassment under Title VII.[84]

The employment limitation on Title VII's reach, although controversial, is supported by the statute's language. In relevant part, Title VII makes it "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or *privileges of employment*, because of *such*

80. *Id.* at 11–15.

81. Emily Anderson Stern, *A Former Legislative Intern Sued After Alleging Harassment by a Lawmaker. Here's How Much Utah Paid to Settle*, SALT LAKE TRIB. (Sep. 11, 2025, at 08:00 ET), https://www.sltrib.com/news/politics/2025/09/11/utah-settles-lawsuit-over-former/ (on file with the Rutgers U. L. Rev.).

82. *Id.*

83. For one, this type of harassment must create a work environment so intolerable that a reasonable person is not expected to endure it. *See* 29 C.F.R. § 1604.11(a)(3) (2026). As the Supreme Court has declared, the effect on the plaintiff's work environment must be so "extreme" as to "amount to . . . [a change] in the 'terms and conditions of employment.'" Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Accordingly, Title VII is not violated based on "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.* (quoting BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)). According to the Court, these standards are demanding to ensure that Title VII does not become a "general civility code" to be used against employers anytime anything offensive occurs at work. *Id.* (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)); *see also* Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 583 (11th Cir. 2000) ("The fourth element—that the conduct complained of was 'sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment'—is the element that tests the mettle of most sexual harassment claims.").

84. *See* Llampallas v. Mini–Cirs., Lab, Inc., 163 F.3d 1236, 1242–44 (11th Cir. 1998) (discussing this issue and citing cases from various circuits); *see also* Serapion v. Martinez, 119 F.3d 982, 995–96 (1st Cir. 1997) ("Although the language [of Title VII] speaks of 'any individual,' courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees.").

individual's . . . sex."[85] Despite the statute's explicit application to "any individual," most courts have held that the term "any individual" is not to be read literally, but instead is limited only to employees.[86] This interpretation reflects Congress's intent to limit Title VII to employment relationships.[87] After all, the aim of Title VII is equal employment opportunity,[88] a concept that "requires that persons of like qualifications be given employment opportunities irrespective of their sex."[89] For these reasons, courts have recognized that "[i]n enacting Title VII, Congress sought to eliminate a pervasive [practice] of denying or limiting one's livelihood simply because of one's race, color, sex, religion or national origin."[90]

This employment limitation finds additional support in the statutory language, "privileges of employment." As one court declared, "an 'employer' logically cannot discriminate against a person in the 'conditions or privileges of employment' if no employment relationship exists."[91] Moreover, in authorizing sexual harassment claims under Title VII, the Supreme Court reasoned that harassment that is sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment" is one way that the "privileges of employment" can be altered.[92] Finally, courts have observed that Title VII provides financial and equitable remedies to plaintiffs—including back pay, reinstatement, and hiring—that would not logically apply to a non-employee plaintiff, such as an unpaid intern.[93] In sum, with equal *employment* opportunity as the focus, as opposed to equal *internship* opportunity, unpaid interns are not "susceptible to the discriminatory practices [in employment] which the [A]ct was designed to eliminate."[94]

85. 42 U.S.C. § 2000e-2(a)–(a)(1) (emphasis added).

86. *Llampallas*, 163 F.3d at 1242–43.

87. *Id.* at 1243.

88. *See* Griggs v. Duke Power, 401 U.S. 424, 429–30 (1971).

89. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (declaring that Title VII does not permit "one hiring policy for women and another for men").

90. Haavistola v. Cmty. Fire Co. of Rising Sun, 6 F.3d 211, 221 (4th Cir. 1993) (quoting Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987)).

91. Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 532 (S.D.N.Y. 2013).

92. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (discussing the statutory linkage to sexual harassment claims).

93. Llampallas v. Mini–Cirs., Lab, Inc., 163 F.3d 1236, 1243 (11th Cir. 1998).

94. Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983).

C. The General Approach Under Title VII: Remuneration Required

Because Title VII only protects employees, the question becomes whether unpaid interns can qualify as "employees" under the statute.[95] There are two basic views among courts on this issue: 1) the majority view, which requires either compensation or some form of financial remuneration as a necessary ingredient of employment (which unpaid interns would not meet), and 2) a minority view that treats compensation or remuneration as just one factor among many that can lead to employee status under a multi-factor test (which unpaid interns might meet if enough factors point towards employee status).

According to the majority view, one cannot be an employee without receiving some form of compensation in exchange for services.[96] This effectively eliminates Title VII protection for unpaid interns, who lack this necessary ingredient.[97] With no Title VII protection, these rulings often leave unpaid interns without a legal remedy for harassment they experience during an unpaid internship, even harassment that is severe and pervasive.[98]

One early case example noted above involved a student intern, Bridget O'Connor, who was sexually harassed during her unpaid internship at Rockland Hospital.[99] In her suit against Rockland, the Second Circuit ruled that O'Connor was not a Rockland employee under Title VII because she received no financial benefit from her internship.[100] As the court explained, "[w]here no financial benefit is obtained by the

95. *See generally infra* note 111 and accompanying text (explaining the "circular" nature of the Title VII definition of "employee").

96. *See* Yamada, *supra* note 57, at 240–41 ("There is a consistent body of case law which holds that purely volunteer activities fail to constitute an employer-employee relationship and that the question of compensation *precedes* the application of any test for employee status."); *see, e.g.*, Marie v. Am. Red Cross, 771 F.3d 344, 353 (6th Cir. 2014) ("[A]ll of the other circuits to have considered the circumstances under which a volunteer is an employee have exalted remuneration as an independent antecedent inquiry, such that the traditional common law agency analysis is only employed when the volunteer relationship fairly approximates an employment relationship."); *id.* at n.2 (listing relevant cases from the Second, Fourth, Eighth, Tenth, and Eleventh Circuits); Abel v. Abbott Nw. Hosp., 947 N.W.2d 58, 81 (Minn. 2020) (Gildea, C.J., dissenting) ("The vast majority of federal courts that have addressed the issue have adopted the Second and Eighth Circuits' rule that remuneration is an essential condition of the employment relationship.").

97. Reflecting the majority view, the Eighth Circuit Court of Appeals has noted that "[c]ompensation by the putative employer to the putative employee in exchange for his services . . . is an essential condition to the existence of an employer-employee relationship." Graves v. Women's Pro. Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990).

98. *See e.g.*, Yamada, *supra* note 57, at 242–44 (describing how O'Connor's lack of employee status left her without a viable cause of action under Title VII).

99. *See supra* note 5 and accompanying text.

100. O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997).

purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because . . . 'compensation . . . is an essential condition to the existence of an employer-employee relationship.'"[101] For this reason, the court dismissed O'Connor's Title VII sexual harassment claim without even considering its merits.[102] As a result, in jurisdictions like the Second Circuit, the severity of the harassment experienced by an unpaid intern simply does not matter—at least as it pertains to the employer's potential liability under Title VII.[103]

In the nearly thirty years since the *O'Connor* decision, Congress has not amended Title VII to cover claims like hers.[104] In addition, numerous federal circuit courts have weighed in on Title VII's application to intern harassment and have agreed that Title VII requires either compensation or financial benefits "that are not merely incidental to the activity performed," such as retirement pensions, life insurance, disability insurance, or medical benefits.[105] Along with the Second Circuit, the United States Court of Appeals for the Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have all imposed a remuneration requirement for Title

101. *Id.* at 115–16 (quoting *Graves*, 907 F.2d at 73).

102. *Id.* at 116.

103. *See* Yamada, *supra* note 57, at 243–44 ("[H]ad O'Connor prevailed on her claim of employee status, she would have had a strong Title VII hostile work environment claim against her employer.").

104. *See* Sacchi v. IHC Health Servs., Inc., 918 F.3d 1155, 1159 (10th Cir. 2019) ("We also decline the invitation to conclude that all interns are protected by Title VII, the ADA, and the ADEA. Even if a laudable goal, this is a task for Congress.") (citations omitted).

105. *See* Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 435–39 (5th Cir. 2014) (discussing this issue and stating that the Second, Fourth, Eighth, Tenth, and Eleventh Circuits have adopted the threshold-remuneration test); *see also* Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999) (affirming a bench trial's finding that a volunteer firefighter was a Title VII "employee" when that individual did not receive a salary or wages but received significant indirect benefits, including a retirement pension, life insurance, death benefits, disability insurance, and limited medical benefits); Haavistola v. Cmty. Fire Co. of Rising Sun, 6 F.3d 211, 221–22 (4th Cir. 1999) (declaring that a reasonable factfinder could decide that an employment relationship exists under Title VII for a volunteer firefighter who did not receive a salary or wages, but did receive valuable job-related benefits, including group life insurance and a state-funded disability pension). Courts in the Second Circuit have found the following benefits sufficiently substantial to qualify as remuneration: "health insurance[,] vacation[,] sick pay[,] . . . a retirement pension, . . . life insurance, . . . death benefits, [and] disability insurance." Glaser v. Upright Citizens Brigade, LLC, 377 F. Supp. 3d 387, 396 (S.D.N.Y. 2019) (citing *Pietras*, 180 F.3d at 473). Conversely, the Second Circuit found the following benefits insufficiently substantial: networking opportunities, "the opportunity to showcase [one's] work to casting directors," and reimbursement for travel expenses or hair and make-up services. *Id.* at 396–97 (citing Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp.3d 429, 442 (S.D.N.Y. 2018)).

VII.[106] Because the typical unpaid intern would not satisfy this threshold requirement, their Title VII claims against employers are routinely dismissed or are simply never filed in the first instance.[107]

D. The Title VII Outlier Cases: Remuneration Not Required

As the previous subsection shows, numerous federal circuit courts have ruled that Title VII does not apply in the absence of remuneration, leaving the typical unpaid intern unprotected by the statute. At least two federal circuit courts disagree, including the Sixth and Ninth Circuit Courts of Appeals, which instead treat remuneration or its absence as just one factor in a multi-factor analysis.[108]

When a statute like Title VII does not define the term "employee" or defines it unclearly, courts often apply the common law agency test

106. *See* York v. Ass'n of the Bar of N.Y., 286 F.3d 122, 125–26 (2d Cir. 2002) (rejecting plaintiff's argument that she was an employee under Title VII where she received no pay and no other substantial financial benefit for her volunteer work for the New York City Bar Association); *Haavistola*, 6 F.3d at 219 (discussing whether a volunteer was an employee and recognizing that in cases in which there is no evidence of compensation, the courts have found Title VII inapplicable); *Juino*, 717 F.3d at 435–39 (adopting the threshold-remuneration test for determining whether a volunteer is an employee under Title VII); *Graves*, 907 F.2d at 73; *Sacchi*, 918 F.3d at 1158–59 (endorsing the threshold-remuneration test for employee status under Title VII and concluding that the student intern in that case failed to satisfy the test); Llampallas v. Mini–Cirs., Lab, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998) (limiting Title VII's coverage to employees and ruling that a plaintiff who received no compensation as a company officer-director was not an employee). *But cf.* Payne v. Prevention Point Phila., Inc., No. 20-4444, 2021 WL 2414606, at *4 (E.D. Pa. June 14, 2021), *aff'd*, No. 21-2173, 2022 WL 796184 (3d Cir. Mar. 15, 2022) (stating that "[t]here is no binding Third Circuit authority regarding whether unpaid interns or volunteers qualify as employees under Title VII or whether remuneration is required for one to be deemed an employee," but agreeing with those courts that have imposed compensation or remuneration as a threshold requirement to qualify as a Title VII employee).

107. *See, e.g.*, *Payne*, 2021 WL 2414606, at *1, *4 (granting summary judgment to employer and dismissing Title VII race-based harassment claim of unpaid intern); Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 532–33 (S.D.N.Y. 2013) (stating that "compensation is a threshold issue in determining the existence of an employment relationship under . . . Title VII," and noting that had the plaintiff, "an unpaid intern, brought her hostile work environment claim pursuant to [Title VII], her claim would plainly be foreclosed"); Eagan v. Vibrant Church, No. 21-CV-149, 2022 WL 4360540, at *3 (N.D. Miss. Sept. 20, 2022) (dismissing Title VII sexual harassment claim of unpaid church intern); Areu v. Fox News Network, LLC, No. 20-CV-8678, 2021 WL 4124226, at *8–10 (S.D.N.Y. Sept. 9, 2021) (dismissing Title VII claims of an unpaid Fox News contributor who alleged sexual harassment by Fox employees); *Hughes*, 304 F. Supp. 3d at 442–45 (same as *Areu*); *cf.* City of Fort Calhoun v. Collins, 500 N.W. 2d 822, 826 (Neb. 1993) (holding that volunteer fire fighters do not qualify as "employees" of the fire department or the city within meaning of Nebraska Fair Employment Practice Act, which is patterned after Title VII).

108. Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 353–54 (6th Cir. 2011); Waisgerber v. City of L.A., 406 F. App'x 150, 151–52 (9th Cir. 2010).

adopted by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden* to distinguish between employees and independent contractors.[109] This test applies to Title VII, which defines an "employee" as "an individual employed by an employer"[110]—a definition that "is completely circular and explains nothing."[111]

As articulated in *Darden*, the common law agency test determines whether a given worker is an employee or independent contractor based on the level of control the employer exerts over the worker.[112] Under this multi-factor test, the more control an employer exerts over a worker, the more likely that worker will be deemed an employee.[113] On the other hand, very little control suggests independent contractor status.[114] The following factors, among others, are relevant to this analysis:

> [T]he skill required [to perform the work]; [whether the worker or the hiring party provides the worker's] instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work performed by the hired party is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[115]

The Court did not limit its analysis to these enumerated factors, and specifically said that all other "incidents of the relationship" relevant to the question of control should be considered.[116]

As discussed in the previous subsection, most courts will not perform this analysis for a student intern unless they first find some form of

109. *See, e.g.*, *Juino*, 717 F.3d at 434; Marie v. Am. Red Cross, 771 F.3d 344, 352 (6th Cir. 2014) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992)).

110. 42 U.S.C. § 2000e(f).

111. *Darden*, 503 U.S. at 323.

112. *See id.* at 323–27.

113. *See id.* at 323–24.

114. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 81 (1984) (discussing the control test and noting that "[i]f the authority to control the means and methods of performance exists, the worker is an employee; if it is absent, the worker is deemed an independent contractor"); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 354–62 (2011) (discussing the common law control test).

115. *Darden*, 503 U.S. at 323–24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989)).

116. *Id.* at 324 (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)).

remuneration—such as pay or valuable benefits—a common feature shared by both employees and independent contractors. Accordingly, courts will only examine the *Darden* factors if remuneration is present, or "only in situations that plausibly approximate an employment relationship."[117] A minority of courts, however, do not require pay or benefits as a threshold matter and may engage in the full common law agency analysis even for unpaid workers.[118]

One example is *Bryson v. Middlefield Volunteer Fire Department, Inc.*, where the Sixth Circuit examined whether volunteer firefighters were employees under Title VII.[119] In that case, the Sixth Circuit rejected the remuneration requirement, reasoning that it flowed from a misreading of the Supreme Court's opinions in cases like *Darden*.[120] The court noted, for example, that "the [Supreme] Court's instruction to apply the common law of agency [and the control test] is not limited to when the individual receives significant remuneration but rather 'when Congress has used the term "*employee*" without defining it.'"[121] In addition, treating "remuneration as a factor when determining whether a[n] employment relationship exists comports with *Darden*'s instruction that, when evaluating a particular relationship, 'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'"[122] Simply put, if "no one factor . . . is decisive, . . . [then] no one factor is an independent antecedent requirement."[123]

In the end, the relevant Title VII dispute centers on whether remuneration is just one factor of the multi-factor control test, or instead an antecedent and independent requirement of employment that must be satisfied before a court will apply the control test.[124] Under cases like *Bryson*, which treat remuneration as one of many factors, an unpaid intern could still be deemed an employee if the employer that conducts the internship exhibits a great deal of control over the intern's work, even if no financial benefits of any kind are provided.

117. Graves v. Women's Pro. Rodeo Ass'n, 907 F.2d 71, 73–74 (8th Cir. 1990).

118. *See* Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 353–54 (6th Cir. 2011) (rejecting an independent antecedent requirement of remuneration); Waisgerber v. City of Los Angeles, 406 F. App'x 150, 151–52 (9th Cir. 2010) ("[T]he fact that a person is not paid a salary does not necessarily foreclose the possibility that the person is an 'employee' for purposes of federal statutes, including Title VII.").

119. 656 F.3d at 349–50, 353.

120. *Id.* at 354.

121. *Id.* (alteration in original) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40).

122. *Id.* (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

123. *Id.*

124. *See id.* at 358–59 (Gibbons, J., concurring in part and dissenting in part).

For example, if a law student interning for a federal judge is required to be in the judge's chambers at set times throughout the week, is given detailed instructions on tasks that must be completed by certain tightly-controlled deadlines, is required to work only on certain cases at certain times, can only work on certain monitored court computers, and is not permitted to take breaks from work except during designated times throughout the day, the high level of control over the intern's work might suggest employment status. A similar fact set was at play in a recent Second Circuit Court of Appeals case, *Glatt v. Fox Searchlight Pictures, Inc.*, where certain unpaid interns for Fox worked ten-hour days, five days per week, doing work that was no different than that of Fox's regular employees, rather than engaging in educational activities.[125] Nevertheless, this type of work scenario is probably not the norm, particularly for unpaid interns. In addition, most courts still agree that employment requires some form of compensation by the putative employer in exchange for services.[126] Accordingly, under current case law, most unpaid interns remain unprotected by Title VII.

III. TITLE IX CLAIMS OF SEXUAL HARASSMENT BY UNPAID INTERNS

If Title VII affords no remedy to an unpaid intern who is the victim of sexual harassment, the next obvious claim to pursue, especially for internships completed by students for academic credit, is a sexual harassment claim under Title IX.

Title IX generally prohibits discrimination and harassment in education programs and activities that receive federal financial assistance.[127] The statute specifically provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[128] Notably, this statute applies only to an "education program or activity receiving Federal financial assistance."[129] Examples of entities that might be deemed to operate the requisite "education program or activity"

125. *See* 811 F.3d 528, 532 (2d Cir. 2016) (describing the internship experiences of interns Eric Glatt, Alexander Footman, and Eden Antalik).

126. *See supra* Part II.C.

127. *See Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC., https://www2.ed.gov/
policy/rights/guid/ocr/sexoverview.html [https://perma.cc/4EFM-67DS] (last visited Nov. 25, 2025).

128. 20 U.S.C. § 1681(a).

129. *Id.*; *see also* 34 C.F.R. § 106.2 (2026) (defining "Federal financial assistance").

include colleges, universities, and vocational education programs that receive federal financial assistance.[130]

Title IX specifically outlaws sex-based harassment and sexual violence.[131] In addition, Title IX bestows a private right of action to enforce its prohibition on intentional sex discrimination.[132] This private right of action extends to an entity's deliberate indifference to a teacher's sexual harassment of a student.[133] Sexual harassment of a student by another student may likewise be enforced by private action against the educational institution.[134]

The most critical issue for the instant analysis is what constitutes an "educational program or activity" for Title IX purposes, as no Title IX claim of sexual harassment can exist outside of this setting. As noted, a teacher's sexual harassment of a student would clearly fall within Title IX's reach, as such conduct would occur during an "educational program or activity" (of the school itself).[135] Far less clear is whether Title IX would apply in the event an unpaid intern is sexually harassed during the student's off-campus internship by an individual who is not a paid employee of the student's school, such as a supervisor at a private company hosting the student's internship.[136]

Because the focus of this Article is on the *employer's* potential liability, rather than the school's, this section specifically examines whether an employer who hosts an internship could be deemed to operate an "educational program or activity" under Title IX. In such cases, courts will typically consider whether the entity in question has "features such that one could reasonably consider its mission to be, at least in part,

130. 20 U.S.C. § 1687.

131. *See* 34 C.F.R. § 106.2 (2026) (defining "Sex-based harassment"); *Sex Discrimination: Overview of the Law*, *supra* note 127.

132. Cannon v. Univ. of Chi., 441 U.S. 677, 690–709 (1979).

133. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998); *see also* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (ruling that a damages remedy is available for a private action under Title IX).

134. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (ruling that student-on-student harassment is actionable by private right of action "where the funding recipient acts with deliberate indifference" and the harassment is so severe "that it effectively bars the victim's access to an educational opportunity or benefit").

135. *Gebser*, 524 U.S. at 290–91.

136. The United States Supreme Court recently denied cert in a case raising the issue of "[w]hether Title IX of the Education Amendments Act of 1972 affords a student intern the same legal protection against sexual harassment during an off campus internship as the student would have the right to expect while on campus." *See* Petition for Writ of Certiorari, Fritze v. Nexstar Broad., Inc., 142 S. Ct. 111 (2021) (No. 20-1769), 2021 WL 2555359, at *i, (cert. denied).

educational."[137] In *Doe v. Mercy Catholic Medical Center*, for example, the United States Court of Appeals for the Third Circuit examined the "educational characteristics" of a private teaching hospital's residency program and determined that the program was plausibly covered by Title IX.[138] For similar reasons, the Eighth and Ninth Circuits have applied Title IX to state prison systems offering inmate educational programs.[139]

Doe involved a residency program at Mercy Catholic Medical Center, a private teaching hospital in Philadelphia that accepted federal funding and was affiliated with Drexel University's College of Medicine.[140] In 2011, plaintiff Doe joined Mercy's diagnostic radiology residency program.[141] The program allowed Doe to receive training in radiology and "combin[ed] hands-on experience with didactic teaching."[142] Doe attended mandatory daily morning lectures by faculty and afternoon case presentations by her fellow residents, both under the supervision of faculty and attending physicians.[143] The program also required Doe to take annual tests to assess her progress and competence.[144]

In her lawsuit against Mercy, Doe alleged that the director of Mercy's residency program, Dr. James Roe, "sexually harassed her and retaliated against her for complaining about his behavior, resulting in her eventual dismissal" from the program.[145] Doe brought six claims against Mercy, including Title IX claims of retaliation and harassment.[146] The District Court dismissed the complaint, ruling that Title IX does not apply to Mercy because it is not an "education program or activity" under the applicable statute, 20 U.S.C. § 1681(a).[147]

On appeal, the Third Circuit addressed whether "Mercy's operation of a residency program makes it an 'education program or activity' under Title IX," an issue of first impression in the circuit.[148] In conducting this analysis, the court sought to adhere to "the common understanding of the word 'education' prevalent when Title IX was enacted"—that is, the

137. *See, e.g.*, Doe v. Mercy Cath. Med. Ctr., 850 F.3d 545, 555 (3d Cir. 2017) (quoting O'Connor v. Davis, 126 F.3d 112, 117 (2d Cir. 1997)).

138. *See id.* at 556–58.

139. *See* Klinger v. Dep't of Corr., 107 F.3d 609, 613–16, 614 n.5 (8th Cir. 1997); Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 976–79 (8th Cir. 2009); Jeldness v. Pearce, 30 F.3d 1220, 1224–26 (9th Cir. 1994).

140. *Doe*, 850 F.3d at 550.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 552.

147. *Id.*

148. *Id.*

"process of training and developing the knowledge, skill, mind, character, etc., esp. by formal schooling; teaching; training."[149] The court highlighted the following educational characteristics potentially relevant to this inquiry: 1) whether the program "is incrementally structured through a particular course of study or training, whether full- or part-time;" 2) whether the program "allows participants to earn a degree or diploma, qualify for a certification or certification examination, or pursue a specific occupation or trade beyond mere on-the-job training;" 3) whether the program "provides instructors, examinations, an evaluation process or grades, or accepts tuition;" and 4) whether "the entities offering, accrediting, or otherwise regulating a program hold it out as educational in nature."[150] Notably, the court emphasized that these particular features, or even other relevant features not listed, "may be more or less relevant depending on the unique circumstances of each case."[151]

On the merits, the court concluded that Mercy's residency program "makes its mission, at least in part, educational."[152] Key educational features of the program the court highlighted included that it was:

> [A] multiyear regulated program of study and training in diagnostic radiology . . . . [t]hat . . . required her to learn and train under faculty members and physicians, attend lectures, and help present case presentations under supervision, participate in a physics class on a university campus, and sit for annual examinations . . . . [That] Mercy held [it] out . . . as educational in nature and that the [Accreditation Council for Graduate Medical Education] calls residency programs "structured educational experience[s]."[153]

Additionally, the Third Circuit considered that students were eligible to take the American Board of Radiology's certification examinations upon completion of Mercy's program.[154]

According to the court, these allegations within Doe's complaint raised the plausible inference that Mercy's residency program was an "education program or activity" under Title IX.[155] This was particularly

149. *Id.* at 556 (quoting *Education*, WEBSTER'S NEW WORLD DICTIONARY 444 (2d ed. 1970)).
150. *Id.*
151. *Id.*
152. *Id.* at 558.
153. *Id.* at 556–57.
154. *Id.* at 557.
155. *Id.* at 556.

true since Mercy's residency program is "affiliated" with Drexel Medicine, itself "a university program plausibly covered by Title IX."[156]

In the end, medical residencies combine features of both employment and academic study, but a core feature of such programs is "medical education and training."[157] This requisite educational mission, however, is missing from most college internship experiences. Once again, *O'Connor* provides a useful illustration.

Recall that in *O'Connor*, college student Bridget O'Connor served as an unpaid intern at a hospital, where she was allegedly sexually harassed by a doctor.[158] O'Connor later sued the hospital under Title IX.[159] O'Connor argued that the hospital was required to comply with Title IX because it receives federal financial funding and operates "vocational training through an organized educational program," including for college interns.[160]

According to the Second Circuit, the key Title IX issue was whether "an entity such as Rockland" operates the requisite Title IX "education program or activity" where it receives federal funds and "permits student-interns from a college with which it has no affiliation to perform volunteer field work at its facility."[161] Similar to *Doe*, the Second Circuit declared that "in order to implicate Title IX in the first instance, an entity must have features such that one could reasonably consider its mission to be, at least in part, educational."[162] Applying this standard, the court found that Rockland "maintains none of the characteristics associated with being an educator."[163] The court further noted that "[t]he environment at Rockland is not . . . analogous to a teaching hospital's 'mixed employment-training context,'" and that Rockland lacks the instructors, evaluations, and particular course of training used by certain educational or vocational programs subject to Title IX.[164] Finally, the court refused to impute the college's own education program to Rockland on the mere basis that "O'Connor was a student at the former while she performed volunteer work with the latter."[165] This was because there was no evidence of an "institutional affiliation" between Rockland and the

156. *See id.* at 557.
157. *See id.* (quoting 15 U.S.C. § 37b(b)(1)(B)(i)) (defining "graduation medical education program" as "a residency program for the medical education and training of individuals following graduation from medical school").
158. O'Connor v. Davis, 126 F.3d 112, 113–14 (2d Cir. 1997).
159. *Id.* at 114.
160. *Id.* at 116 (internal citation omitted).
161. *Id.* at 117.
162. *Id.*
163. *Id.* at 118.
164. *Id.* (internal citations omitted).
165. *Id.*

college, no "written agreement binding" them, no shared staff, and no circulation of funds between the entities.[166] Moreover, the court noted that Rockland had rarely accepted volunteers from O'Connor's college in the past.[167] As such, the court refused to declare Rockland "an agent or arm of Marymount for Title IX purposes," and "decline[d] . . . to convert [the hospital's] willingness to accept volunteers into conduct analogous to administering an 'education program' as contemplated by Title IX."[168]

Reaching a similar result, the United States District Court for the Eastern District of Michigan in *Varlesi v. Wayne State University* ruled that an adult rehabilitation center where a graduate student completed an unpaid internship was not an "educational institution" for Title IX purposes, making it exempt from the law.[169] Unlike *Doe* and *O'Connor*, the *Varlesi* court focused on whether the rehabilitation center at issue qualified as an educational *institution* under the law, a term that appears alongside the "education program or activity" requirement in Title IX.[170]

As defined by 20 U.S.C. § 1681, the term "educational institution" means "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education."[171] After noting that the center was "obviously not a preschool, an elementary school, a secondary school, or an institution of higher education," the court then examined the regulatory definitions of the remaining two possibilities—institution of vocational education or institution of professional education—and found neither applicable.[172]

166. *Id.*
167. *Id.*
168. *Id.* at 118–19.
169. 909 F. Supp. 2d 827, 832–34, 840–41 (E.D. Mich. 2012).
170. *Id.* at 840. For context, the term "educational institution" appears in the same Title IX statute that prohibits sex discrimination under "any education program or activity" receiving federal financial assistance, even though the term does not appear in the statute's particular subsection outlawing sex discrimination. *See* 20 U.S.C. § 1681(a) (providing the general rule that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."). Certain enumerated exceptions in the statute use the term "educational institution." *See id.* (a)(1)–(4) (using this term in certain enumerated exceptions). Courts disagree as to whether an entity must meet this definition to be covered by § 1681, or rather whether the sole relevant inquiry is whether the entity operates an education program or activity. For example, the *Varlesi* court's approach is based on the U.S. Supreme Court's statement in a footnote that "Title IX is applicable only to certain educational institutions receiving federal financial assistance . . . ." *Varlesi,* 909 F. Supp. 2d at 840 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 695 n.17 (1979)). On the other hand, the Third Circuit in *Doe* declared that § 1681(a) and § 1682 extend Title IX to "education programs or activities," not to the "educational institutions" of § 1681(c). Doe v. Mercy Cath. Med. Ctr. 850 F.3d 545, 554 (3d Cir. 2017).
171. 20 U.S.C. § 1681(c).
172. *Varlesi*, 909 F. Supp. 2d at 840.

Here, the court noted that the center did not offer "a program of academic study that leads to a first professional degree"—as required to be an institution of professional education—and its primary purpose was to provide rehabilitation services for adults with substance abuse problems, rather than education, failing the definition of an institution of vocational education.[173]

Finally, the court addressed the plaintiff's argument, similar to one made in *O'Connor*, that the center qualified as an educational institution through its "longstanding partnership" with Wayne State University's School of Social Work.[174] Invoking the *O'Connor* court's reasoning on this point, the court declared that "*O'Connor* is nearly indistinguishable from the present case," and "compellingly counsel[ed] against" finding the center to be "an educational institution for Title IX purposes."[175] In the end, these cases demonstrate that the typical internship experience at a business that itself lacks an educational mission makes the internship host beyond the reach of Title IX.

IV. STATE STATUTES THAT PROTECT UNPAID INTERNS FROM HARASSMENT

Given the general judicial stance against Title VII and Title IX claims brought by unpaid interns, a handful of state legislatures have enacted laws explicitly protecting unpaid interns from discrimination and harassment by providing them with a cause of action in those states.

173. *Id. See generally* 34 C.F.R. § 106.2(n) (2025) (defining an institution of professional education as an institution offering "a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary [of Education]"); 34 C.F.R. § 106.2(o) (2025) (defining an institution of vocational education as "a school or institution . . . which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field . . . .").

174. *Varlesi*, 909 F. Supp. 2d at 840.

175. *Id.* at 841; *cf.* Lam v. Curators of UMKC Dental Sch., 122 F.3d 654, 655–56 (8th Cir. 1997) (noting that an education program under Title IX is one "controlled by" and that "inure[s] some benefit" to the covered institution or university, such that a private dental office that was "[un]affiliated" with the university and not subject to its control did not trigger Title IX liability for the university for a sexual assault occurring at the dental office).

Such laws exist in New York,[176] California,[177] Connecticut,[178] Illinois,[179] Oregon,[180] and Maryland.[181]

The New York statute is a good illustration. That statute generally makes it unlawful "for an employer to . . . engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to an intern."[182] Accounting for both quid pro quo and hostile work environment theories of harassment, the statute more specifically declares such sex-based harassment unlawful when:

> (1) submission to such conduct is made either explicitly or implicitly a term or condition of the intern's employment;
>
> (2) submission to or rejection of such conduct by the intern is used as the basis for employment decisions affecting such intern; or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with the intern's work performance by

176. *See* N.Y. EXEC. LAW § 296-c(3)(a) (McKinney 2025) (making it "an unlawful discriminatory practice for an employer to . . . engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to an intern").

177. CAL. GOV'T CODE § 12940(j)(1) (West 2025) (making it "an unlawful employment practice . . . [f]or an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment . . . because of . . . sex, gender, [and other characteristics,] to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract," and stating that "[h]arassment of . . . an unpaid intern or volunteer . . . shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action").

178. CONN. GEN. STAT. § 31-40y(b)(4) (2025) (making it unlawful for an employer to "[e]ngage in any sexual harassment toward any intern or individual seeking an internship").

179. 775 ILL. COMP. STAT. 5/2-101(A)(1) (2025) (defining "employee" to "include[] an unpaid intern").

180. OR. REV. STAT. § 659A.350(1) (2025) (stating that "[a]n intern is considered to be in an employment relationship with an employer for the purposes of the employee protections provided under" the state's employment discrimination statute, among other statutes).

181. MD. CODE ANN., STATE GOV'T § 20-610(b) (West 2025) ("An employer may not . . . fail or refuse to offer an internship, terminate an internship, or otherwise discriminate against an individual with respect to the terms, conditions, or privileges of an internship because of the individual's race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, military status, or disability unrelated in nature and extent so as to reasonably preclude the performance of the internship.").

182. N.Y. EXEC. LAW § 296-c(3)(a) (McKinney 2025).

> creating an intimidating, hostile, or offensive working environment.[183]

To clearly indicate the statute's application to *unpaid* interns, the statute defines "intern" as:

> [A] person who performs work for an employer for the purpose of training under the following circumstances:
>
> a. the employer is not committed to hire the person performing the work at the conclusion of the training period;
>
> b. the employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed; and
>
> c. the work performed:
>
> (1) provides or supplements training that may enhance the employability of the intern;
> (2) provides experience for the benefit of the person performing the work;
> (3) does not displace regular employees; and
> (4) is performed under the close supervision of existing staff.[184]

The analogous Connecticut statute makes it unlawful for an employer to "[e]ngage in any sexual harassment toward any intern or individual seeking an internship."[185] In addition, the Connecticut law defines "intern" using language that is nearly identical to the New York statute summarized above, solidifying the law's application to the bona fide intern.[186]

The New York and Connecticut statutes share several notable similarities. First, they each explicitly protect unpaid interns from employer harassment during an unpaid internship, though they do so in different ways. The New York statute uses more detailed language that

183. *Id.* § 296-c(3)(a)(1)–(3).
184. *Id.* § 296-c(1)(a)–(c).
185. CONN. GEN. STAT. § 31-40y(b)(4) (2025).
186. *See* CONN. GEN. STAT. § 31-40y(a)(3) (2025) (adding just one additional requirement at the end of this definition that is not included in the New York definition: that the work performed by the intern "provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer").

directly accounts for both quid pro quo and hostile work environment theories of harassment. Second, they each define the term "intern" to target the truly academic-style internship, where the internship's primary focus is training and experience for the benefit of the intern without displacing any employee. Third, and related to the previous point, each law applies to unpaid interns, as both define the term "intern" to include an agreement between the employer and the intern that the intern is "not entitled to wages for the work performed."[187] This narrow focus makes sense because interns who are paid for their work are often classified as employees under statutes like Title VII, giving them protection from harassment under other laws.[188] Thus, these laws serve as useful examples of statutory language that could close the Title VII loophole for unpaid interns at the federal level.[189]

V. TORT THEORIES OF LIABILITY

Given the overwhelming weight of authority excluding unpaid interns from Title VII and Title IX protection, this Article next examines whether tort law may provide an alternative path to recovery for harassment of unpaid interns. This Part examines both negligence and intentional tort theories of liability.

A. Negligence Claims Against Employers

To date, there have been few reported opinions involving negligence claims brought by an unpaid intern against their employer. One recent case from the Minnesota Supreme Court, *Abel v. Abbott Northwestern Hospital*, is one of the few cases to recognize negligence as a potentially viable claim in an intern sexual harassment scenario and, given its pro-plaintiff stance, has the potential to become influential in this area.[190]

187. *See* CONN. GEN. STAT. § 31-40y(a)(3) (2025) ("[T]he employer and the individual performing the work agree that the individual performing the work is not entitled to wages for the work performed."); N.Y. EXEC. LAW § 296-c(1)(b) (McKinney 2025) ("[T]he employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed.").

188. *See generally supra* Section II.D (discussing the common law control test); Comm'n on Hum. Rts. & Opportunities v. Echo Hose Ambulance, 140 A.3d 190, 195 (Conn. 2016) (noting that the Connecticut statute "expands protections for one narrowly defined class of persons—unpaid interns").

189. *See* Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp. 3d 429, 445 (S.D.N.Y. 2018) ("The 2014 amendments were designed to protect college students who took internships as a valuable learning experience and a steppingstone to the job market.").

190. 947 N.W.2d 58, 64 (Minn. 2020).

The plaintiff in *Abel*, Meagan Abel, was a doctoral student in the psychology program at St. Mary's University of Minnesota in 2015.[191] As alleged in her complaint, Abel's doctoral program required her to complete a certain number of practicum hours.[192] In September 2015, Abel was placed with employer Allina Health System in its clinical psychology program at Abbott Northwestern Hospital, an unpaid and wholly uncompensated position.[193]

Abbott's practicum program was supervised by Dr. Jeffrey Gottlieb.[194] Over the course of the practicum, Dr. Gottlieb regularly harassed Abel.[195] For example, the court stated that "Dr. Gottlieb required Abel to participate in highly sexualized . . . sessions, which included role-play exercises where Dr. Gottlieb would touch students' chests, force students to mimic having sex with him, and make remarks on and critique students' bodies."[196] The court explained that to sustain this environment, "Dr. Gottlieb intimidated students by telling them that obeying him was integral to their continued participation in the practicum and their future paid employment."[197]

Abel reported the harassment to various Allina employees throughout her practicum experience.[198] During one meeting with a clinical director at Abbott, Dr. Michael Schmitz, Abel was told to be "emotionally tough" and to tolerate Dr. Gottlieb's misconduct.[199] After Abel filed a formal complaint with the Board of Psychology, Dr. Schmitz held a follow-up meeting where he focused on keeping the complaint suppressed.[200]

Abel had similar conversations with school representatives at St. Mary's.[201] Early on, Abel voiced concerns to her program's advisor, who simply advised her to tolerate Dr. Gottlieb's behavior.[202] Abel also discovered that Dr. Gottlieb had similarly sexually harassed other students in his capacity as supervisor of the practicum, and that the

191. *Id.* at 64–65.
192. *Id.* at 65.
193. *See id.* at 65, 73; *see also id.* at 83 (Gildea, C.J., dissenting) ("Abel does not dispute that she received no salary, wages, or employee benefits from Allina during her practicum.").
194. *Id.* at 65 (majority opinion).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 65–66.
200. *Id.* at 66.
201. *Id.*
202. *Id.*

university had responded by "counsel[ing] them on how to 'get through' it."[203]

By December 2015, Abel expressed her concerns regularly with St. Mary's.[204] On December 23, 2015, Allina removed Dr. Gottlieb as training director and issued a no-contact order with students.[205] Despite the no-contact order, Dr. Gottlieb continued to interact with Abel in inappropriate ways. For example, Dr. Gottlieb "approached [Abel] from behind and stood breathing in a simultaneously sexualized and threatening manner."[206] Abel was also harassed by others at the clinic, including the interim program director who replaced Dr. Gottlieb in that role.[207]

In May 2016, Abel chose to end her practicum three months early.[208] Dr. Gottlieb resigned the next month.[209] On March 2, 2018, Abel sued Allina. Her suit against Allina included state law claims of negligence and employment discrimination under the Minnesota Human Rights Act ("MHRA").[210] Allina filed a motion to dismiss Abel's claims, which the district court granted.[211] This decision was affirmed by the Court of Appeals of Minnesota.[212] Both courts ruled that Abel's negligence claim was preempted by the MHRA, unless she could demonstrate a duty separate and apart from the employer's obligations under the Human Rights Act, which she failed to do.[213]

The Minnesota Supreme Court reversed.[214] In the negligence portion of its opinion, the Minnesota Supreme Court focused on whether Allina

203. *Id.*

204. *Id.* Abel further alleged that "St. Mary's ignored Dr. Gottlieb's misconduct because St. Mary's depended on practicum sites under his control for its continued accreditation and noted that Dr. Gottlieb sat on the advisory board for the psychology doctorate program at St. Mary's." *Id.*

205. *Id.* at 65.

206. *Id.*

207. *Id.*

208. *Id.* at 66.

209. *Id.* at 67.

210. *Id.*

211. *Id.*

212. *Id.*; *see also* Abel v. Abbott Nw. Hosp., No. A19-0461, 2019 WL 4745372, at *1 (Minn. Ct. App. Sep. 30, 2019), *aff'd in part, rev'd in part, and remanded*, 947 N.W.2d 58 (Minn. 2020).

213. *Abel*, 947 N.W.2d at 77; *Abel*, 2019 WL 4745372, at *7 ("[A]bsent a basis for concluding that Allina owed a common-law duty to Abel, the district court properly dismissed the negligence claim against Allina and St. Mary's.").

214. *Abel*, 947 N.W.2d at 80. Of Abel's four original discrimination claims, only her employment discrimination claim survived, as the others were deemed time barred. *Id.* at 72–73. For the sole surviving discrimination claim, the Minnesota Supreme Court determined that the "[t]he absence of compensation does not bar Abel's employment discrimination claim as a matter of law." *Id.* at 76. *But see id.* at 81 (Gildea, C.J., dissenting)

owed Abel a duty of care, as did the lower courts.[215] Categorizing Dr. Gottleib's conduct as that of a third party, rather than of Allina itself, the court noted that "a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct."[216] Under Minnesota law, however, the court noted that there are two instances where "a negligent defendant may be held liable to a plaintiff for harm caused by a third party": (1) "when there is a special relationship between a plaintiff and a defendant and the harm . . . is foreseeable;" and (2) "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff."[217]

Focusing on the second exception, the court distinguished between misfeasance and nonfeasance.[218] According to the court, if the case involved mere nonfeasance—characterized by "passive inaction" or "a failure to take steps to protect [others] from harm"—the defendant would owe "no duty to the plaintiff for harm caused by a third party."[219] A duty might exist, however, if Allina's actions constituted misfeasance, defined as "active misconduct working positive injury to others."[220]

Finding sufficient allegations of misfeasance, the court emphasized that Allina put Dr. Gottlieb in a position to supervise the practicum.[221] Also, Allina itself fielded student complaints, and, upon receiving Abel's complaints, instructed Abel to bring her concerns back to Dr. Gottlieb.[222] Later, Allina "attempted to exercise its control" over the situation when it removed Dr. Gottlieb as training director and instituted the unsuccessful no-contact order.[223] In addition, Abbott replaced Dr. Gottlieb with a director who engaged in similar harassing conduct.[224] According to the court, "these allegations, at least at this early stage of litigation, constitute[d] misfeasance on the part of Allina."[225]

("[C]ompensation is a necessary prerequisite in determining that an employment relationship exists.").

215. *See id.* at 77–78 (majority opinion). The court noted that "[t]he existence of a duty of care is a threshold question because a defendant cannot breach a nonexistent duty." *Id.* at 77 (quoting Doe 169 v. Brandon, 845 N.W.2d 174, 177 (Minn. 2014)).

216. *Id.* (quoting *Doe* 169, 845 N.W.2d at 177–78)).

217. *Id.* (citations omitted) (first quoting Fenrich v. Blake School, 920 N.W.2d 195, 202 (Minn. 2018); then quoting *Doe* 169, 845 N.W.2d at 178; and then quoting Domagala v. Rolland, 805 N.W.2d 14, 23 (Minn. 2011)).

218. *Id.* at 78.

219. *Id.*; *Fenrich*, 920 N.W.2d at 203 (Minn. 2018).

220. *See Abel*, 947 N.W.2d at 78 (quoting *Fenrich*, 920 N.W.2d at 203).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

Regarding foreseeability of harm, the court found it "objectively reasonable for Allina to expect Dr. Gottlieb's misconduct against Abel to occur," especially since problematic conduct was well-known in the hospital by virtue of being so flagrant.[226] And even when Allina instituted the no-contact order, Dr. Gottlieb was still permitted to interact with practicum students, and the order was not enforced.[227] Thus, "[n]ot only could Allina reasonably expect harm, it knew the harm was occurring."[228] Finally, Abel herself was a foreseeable plaintiff because, as a female student, she was the very type of person who had already been harassed by Dr. Gottlieb.[229] Accordingly, Abel sufficiently alleged that "Allina had a duty to protect Abel based on its own conduct creating a foreseeable risk of harm to Abel, a foreseeable plaintiff."[230]

In a lengthy dissenting opinion, Chief Justice Lorie Gildea disagreed with the majority's decision to label Allina's conduct misfeasance, rather than nonfeasance.[231] Highlighting specific allegations of nonfeasance, Chief Justice Gildea noted the following allegations from Abel's complaint as evidence that Allina simply "fail[ed] to stop ongoing discrimination"[232]:

> Allina failed to provide written policies about supervising practicum students, and Dr. Gottlieb took advantage of this lack of guidance. Abel brought her concerns about Dr. Gottlieb's behavior to Allina staff yet "Allina[ ] fail[ed] to appropriately intervene." When staff at Allina finally met with Abel as part of "an 'internal investigation' of Dr. Gottlieb," they asked her "a series of 'yes' or 'no' questions and prevented [her] from providing an additional response." Allina failed to remove Dr. Gottlieb as a training director after first learning that he had engaged in discriminatory and harassing behavior toward Abel. After Abel filed a formal complaint, Allina staff "failed to ask any questions about [her] experiences or to provide her an opportunity to discuss Dr. Gottlieb's misconduct."[233]

226. *Id.*
227. *Id.* at 78–79.
228. *Id.* at 79.
229. *Id.*
230. *Id.* Because the allegations under this theory were deemed sufficient, the court declined to address whether a duty could be created through a special relationship, the alternative theory noted by the court. *Id.*
231. *See id.* at 89–90 (Gildea, C.J., dissenting).
232. *See id.* at 90.
233. *Id.* at 90.

In Chief Justice Gildea's view, "[a]lthough these facts show that Allina's response to learning about Dr. Gottlieb's discriminatory behavior was disappointing, they do not support the conclusion that Allina engaged in active misconduct that worked positive injury to Abel."[234] Rather, these allegations demonstrate "passive inaction," given that Allina "failed" on many fronts, including failing "to provide written policies, fail[ing] to respond to or investigate Abel's concerns, and fail[ing] to remove Dr. Gottlieb as the training director upon first learning that he engaged in discriminatory and harassing behavior toward Abel."[235]

In the end, the Minnesota Supreme Court is to be lauded for recognizing negligence as a viable claim in a situation involving the ongoing sexual harassment of an unpaid intern where the employer is aware of the harassment but does nothing to stop it. In this situation, the employer, who controls the internship experience and directly benefits from it, should be legally bound to provide a safe workplace free from harassment and harm. Recognizing negligence as a viable cause of action would be one way to achieve this outcome.

Nevertheless, *Abel* appears to be an outlier in this context. No court outside of Minnesota has endorsed *Abel* since it was decided in 2020.[236] Also, the divergent opinions in *Abel* reveal the challenges associated with pursuing a negligence claim against an employer in a situation like this, even where the harassment is severe and pervasive. For example, if harassment is categorized as coming at the hands of a "third party"—such as Dr. Gottlieb—rather than the employer itself—such as Allina—the starting point to the analysis is a general rule of no duty, and it becomes difficult to trigger the exceptions to this rule for the reasons articulated in Chief Justice Gildea's dissent. In addition, negligence claims might be preempted by the applicable state employment discrimination law, depending on whether the state discrimination statute at issue applies in the case at hand and whether the statute contains an exclusivity provision.[237]

234. *Id.*

235. *Id.*

236. In October 2022, the parties stipulated and agreed that the case should be dismissed with prejudice. Order at 1, Abel v. Allina Health Sys., No. 27-CV-18-16589 (Minn. Dist. Ct. Oct. 4, 2022), Index No. 118 (dismissing with prejudice). The Minnesota District Court thereby entered an order dismissing the case with prejudice. *Id.* Prior to this, trial had been scheduled for May 2023, and discovery had been ongoing. Fourth Amended Scheduling Order at 2–3, Abel v. Abbott Nw. Hosp., No. 27-CV-18-16589, (D. Minn. June 1, 2022), Index No. 94. The case docket does not indicate how Abel's negligence claim was resolved.

237. *See, e.g.*, FLA. STAT. § 760.07 (2025) (providing an exclusive avenue of relief for certain employment discrimination claims); *see also* Abel v. Abbott Nw. Hosp., No. A19-0461, 2019 WL 4745372, at *10 (Minn. Ct. App. Sep. 30, 2019) (Klaphake, J., dissenting)

Despite these concerns, negligence-based concepts have long underpinned much of the United States Supreme Court's sexual harassment jurisprudence, suggesting that a negligence-based approach in this context is appropriate. Under Title VII, courts have distinguished between harassment by a victim's supervisor[238] and harassment by a co-worker, with the latter scenario being explicitly grounded in negligence.[239] According to Supreme Court precedent, "[i]f the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions"—that is, only "if the employer knew or reasonably should have known about the harassment but failed to take remedial action."[240] This standard is overtly negligence-based.[241] As the Court noted in its recent decision in *Vance v. Ball State University*, "an employer is directly liable for an employee's unlawful harassment if the employer was negligent with respect to the offensive behavior"[242] or "negligent in controlling working conditions."[243]

Harassment by a supervisor was addressed at length in *Faragher v. City of Boca Raton*.[244] In that case, the Court sought to articulate the principles of vicarious liability that would govern Title VII employment discrimination claims against employers for the acts of supervisory employees whose sexual harassment of subordinates creates a hostile work environment. With vicarious liability as the focus, at issue was exactly what theory or principle of law should hold the employer, rather than the actual wrongdoer, liable for the supervisor's harassment.[245]

Invoking principles of negligence, the Court cited the "myriad cases" in which lower courts had "held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop."[246] "In such

(noting that defendants were attempting to "have it both ways" by arguing that the MHRA does not apply to unpaid interns and also that Abel's negligence claims were preempted by the exclusivity provision of the MHRA, section 363A.04), *aff'd in part, rev'd in part and remanded*, 947 N.W.2d 58 (Minn. 2020).

238. For Title VII purposes, "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

239. *See id.*

240. *See id.* at 424, 427.

241. *Id.* at 427 (citations omitted) (also noting that "[c]ourts have generally applied this rule to evaluate employer liability when a co-worker harasses the plaintiff").

242. *Id.*

243. *Id.* at 424.

244. 524 U.S. 775 (1998).

245. *See id.* at 780, 793–95, 797.

246. *Id.* at 789.

instances," the Court declared, "the combined knowledge and inaction may be seen as demonstrable negligence."[247]

In the end, the *Faragher* Court was unwilling, at least insofar as Title VII liability is concerned, to create any bright-line rules of liability or immunity in those scenarios where supervisors are responsible for harassment.[248] Instead, the Court opted for a middle ground solution giving employers the opportunity to escape liability through the so-called *Faragher-Ellerth* affirmative defense to harassment, set forth below.[249]

Under the *Faragher-Ellerth* framework, as a general rule, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate . . . authority over the employee."[250] Nevertheless, in such cases, the employer may raise an affirmative defense to avoid liability, under which the employer must prove both that 1) it "exercised reasonable care to prevent and promptly correct any harassing behavior" (*i.e., that the employer was not negligent in controlling the work environment*), and 2) "that the employee unreasonably failed to take advantage of any preventive or corrective opportunities" offered by the employer.[251]

As the *Faragher* Court acknowledged, this affirmative defense is designed to encourage "forethought by employers" in order "to avoid . . . harm" and incentivize employers to take steps to avoid Title VII violations in the first instance.[252] With echoes of negligence, the basic requirement is for the employer to act with "reasonable care."[253] An employer can meet this standard of care, for example, by promulgating an anti-harassment policy with an adequate complaint procedure.[254] On the other hand, an employer will fail to exercise reasonable care when it "entirely fail[s] to disseminate its policy against sexual harassment

247. *Id.*
248. *See id.* at 807–08.
249. *See id.*
250. *Id.* at 807.
251. *Id.*; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). Regarding the employee's duty, the Court explained that "[i]f the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so." *Faragher*, 524 U.S. at 806–07.
252. *See Faragher*, 524 U.S. at 806–07.
253. *See id.* at 807.
254. *See id.* at 807–09. According to one court, this prong can be satisfied "by implementing suitable [effective] institutional policies and educational programs regarding sexual harassment." EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 462–63 (5th Cir. 2013) (en banc).

among [its] employees" and "ma[kes] no attempt to keep track of the conduct of [harassing] supervisors."[255]

While not overtly negligence-based, the standards for supervisory harassment articulated above incorporate concepts like reasonable care and duties to prevent harm, principles that find roots in negligence law. On this point, it is telling that the dissenting Justices in *Faragher* would not have created a special rule for harassment by supervisors, and instead would have held that an employer is liable for any employee's creation of a hostile work environment "if, and only if, the plaintiff proves that the employer was negligent in permitting the [offending] supervisor's conduct to occur."[256] In sum, threads of negligence are woven into employment discrimination and harassment jurisprudence, demonstrating the inherent logic of a negligence-based standard of liability. Thus, unless some rule of preemption applies, it makes sense to consider negligence-based claims in this context.

B. Negligent Hiring, Supervision, and Retention

Another negligence-based theory of liability that may apply in the sexual harassment context is negligent hiring, supervision, and retention. In one recent Texas case, *Doe v. Apostolic Assembly of Faith in Christ Jesus*, the United States District Court for the Western District of Texas recognized these negligence-based duties arising from the employee-employer special relationship.[257]

In *Doe*, plaintiff Jane Doe, a minor, and her parents sued the Apostolic Assembly of the Faith in Christ Jesus and Stephen Arellano, the church's thirty-year-old youth pastor.[258] When Jane was fifteen years old, Arellano began communicating with her on Snapchat, which the court describes as "a photograph and messaging application."[259] Soon thereafter, Arellano "became flirtatious" with Jane and "initiated sexually charged communications."[260]

In August 2017, Jane and Arellano attended a church-sponsored event at a hotel in New Mexico.[261] Arellano invited Jane to his hotel room

255. *See Faragher*, 524 U.S. at 808. The Court stated that, under these circumstances, as a matter of law, the employer "could not be found to have exercised reasonable care to prevent the supervisors' harassing conduct." *Id.*

256. *Ellerth*, 524 U.S. at 766–67 (Thomas, J., dissenting); *see also Faragher*, 524 U.S. at 810 (Thomas, J., dissenting) (disagreeing with the majority opinion on liability for a hostile work environment claim for the reasons set forth in his dissenting opinion in *Ellerth*).

257. 452 F. Supp. 3d 503, 522 (W.D. Tex. 2020).

258. *Id.* at 513–14.

259. *Id.* at 514.

260. *Id.*

261. *Id.* at 515.

and had sexual intercourse with her; he also "photographed himself with [her], naked, and . . . posted it on Snapchat."[262] When Jane's father found out about the incident, he reported it to local police, but the church refused to cooperate in the subsequent investigation.[263]

In June 2019, plaintiffs sued the church and Arellano in federal court.[264] When examining defendants' motion to dismiss the case, the court first recognized that, "[a]s a general rule, 'there is no duty to control the conduct of third persons.'"[265] However, "[t]his general rule does not apply when a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct. . . . includ[ing] the relationship between employer and employee."[266] The court then declared that the "employer-employee special relationship exception can give rise to direct liability" for the employer based on a theory of negligent hiring, retention, and supervision.[267] According to the court, "[a]n employer who negligently hires, retains, or supervises an incompetent or unfit individual may be directly liable to a third party whose injury was proximately caused by the employee's negligent or intentional act."[268] The applicable duty here is "a general duty on an employer to adequately hire, train, and supervise its employees."[269] This duty, in turn, mandates "an inquiry into the qualifications of candidates for employment, the termination of employees who are not qualified or are unfit, and the adequate supervision and training of employees."[270] Notably, this negligence-based theory is grounded in the employer's own conduct, so it is not a form of vicarious liability.[271] In addition, unlike respondeat superior liability, this type of claim does not require "that the employee was acting in the course and scope of his employment when the tortious act occurred."[272]

Turning to the plaintiffs' complaint, the court found sufficient allegations that the church breached its duty to exercise ordinary care in

262. *Id.*
263. *Id.*
264. *Id.* at 516.
265. *Id.* at 517 (citing Greater Hou. Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).
266. *Id.* (citing *Greater Hou. Transp. Co.*, 801 S.W.2d at 525).
267. *See id.* at 522.
268. *Id.* (quoting Wrenn v. G.A.T.X. Logistics, Inc., 73 S.W.3d 489, 495 (Tex. App. 2002)).
269. *Id.* (quoting Houser v. Smith, 968 S.W.2d 542, 544 (Tex. App. 1998)).
270. *Id.* at 524 (quoting Verhelst v. Michael D's Rest. San Antonio, Inc., 154 F. Supp. 2d 959, 967 (W.D. Tex. 2001)).
271. *Id.* at 522.
272. *Id.* (quoting Wrenn, 73 S.W.3d at 496); *see also id.* at 522–23 (quoting *Houser*, 968 S.W.2d at 544) ("[W]hile the conduct need not occur within the scope of employment, the theory 'does require that a plaintiff's harm be the result of the employment.'").

hiring because it did not interview Arellano and conducted "no inquiry" before selecting him to supervise minors without oversight.[273] As to training and supervision, the plaintiffs alleged that the church provided no "training or policy regarding appropriate boundaries between the youth minister and the youth parishioners," yet it "delegated him the authority to mentor and chaperone youth trips 'without supervision.'"[274] Regarding negligent retention, the plaintiffs alleged that "Arellano maintained extensive contacts with young women over social media, often in a sexually explicit manner," and that "the Church knew or should have known about this conduct and about Arellano's 'sexual propensities.'"[275] The court found that, despite this alleged knowledge, the church allowed Arellano to continue working with these children in an unsupervised capacity.[276] Finally, the court found that "the abuse and resulting injuries could not have occurred but for these breaches."[277] Accordingly, the complaint's allegations were deemed "sufficient to state a claim for negligent hiring, training, supervision, or retention."[278]

C. Respondeat Superior Liability for Intentional Torts Committed by an Employee

This subsection addresses an alternative tort-based theory of recovery that might be used to hold an employer liable for the sexual harassment of an unpaid intern: respondeat superior.[279] Under the respondeat superior doctrine, an employer is generally liable for torts committed by their employees while acting within the scope of their employment.[280] When respondeat superior is alleged, courts must often

273. *Id.* at 524.
274. *Id.*
275. *Id.* at 525.
276. *Id.*
277. *Id.*
278. *Id.* at 528.
279. Notably, the Minnesota Supreme Court in *Abel* suggested this theory might be a viable one, even though it did not rule on the issue or openly endorse it. *See* Abel v. Abbott Nw. Hosp., 947 N.W.2d 58, 77 n.13 (Minn. 2020) ("The parties did not argue or brief whether Allina was responsible for Dr. Gottlieb's misconduct under a theory of respondeat superior. Our decision today does not foreclose any party from moving to amend its pleadings to address this theory.").
280. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(1) (AM. L. INST. 2006); *see e.g.*, N.X. v. Cabrini Med. Ctr., 765 N.E.2d 844, 847 (N.Y. 2002) ("Under the doctrine of respondeat superior [in New York], an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment."); Piedmont Hosp., Inc. v. Palladino, 580 S.E.2d 215, 217 (Ga. 2003) (first quoting CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 7-2, at 263 (2002 ed.); then citing Farmer v. Ryder Truck Lines, 266 S.E.2d 922, 924 n.2 (Ga. 1980); and then citing Allen Kane's Major Dodge v, Barnes, 257 S.E.2d 186, 188 (Ga. 1979)) ("Two elements

resolve two issues: 1) whether the wrongdoer is an employee of the employer, rather than an independent contractor, and 2) if so, whether the employee committed their tort within the scope of their employment. These issues are not always clear-cut.

In *Doe v. Uber Technologies, Inc.*, for example, two women sued Uber under respondeat superior for various tort claims—including battery, assault, and false imprisonment—after they were each sexually assaulted by Uber drivers during or immediately after having used their ride share service.[281] Uber then filed a motion to dismiss the lawsuit, arguing that Uber should not be liable for the drivers' torts.[282] Specifically, Uber argued that the drivers were not employees of Uber, and that, even if they were, the company should not have been vicariously liable because "sexual assault falls outside the scope of an employee's duties."[283]

To determine the employment status of the Uber drivers, the court applied the common law control test discussed previously in Section II.B.[284] On this issue, the court found that plaintiffs had alleged sufficient evidence of control to plausibly claim an employment relationship.[285] For the scope of employment issue, the court applied a foreseeability-based standard by asking whether "in the context of the particular enterprise

must be present [under Georgia law] to render a master liable [under respondeat superior]: first, the servant must be in furtherance of the master's business; and, second, he must be acting within the scope of his master's business."); Cent. Trust & Inv. Co. v. Signalpoint Asset Mgmt., LLC, 422 S.W.3d 312, 323 (Mo. 2014) (en banc) ("[W]here an employer-employee relationship exists, the doctrine of respondeat superior holds that the employer is vicariously liable for the injury-causing conduct of an employee done within the course and scope of the employment."); Barnett v. Clark, 889 N.E.2d 281, 283 (Ind. 2008) (citations omitted) ("The general rule [under Indiana law] is that vicarious liability will be imposed upon an employer under the doctrine of respondeat superior where the employee has inflicted harm while acting 'within the scope of employment.' In order for an employee's act to fall 'within the scope of employment,' the injurious act must be incidental to the conduct authorized or it must, to an appreciable extent, further the employer's business."); Tammen v. Tronvold, 965 N.W.2d 161, 168–69 (S.D. 2021) (quoting Kirlin v. Halverson, 758 N.W.2d 436, 444 (S.D. 2008)) ("In South Dakota, '[t]he ancient doctrine of respondeat superior is well established as holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.'").

281. 184 F. Supp. 3d 774, 780 (N.D. Cal. 2016).

282. *Id.* at 780–81.

283. *Id.* at 781.

284. *See id.* at 781–82.

285. *See id.* at 782. For example, the court noted that Uber required all drivers to accept all ride requests; Uber set fares without driver input; Uber, rather than the driver, had the power to modify fares—e.g., if the driver took a circuitous route. Uber also controlled various aspects of the drivers' conduct. *Id.* These included how they dressed, what music they listened to in the car, mandating that drivers were to open the door for customers, how they interacted with customers, and the cleanliness of their vehicles. *Id.*

an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[286] According to the court, "statistical frequency" is not the focus of this foreseeability analysis; rather, the analysis examines the "relationship between the nature of the work involved and the type of tort committed."[287] Employing an expansive view of the scope of employment requirement—one that tends to support tort victims like Jane Doe—the court further noted that California courts consider three policy goals underlying the respondeat superior doctrine: "preventing future injuries, assuring compensation to victims, and spreading the losses caused by an enterprise equitably."[288]

Applying these standards, the court determined that "sexual assault by a taxi driver (or a taxi-like driver, as the case may be)" might not be "so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[289] Indeed, "[a]ssaults of this nature are exactly why customers would expect taxi companies to perform background checks of their drivers."[290] Moreover, "[h]olding Uber liable could also forward the underlying policy goals of respondeat superior, including prevention of future injuries and assurance of compensation to victims," especially because there is no statutory remedy in this situation.[291] Finally, the court invoked cases where similar tortious acts were found to be within the scope of one's employment, such as one where an employee threw a hammer at a co-worker in a fit of rage.[292]

In contrast to *Uber*, the United States Court of Appeals for the First Circuit, applying Maine law, ruled that a truck company was not liable for its driver's act of stabbing a motorist in an incident of "road rage" that occurred while the driver was driving a tractor-trailer for the company.[293] According to the court, the attack did not occur during the scope of

286. *Id.* at 784 (quoting Perez v. Van Groningen & Sons, Inc., 719 P.2d 676, 678 (Cal. 1986)).

287. *Id.* (quoting Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 364 (Cal. 1995)).

288. *Id.* (quoting *Lisa M.*, 907 P.2d at 366).

289. *Id.* (quoting *Lisa M.*, 907 P.2d at 365).

290. *Id.* at 785.

291. *Id.*

292. *Id.* ("Like a police officer who rapes a detained woman, an employee who throws a hammer at a fellow worker in a fit of irritation, or an asylum officer who abuses his role to corner female immigrants and molest them, sexual assault by an Uber driver may be incidental to the operation of its business."); *see also* Carr v. Wm. C. Crowell Co., 171 P.2d 5, 8 (Cal. 1946) (holding employer liable for actions of carpenter who attacked a co-employee with a hammer).

293. Nichols v. Land Transp. Corp., 223 F.3d 21, 22, 24–25 (1st Cir. 2000).

employment because the attack was not intended to serve the trucking company.[294] Here, the court relied upon section 228(1) of the *Restatement (Second) of Agency*, which states that "[c]onduct of a servant is within the scope of employment . . . only if . . . it is actuated, at least in part, by a purpose to serve the master."[295] The court further quoted the Restatement in noting that "if the servant has no intent to act on his master's behalf," the employer will not be liable even if "the events from which the tortious act follows arise while the servant is acting in the employment and the servant becomes angry because of them."[296]

These divergent views on the "scope of employment" concept should be expected, as scope of employment determinations are made "according to the principles of respondeat superior of the state in which the alleged tort occurred," and states will vary in the degree to which they believe employers should be liable for certain employee torts.[297] As seen in the discussion above, two main schools of thought exist with respect to scope of employment issues. The first, as reflected in the First Circuit's road rage case, is that an employee acts within the scope of their employment only when the tortious act itself is motivated by a desire to serve the employer and is part of the employee's job duties.[298] A similar rule applies in Texas.[299] Under this approach, courts have typically found that workplace harassment—including offensive comments and unwelcome touching—is motivated solely by individual desires and serves no purpose for the employer, which makes the employer not vicariously liable.[300] Likewise, when an intern's supervisor sexually harasses her, such harassment is not within the scope of the employee's duties, the harassment does not further the employer's business, and it does not accomplish the objective for which the employee was employed.[301]

294. *Id.* at 24.

295. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 228(1) (AM. L. INST. 1958)).

296. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 245 cmt. f (AM. L. INST. 1958)).

297. Wilson v. Drake, 87 F.3d 1073, 1076 (9th Cir. 1996) (quoting Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 876 (9th Cir. 1992)).

298. *See Nichols*, 223 F.3d at 23 (discussing the split of authority among courts on this issue).

299. Under Texas law, "an employee acts within his scope of employment if the act is done (1) within the employee's general authority, (2) in furtherance of the employer's business, and (3) for the accomplishment of the objective for which the employee was employed." Rodriguez v. Sarabyn, 129 F.3d 760, 767 (5th Cir. 1997).

300. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 793–96 (1998).

301. *See* Vance v. Ball State Univ., 570 U.S. 421, 428 (2013) ("[B]ecause racial and sexual harassment are unlikely to fall within the scope of a servant's duties, application of this rule would generally preclude employer liability for employee harassment.").

Accordingly, respondeat superior would not apply under this narrow view of the doctrine.[302]

In contrast, some courts—like that in *Uber*—take a more expansive view of what it means to act within the "scope of employment." In these jurisdictions, "an assault can be within the scope of employment if it arises out of an employment-related [action], even if in committing the assault the servant lacked a purpose to serve the master."[303] Indeed, the *Uber* court explicitly rejected the motive-benefit test and found no requirement under California law that an assault be committed "to further the interests of the employer."[304] In addition, as some courts have recognized, an employer may be liable even for torts committed outside the scope of employment if the employee was "aided in accomplishing the tort by the existence of the agency relation."[305] Under this aided-in-the-accomplishment rule, an Uber driver who assaults a customer during a ride could trigger vicarious liability for the employer because the very existence of the agency relationship is what created the opportunity for harm in the first place.[306] The same is true for an internship host supervisor who harasses an intern.

As a general rule, however, courts have typically held—or have assumed—that sexual harassment falls outside the scope of employment.[307] As commentators have declared, acts of harassment fall outside the scope of employment doctrine because "[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business."[308] Given this general trend, the respondeat superior doctrine, on the whole, is not an effective remedy for intern harassment.[309]

302. *See* Doe v. Apostolic Assembly of Faith in Christ Jesus, 452 F. Supp. 3d 503, 518–19 (W.D. Tex. 2020) (discussing similar Texas cases involving sexual abuse by an employee).

303. Nichols v. Land Transp. Corp., 223 F.3d 21, 23 (1st Cir. 2000).

304. Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 785 (N.D. Cal. 2016) (citing Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 361 n.3 (Cal. 1995)).

305. *See Vance*, 570 U.S. at 428 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1958)).

306. *See* Smith v. Liberty Mut. Ins. Co., 201 A.3d 555, 561–70 (Del. Super. Ct. 2019) (discussing this form of liability in a case involving sexual assault allegations).

307. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 793–96 (1998) (citing examples of such cases).

308. David Holtzman & Eric Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After* Meritor Savings Bank v. Vinson, 31 ST. LOUIS U. L.J. 239, 276 (1987).

309. *See* Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 604 (1993) (recognizing that respondeat superior "would rarely result in employer liability [for sexual harassment] because sexual harassment is not part of anyone's job description").

VI. CONTRACTUAL REMEDIES

Contract law might provide another avenue of relief for the unpaid intern. One method by which a student intern might sue an employer for contract damages is to allege that the student is the intended beneficiary of any contract that might exist between the school and the internship organization.[310]

A third-party beneficiary is not a party to a contract but stands to benefit from it.[311] Third-party beneficiaries fall into two camps: intended beneficiaries, who may enforce the contract directly, and incidental beneficiaries, who may not.[312] Michigan's third-party beneficiary statute, for example, states in pertinent part:

> Any person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.[313]

When a dispute arises over whether a particular third-party beneficiary is an intended or incidental beneficiary, courts will examine the contract itself to determine whether the parties intended to benefit the third party, either to satisfy some duty owed to the third party or make the third party a gift.[314]

310. *Cf.* Bowman & Lipp, *supra* note 61, at 126 (advancing this argument as a means of holding a *university* liable for such harassment).

311. *See* Martinez v. Socoma Companies, Inc., 521 P.2d 841, 844–45 (Cal. 1974) (en banc).

312. *See id.*; *see also* Schmalfeldt v. N. Pointe Ins. Co., 670 N.W.2d 651, 654 (Mich. 2003) (per curiam) (stating that under Michigan law, "only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor").

313. MICH. COMP. LAWS § 600.1405 (2025).

314. *See* Brunsell v. City of Zeeland, 651 N.W.2d 388, 391 (Mich. 2002) (quoting Guardian Depositors Corp. of Detroit v. Brown, 287 N.W. 798, 800 (Mich. 1939)) ("[A]n objective standard is to be used to determine from the contract itself whether the promisor undertook 'to give or to do or to refrain from doing something *directly* to or for' the putative third-party beneficiary."); *Martinez*, 521 P.2d at 845 ("American law generally classifies persons having enforceable rights under contracts to which they are not parties as either creditor beneficiaries or donee beneficiaries."); *see also* Bowman & Lipp, *supra* note 61, at 126 ("For this theory to succeed, the intent to benefit the student as third party must be clear in the contract.").

As one example, the Memorandum of Understanding ("MOU") used by the internship program at one university affiliated with the author states that the "UNIVERSITY and AGENCY [hosting the internship] will comply with all Federal and State laws prohibiting discrimination."[315] Speaking more specifically to sexual harassment, the MOU further states:

"The UNIVERSITY does not discriminate on the basis of race, color, gender, national or ethnic origin, age, religion, disability, marital status, veteran status, sexual orientation, or pregnancy in educational programs and activities as required by Title IX."[316] Also, the MOU states that "[i]f a student makes a report to the AGENCY, believing he or she has experienced or witnessed discrimination including sexual harassment, . . . the AGENCY must report such incidents to the Title IX Coordinator [for the University]."[317] Finally, the MOU recognizes and validates the existence of "unpaid internships," both in the public sector and in the for-profit private sector, and sets forth criteria that must be met for a student to qualify as an unpaid intern in the for-profit private sector.[318]

As noted, the MOU directly states that the university and internship host will comply with all applicable discrimination laws. Quite clearly, this is an explicit recognition of each party's duty to comply with applicable discrimination laws, which cover sexual harassment. Also, this is not some broad recognition of these legal duties by each organization, such as a posted statement of non-discrimination on a school or employer website. Rather, this is a statement directly applicable to student internships, including unpaid internships, deliberately written into the parties' MOU. In addition, the entire point of the internship experience is to confer educational benefits upon the student, both academically and in employment.[319] As such, if an unpaid intern from this university were sexually harassed during her internship, reported the harassment to the relevant internship agency, and the agency failed to report the incident to the Title IX Coordinator as

315. Coastal Carolina University Internship Program, *Memorandum of Understanding*, COASTAL CAROLINA UNIV., https://www.coastal.edu/media/2024siteassets/contentassets/documents/careerservices/Memorandum_of_Understanding_Internships.pdf [https://perma.cc/8HFX-ZEAC] (last visited January 4, 2026).

316. *Id.*

317. *Id.*

318. *See id.* Specifically, the MOU states that unpaid internships must comply with the Department of Labor's six-factor test from its Intern Fact Sheet. *Id.*

319. Bowman & Lipp, *supra* note 61, at 126.

promised, the intern could sue the employer directly for breach of contract as an intended beneficiary of the MOU.[320]

As this example makes clear, when evaluating the potential for such a claim, it is necessary to examine the terms of the contract, if any, between a university and the internship site.[321] Such a claim would be impossible to make if no contract existed between a school and the internship host. And even with a contract, such a claim would likely fail if the contract does not specifically mention discrimination or harassment; if there is no contractual obligation on which to base a claim, such as a duty to prevent or report harassment on the part of the internship host; or if the language of the contract were overly vague.[322]

VII. PROPOSALS

This Part explores three potential ways to expand unpaid interns' rights to prevent employer harassment and hold employers directly accountable for such conduct. The first proposal is to redefine the term "employee" under Title VII. The second proposal is including indemnification agreements in contracts between universities and internship hosts. The final proposal is to enact a federal law that would directly outlaw harassment of interns and impose liability on employers who fail to prevent or address such harassment. Each of these proposals, including their strengths and weaknesses, is discussed below.

A. Applying FLSA "Employee" Precedents to Title VII

One way to expand the protections for unpaid interns is for courts to reconsider their judicial definitions of "employee" under Title VII. If, for example, courts borrowed from their interpretations of the same term under the Fair Labor Standards Act ("FLSA")—a statute that defines the term in a strikingly similar manner—this would have the effect of making more unpaid interns into definitional employees under Title VII, giving them the ability to pursue harassment claims directly against employers.[323]

320. *See id.* at 127–28 (discussing a similar example and stating, "[w]here it is clear . . . that the contractual provisions are intended for the benefit of the student intern and that allowing her a remedy for harassment is appropriate to effectuate the parties' intentions, the student likely has standing to sue as a third-party beneficiary of the contract").

321. *Id.* at 127.

322. *Id.*

323. Professor David Yamada has argued that if courts expand their minimum wage protections under the FLSA, this "will have the residual effect of making it easier for student interns to claim employee status under employment discrimination statutes." Yamada, *supra* note 57, at 244. This is because "if more student interns were paid in

Similar to Title VII, the FLSA defines the term "employee" as "any individual employed by an employer."[324] An "employer" under the FLSA is "any person acting directly or indirectly in the interest of an employer in relation to an employee."[325] Also, to "employ" under the FLSA is "to suffer or permit to work."[326] As the Third Circuit recently reiterated, these "statutory definitions regarding employment status are necessarily broad to effectuate the remedial purposes of the [FLSA]."[327]

Recall that Title VII defines the term "employee" in a way that is virtually identical to the FLSA as "an individual employed by an employer."[328] This arguably opens the door for courts to interpret Title VII and FLSA terms similarly. Moreover, applying FLSA precedents to Title VII would effectively result in more unpaid interns being classified as employees under the law. The Second Circuit's opinion in *Glatt v. Fox Searchlight Pictures, Inc.* illustrates the point.

In *Glatt,* the Second Circuit—in an issue of first impression for the court—decided under what circumstances an unpaid intern must be deemed an "employee" under the FLSA.[329] In this suit, plaintiffs argued that the defendants violated the FLSA and an analogous New York law by failing to pay them as employees during their internships.[330] After the district court granted partial summary judgment to two of the unpaid interns, an appeal was filed challenging the court's ruling.[331] On appeal, the Second Circuit noted that "all parties [in this case] agree[d] that there are circumstances in which someone who is labeled an unpaid intern is actually an employee entitled to compensation under the FLSA," but "[t]hey do not agree on what those circumstances are or what standard

compliance with the FLSA, the issue of whether the lack of compensation precludes the plaintiff from claiming employee status in a discrimination claim would become moot in many instances." *Id.* Nevertheless, this approach is not the ideal way to expand Title VII protections because, even with pay, a given worker still might not be deemed an employee under Title VII when there is little evidence of control. In addition, an expansion of the FLSA might simply cause more employers to treat interns less like employees and more like the true academic-style intern, doing nothing to alleviate the Title VII problem. Thus, the better solution is to directly expand Title VII's protections.

324. Fair Labor Standards Act of 1938 § 3(e), 29 U.S.C. § 203(e)(1).

325. 29 U.S.C. § 203(d).

326. 29 U.S.C. § 203(g).

327. *Johnson*, 108 F.4th at 176 (quoting Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991)).

328. Civil Rights Act of 1964 § 701(f), 42 U.S.C. § 2000e(f); *see also supra* notes 109–116 and accompanying text (detailing how the Supreme Court applies a common law agency test to define employment, as established in *Nationwide Mutual Insurance Co. v. Darden*, which focused on the Employee Retirement Income Security Act of 1974).

329. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533, 535 (2d Cir. 2016).

330. *Id.* at 531–32.

331. *Id.* at 533.

we should use to identify them."[332] As such, each party proposed a test for the court to adopt. The plaintiffs argued that interns should "be considered employees whenever the employer receives an immediate advantage from [their] work."[333] The defendants promoted the primary beneficiary test, which examines "whether the intern or the employer is the primary beneficiary of the relationship."[334] Finally, the Department of Labor ("DOL") appeared as amicus curiae and argued that the court should adopt the DOL's test requiring six criteria to be met for a worker to be treated as an intern, rather than an employee.[335]

The court sided with the defendants and adopted the primary beneficiary test.[336] Under this test, when the benefits provided to the intern are greater than the intern's contribution to the employer's operation, no employment relationship is created.[337] According to the court, the primary beneficiary test has several advantages, including its focus on "the economic reality as it exists between the intern and the employer," which the court described as "the touchstone of this analysis."[338] Elaborating further, the court set forth seven non-exclusive factors to consider in this analysis.[339] Key factors include "[t]he extent to which the intern and the employer clearly understand that there is no expectation of compensation,"[340] "[t]he extent to which the internship

332. *Id.* at 535.

333. *Id.*

334. *Id.* at 536.

335. *Id.* at 535. Under the DOL's test, "an employment relationship does not exist," and consequently the worker is a bona fide intern, "if all of the following factors apply":

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

Id. at 534–35 (quoting U.S. Dep't of Lab., Wage & Hour Div., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB. (Jan. 2018) [hereinafter *DOL Fact Sheet #71*], https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships#2 [https://perma.cc/2VHV-5E5J]).

336. *Id.* at 536.

337. *Id.* at 535.

338. *Id.* at 536–37.

339. *See id.* at 536–37.

340. *Id.* at 537.

provides training that would be similar to that which would be given in an educational environment,"[341] and "[t]he extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern."[342]

According to the court, this is a totality-of-circumstances test that "requires weighing and balancing all of the circumstances."[343] In addition, "[n]o one factor is dispositive and every factor need not point in the same direction."[344] Finally, courts may consider other "relevant evidence beyond the specified factors in appropriate cases."[345]

In essence, this primary beneficiary test directs courts to "examine the 'economic reality' of the intern-employer relationship to determine which party is the 'primary beneficiary' of the relationship."[346] If the employer is the primary beneficiary, then an employment relationship exists, and the intern must be paid for their work.

In the decade or so since *Glatt* was decided, its approach has been endorsed by the Department of Labor and other courts.[347] In addition, a similar "economic realities" approach has been applied in other contexts, demonstrating a judicial willingness to reexamine what exactly constitutes employment in various settings. For example, in a recent Third Circuit case, *Johnson v. NCAA*, the court addressed whether college athletes could be considered "employees" under the FLSA, thereby entitling them to wages.[348] Given the FLSA's strikingly broad definitions of "employee," "employer," and "employ," the court stated that the FLSA could cover workers "'who might not qualify as [employees] under a strict application of traditional agency law principles' or under

341. *Id.*

342. *Id.* Other considerations the court identified include "[t]he extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;" "[t]he extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;" and "[t]he 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." *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *DOL Fact Sheet #71*, *supra* note 335.

347. *See id.* (explaining that "[c]ourts have used the 'primary beneficiary test' to determine whether an intern or student is, in fact, an employee under the FLSA" and providing a set of factors derived from *Glatt* and similar cases). One such case discusses this issue and agrees with the decisions of the Second, Sixth, and Eleventh Circuits that "the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA." Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1144–47 (9th Cir. 2017).

348. *See* 108 F.4th 163, 167 (3d Cir. 2024).

other federal statutes."[349] Like the *Glatt* court, this court declared that it must "look to the economic realities of the relationship" to determine employment status in this context.[350] In the end, the court held that "college athletes may be employees under the FLSA when they (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'"[351]

Today, very few unpaid interns are protected by Title VII under the precedents discussed in Section II.C. Thus, if courts were to shift their Title VII analysis from the control test to an economic realities framework that seeks to determine the primary beneficiary of the intern-employer relationship, there would naturally be an increase in protection for unpaid interns under Title VII, as there are certainly interns whose work primarily benefits their employer. Although it is difficult to know exactly how many unpaid interns fall into this category, it is likely not a negligible amount.

Despite its appeal, refocusing Title VII "employee" analysis in this manner is an imperfect solution for several reasons. First, many unpaid interns would remain unprotected under this approach—namely, those whose work primarily benefits themselves, as with the true academic-style internship.[352] This, in turn, would create an unfair imbalance where only select unpaid interns may pursue harassment claims against their employers, while others may not. As such, the better solution would be a freestanding statute that explicitly protects all interns from harassment. Second, from a pragmatic standpoint, courts will likely be reluctant to redefine the Title VII term. Indeed, in *Darden*, the Supreme Court rejected the invitation to interpret ERISA's definition of "employee" in a similar manner, even though ERISA also defined "employee" as "any individual employed by an employer."[353] The *Darden* Court reasoned that the strikingly broad definitions used in the FLSA—such as the statute's definition of "employ" as "suffer or permit to work"— "stretch[] the

349. *Id.* at 176 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)).

350. *Id.* (quoting Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991)). Earlier, the court framed the issue as "whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee-employer." *Id.* at 167.

351. *Id.* at 180 (citations omitted) (first quoting Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944); and then quoting Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985)).

352. *See supra* notes 44–46 and accompanying text.

353. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (quoting Employee Retirement Income Security Act of 1972 § 3(6), 29 U.S.C. § 1002(6)).

meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles" like the common law control test.[354] Similar to ERISA, Title VII also lacks a "suffer or permit to work" definition of "employ,"[355] and thus is unlikely to be read as expansively as the FLSA.

Also, the Supreme Court has repeatedly emphasized that the FLSA's protections extend to workers who might not be considered employees under other statutes. In *United States v. Rosenwasser*, a case from the 1940s, the Court found that both the policy of the FLSA and its legislative history support a very broad reading of the term "employee."[356] After examining the entire statutory framework, including the purpose of the statute and its key definitions, the Court declared that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame."[357] In addition, in *Walling v. Portland Terminal Co.*, the Court examined the potential employment status of certain trainees under the FLSA and again emphasized that the FLSA is broader than other laws.[358] According to the Court, "in determining who are 'employees' under the Act, common law [employee] categories or employer-employee classifications under other statutes are not of controlling significance."[359] Rather, "[t]his Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category."[360]

Finally, because the common law control test originates from U.S. Supreme Court cases like *Darden*, lower courts will naturally be reluctant to disregard such precedent and adopt a wholly different approach to interpreting Title VII. In sum, although a rethinking of Title VII's "employee" definition precedents seems like a logical way to heighten the protections for unpaid interns, statutory definitions of key terms, underlying objectives of various statutes, and stare decisis compel a different outcome.

B. Contracts and Indemnification Agreements

As noted, contract law might provide another avenue of relief for the unpaid intern. Specifically, if an unpaid internship is governed by a

354. *Id.*
355. *See* Civil Rights Act of 1964 §§ 701–16, 42 U.S.C. § 2000e to e-17.
356. *See* 323 U.S. 360, 361–64 (1945).
357. *Id.* at 362.
358. *See* 330 U.S. 148, 152–53 (1947).
359. *Id.* at 150.
360. *Id.* at 150–51.

contract between a student intern's school and an internship host, the intern might be able to enforce that contract against the employer as an intended beneficiary of the agreement.[361]

From the student perspective, the ideal contract would contain at least the following four provisions: First, an explicit reference to all applicable federal and state laws prohibiting discrimination in employment and education. Second, an explicit warranty in the contract stating that the internship host, its employees, and its agents promise not to discriminate against or harass the intern. Third, an explicit warranty in the contract stating that the internship host agrees to promptly correct any discrimination or harassment and to report any such conduct to the school. Finally, an indemnification agreement requiring the internship host to compensate the school for any loss, damage, claim, or liability arising out of discrimination or harassment of the intern.

Aside from a student being able to enforce such an agreement as an intended beneficiary, the existence of a contract like this would also make it more likely for a court to impute a school's own Title IX education program to the internship host under an affiliation-based approach, as in the *Doe* case discussed in Part III.

But this proposed solution is aspirational and spotty at best. For one, not every employer hires interns directly through a school, and not every internship experience is tied to academics.[362] Also, for internships connected to a school or university, this proposed solution depends entirely on the wishes and business practices of individual schools and their internship hosts. Presumably, smaller schools may not have internship contracts at all, let alone ones that provide robust protection for the student intern against harassment. In addition, internship hosts might be reluctant to agree to an indemnification agreement that would make them liable for harassment when existing law often does not. Accordingly, as with the previous proposal, this would have a limited impact and would likely only further the existing patchwork of protection for select interns.

C. Proposed Federal Statute

As this Article has shown, most unpaid interns have no viable way to hold employers accountable for harassment during their internship. Moreover, existing protections under statutes like Title VII and Title IX are limited and may vary by jurisdiction. Thus, the most effective remedy

361. *See supra* Part VI.
362. *See* Yamada, *supra* note 57, at 235.

for addressing the plight of the unpaid intern under discrimination laws is to enact federal legislation explicitly covering interns.[363]

When drafting such a law, it must be written in a way that protects *all* interns, paid or unpaid, regardless of whether the internship experience is tied to any formal program of education. As Professor Yamada has argued, "[i]f, from a policy standpoint, we already have deemed it desirable to protect students from discriminatory treatment through Title IX and workers through Title VII and its counterparts, then it seems illogical and unfair to exclude from protection unpaid interns."[364] This same argument applies to the category of paid interns who might not achieve "employee" status under Title VII, perhaps due to the employer having little control over their work. Accordingly, the ideal statute would combine the best aspects of the various state statutes discussed in Part IV, and could be worded as follows[365]:

FEDERAL INTERN PROTECTION ACT

a) For purposes of this section, the term "protected class or trait" includes an individual's race, color, religion, national origin, age, sex, sexual orientation, gender identity, pregnancy, predisposing genetic characteristics, military status, and disability.

b) It shall be an unlawful employment practice for an employer to:

(1) fail or refuse to offer an internship, terminate an internship, or otherwise discriminate against an individual with respect to the terms, conditions, or privileges of an internship because of the individual's protected class or trait;
(2) limit, segregate, or classify its interns or applicants for internships in any way that would deprive or tend to deprive any individual of internship opportunities or otherwise adversely affect the individual's status

363. *See id.* at 246 ("By far the cleanest way to address the problems and inequities raised in *O'Connor* and [similar cases] is to amend the applicable employment discrimination statutes to explicitly cover bonafide [sic] interns, regardless of whether they are compensated.").

364. *Id.* at 247.

365. This proposed law is adapted from portions of New York Executive Law section 296 and title 20, section 610 of the Maryland Code's State Government Article.

as an intern because of the individual's protected class or trait;

(3) engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to an intern when:

i. submission to such conduct is made either explicitly or implicitly a term or condition of the intern's employment;

ii. submission to or rejection of such conduct by the intern is used as the basis for employment decisions affecting such intern; or

iii. such conduct has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment;

(4) subject an intern to unwelcome harassment based on a protected class or trait where such harassment has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment;

(5) retaliate against an intern or intern applicant because the individual has:

i. opposed any practice prohibited by this statute; or

ii. made a charge, testified, assisted, or participated in any manner in an investigation, a proceeding, or a hearing under this statute.

c) This statute applies regardless of whether an employment relationship exists between an employer and an intern and regardless of whether the intern is compensated in any way for their work or their time spent with the employer as an intern.

d) An intern claiming to be aggrieved by an act prohibited by this statute:

i. shall have access to any internal procedure the employer has for resolving a complaint by an

employee of sexual harassment or other discrimination; or

ii. if the employer does not have an internal procedure for resolving a complaint of sexual harassment or other discrimination or if the employer's procedure is inadequate or ineffective, may file a charge of discrimination with the U.S. Equal Employment Opportunity Commission, which will then investigate the charge following the same procedures utilized for other employment discrimination claims.

This proposed statute contains several core features. First, it is a general discrimination law for interns, not just a law against harassment. As such, this proposed statute incorporates phrases and concepts from other employment discrimination laws, such as Title VII, including the broadly worded "terms, conditions, or privileges of" an internship.[366] It also includes a retaliation provision like those found in federal employment discrimination laws.[367]

Second, as a proposed federal law, this statute includes the existing federally protected classes in its list and does not attempt to account for other protected classes that might exist under state law. [368] This is important because it makes the proposed statute applicable to more than

366. *See* Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (making it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment").

367. *See* 42 U.S.C. § 2000e-3(a) (making it unlawful under Title VII "for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"); Age Discrimination in Employment Act of 1967 § 4(d), 29 U.S.C. § 623(d) (containing a similar provision under the ADEA).

368. *See* 42 U.S.C. § 2000e-2(a) (making it unlawful for an employer "to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin"); 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions"); 29 U.S.C. § 623(a)(1) (making it unlawful for an employer "to . . . discriminate against any individual . . . because of such individual's age"); 42 U.S.C. § 2000ff-1(a)(1) (making it unlawful for an employer "to discriminate against any employee . . . because of genetic information with respect to the employee"); *see also* Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020) (extending Title VII's protections to include sexual orientation and gender identity discrimination); *cf.* CAL. GOV'T CODE § 12940(j)(1) (West 2025) (protecting also against discrimination on the basis of ancestry and reproductive health decision-making).

just sexual harassment, such as the type of race-based harassment that the plaintiff in *Abel* allegedly experienced.[369]

Third, this statute explicitly protects all interns from discrimination and harassment. Accordingly, this statute makes clear that the law applies regardless of whether an employment relationship exists between an employer and an intern, and whether or not the intern is compensated for their work. This is designed to protect all interns, including those who would clearly be reclassified as employees due to compensation and control, those who would be considered bona fide interns due to the lack of compensation and control, and those whose true status is murky or unclear.

Fourth, like the New York statute discussed in Part IV,[370] this proposed statute explicitly accounts for both quid pro quo and hostile work environment theories of harassment, making it clear that both forms of harassment are unlawful.

Fifth, like the comparable Maryland statute, this statute clarifies that an aggrieved intern may either file an internal complaint of discrimination or harassment with the internship host or file a charge of discrimination directly with the Equal Employment Opportunity Commission.[371]

Finally, and most importantly, this statute would impose liability on the entity best positioned to prevent and address harassment in the first instance: the internship host, which is the very entity that should be held responsible for such behavior.[372]

CONCLUSION

Internships have exploded in popularity over the past few decades. They can be tremendous learning experiences and provide numerous employment-related benefits for both interns and employers. Nevertheless, interns are particularly vulnerable to workplace harassment, especially when their internship is a required component of their degree. Moreover, interns who are harassed during unpaid internships often have no remedy against their employer—the primary beneficiary of their free labor and the entity most responsible for controlling the workplace and resolving harassment complaints.

369. *See* Abel v. Abbott Nw. Hosp., 947 N.W.2d 58, 67 (Minn. 2020) (noting that Abel brought claims of race- and sex-based employment discrimination against employer Allina).

370. *See supra* notes 182–84 and accompanying text.

371. *See* MD. CODE ANN., STATE GOV'T § 20-610(d) (West 2025).

372. *See* Yamada, *supra* note 57, at 246.

The unpaid intern's lack of any meaningful remedy against employers for harassment is a legal loophole long overdue for closure. This Article has explored potential remedies for the unpaid intern, including redefining what it means to be an employee under Title VII, the possible use of contracts with indemnification agreements between educational institutions and employers, and federal legislation specifically designed to address this issue. In the end, the most effective solution—one that would protect every intern in America—is a federal statute that would hold employers directly accountable for harassment.