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Employment Law—Antidiscrimination—Falling Into the Legal Void: How Arkansas Can Protect Unpaid Interns From Discrimination and Harassment

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EMPLOYMENT LAW—ANTIDISCRIMINATION—FALLING INTO THE LEGAL VOID: HOW ARKANSAS CAN PROTECT UNPAID INTERNS FROM DISCRIMINATION AND HARASSMENT

I. INTRODUCTION

Annie is a junior at a university in Arkansas. During the summer, Annie takes an internship with a private company. Unfortunately for Annie, the internship is unpaid, but it will look good on her resume once she finishes college. A few weeks after starting her internship, one of the employees at the company begins making crude sexual comments to Annie about the way she dresses and inappropriate sexual comments towards her. Annie informs her supervisor about the situation, but he does not do anything to stop the harassment or help her. A few weeks before Annie completes her internship, the sexual comments become more hostile, causing Annie to quit the internship because she does not feel comfortable or safe at her workplace.

In recent years, internships have almost become a requirement before getting a job.[1] Internships are valuable because they provide the opportunity to network, establish mentors, and gain experience in a particular field.[2] Employers enjoy unpaid internships because they help keep costs low.[3] Recently, internships have become "the principal point of entry" into the workplace.[4] Prior to the 1960s, most internships were in medicine.[5] However, in the 1970s internships began to change and they expanded into other professions.[6] Even though internships expanded during the 1970s, they were still relatively rare in 1980.[7] The modern internship did not become prevalent until the economic crash of 2008.[8] Unpaid internships today tend to be

1. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV 215, 215 (2002); Lauren Fredericksen, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 247 (2013); *see also* ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY x (Verso) (2011) (stating that in much of the developed world, the pressure to have an internship is "simply part of being young").

2. Beth Braccio Hering, *Why Are Internships So Important?*, CNN (Apr. 14, 2010, 11:09 AM EDT), https://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important/index.html.

3. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), https://www.nytimes.com/2010/04/03/business/03intern.html.

4. *See* PERLIN, *supra* note 1, at xiv.

5. *See id.*

6. *Id.*

7. *Id.*

8. *See* Craig Durrant, Comment, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 174

in industries such as "media, communications, entertainment, publishing, and fashion, politics."[9] While internships can provide an intern with real-world experience, an intern can also experience the horrors of the workplace, like discrimination and harassment.[10]

Between 2010 and 2017, more than one million cases of federal discrimination claims were filed with the Equal Employment Opportunity Commission (EEOC).[11] During the 2020 fiscal year (October 1, 2019–September 30, 2020), the EEOC had 67,448 charges of workplace discrimination.[12] Additionally, over half a million Americans contacted the EEOC to inquire about their circumstances.[13] Research rates, specifically about sexual harassment, "suggest that interns may be more vulnerable to sexual harassment than students or full-time employees."[14] Reported instances of discrimination and harassment, however, do not capture the complete story, as many individuals are reluctant to report instances or repeated patterns of discrimination because of the fear of retaliation or other adverse consequences.[15] Interns, in particular, because of their position at the bottom of the career and workplace ladder,[16] are even less likely to speak out because

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(2013); Greenhouse, *supra* note 3 (discussing how unpaid internships more than tripled during the 2009–2010 academic year).

9. *See* Durrant, *supra* note 8, at 174; Anisa Purbasari Horton, *4 Former Interns Look Back at Exploitation, Power Dynamics, and Ultimate Career Payoff*, FAST COMPANY (Aug. 20, 2019), https://www.fastcompany.com/90388723/do-internships-prepare-students-for-working-in-the-real-world-or-are-they-just-a-tool-for-exploitation.

10. Yamada, *supra* note 1, at 219.

11. Maryam Jameel et al., *More Than 1 Million Employment Discrimination Complaints Have Been Filed With the Government Since 2010.*, WASH. POST. (Feb. 28, 2019), https://www.washingtonpost.com/graphics/2019/business/discrimination-complaint-outcomes/.

12. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases 2020 Enf't. & Litig. Data (Feb. 26, 2021), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data.

13. *Id.* ("The agency responded to over 470,000 calls to its toll-free number and more than 187,000 inquiries in the field offices, including 122,775 inquiries through the online intake and appointment scheduling system[.]").

14. Yamada, *supra* note 1, at 219–20 (discussing two research studies that documented rates of sexual harassment).

15. *See* Maryam Jameel & Joe Yeradi, *Workplace Discrimination is Illegal. But Our Data Shows It's Still a Huge Problem*, VOX (Feb. 28, 2019, 8:29 PM EST), https://www.vox.com/policy-and-politics/2019/2/28/18241973/workplace-discrimination-cpi-investigation-eeoc (describing that some employees were hesitant to join an EEOC claim because they were scared); *see also* Lily Zheng, *Do Your Employees Feel Safe Reporting Abuse and Discrimination?*, HARV. BUS. REV. (Oct. 8, 2020), https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination (discussing that rates of harassment and discrimination are low because employees fear retaliation if they speak up).

16. Mary Rinaldi, *I Was Sexually Harassed at Work. Here's My Advice for Interns*, FAST CO. (Aug. 20, 2019), https://www.fastcompany.com/90389016/i-was-sexually-harassed-at-work-heres-my-advice-for-interns.

it could cost them a future recommendation or future employment.[17] Even if an intern did report the harassment, unpaid interns are often not protected by Title VII of the Civil Rights Act of 1964 ("Title VII").[18] Without Title VII protections, interns could look to their state employment anti-discrimination and harassment laws but only a few states have laws that protect interns, and Arkansas is not one. [19] Therefore, in many cases, an unpaid intern in Arkansas will be unable to hold their internship accountable because they have no legal recourse.

This Comment argues that the Arkansas General Assembly should amend the Arkansas Civil Rights Act of 1993 ("the Act") by passing legislation that protects unpaid interns from discrimination and harassment in the workplace. Section II discusses the purpose of Title VII, the different tests the federal circuits use to determine employee status, and concludes that an unpaid intern in the Eighth Circuit would not be considered an employee under Title VII.[20] Section III explores how some states have extended anti-discrimination and harassment protections to unpaid interns.[21] Section IV analyzes the Arkansas Civil Rights Act of 1993 and the protections it established and illustrates why it is unlikely that the Supreme Court of Arkansas will conclude an unpaid intern is an employee when interpreting the statutory language of the Arkansas Civil Rights Act.[22] Lastly, Section V argues that the Arkansas General Assembly should amend the Arkansas Civil Rights Act to protect unpaid interns from discrimination and harassment.[23] Specifically, this Comment argues that Arkansas should join states like Oregon, New York, California, Illinois, Connecticut, Maryland, and Washington D.C. in establishing anti-discrimination and harassment protections for unpaid interns in the workplace.[24]

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17. Fredericksen, *supra* note 1, at 247; Yamada, *supra* note 1, at 219; *see also* Vikki Ortiz Healy & Chicago Tribune Reporters, *Sexually Harassed Interns Often Feel They Have Nowhere to Turn,* CHI. TRIB. (Nov. 25, 2011), https://www.chicagotribune.com/news/ct-xpm-2011-11-25-ct-met-intern-harassment-20111125-story.html.

18. Hannah Nicholes, *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, 82 (2014); *see also infra* Section II.

19. *See, e.g.*, D.C. CODE STAT. § 2:1401.02(9) (2020); OR. REV. STAT. ANN. § 659A.350(3) (2020); 775 ILL. COMP. STAT. ANN. 5/2-101(A)(1)(c) (LexisNexis 2020); CAL. GOV'T CODE § 12940(c), (j) (Derring 2020); N.Y. EXEC. LAW § 296-(1-c) (Consol. 2020); CONN. GEN. STAT. § 31-40y(a)(3) (2020); M.D. CODE ANN., STATE GOV'T § 20-610(a) (LexisNexis 2020).

20. *See infra* Section II.

21. *See infra* Section III.

22. *See infra* Section IV.

23. *See infra* Section V.

24. *See infra* Section V.

II. DISCRIMINATION AND HARASSMENT PROTECTIONS UNDER FEDERAL LAW

A. Title VII's Purpose

Title VII became law in 1965[25] as part of the Civil Rights Act of 1964.[26] Congress enacted the law as a means to eliminate discrimination in employment.[27] Title VII prohibits discrimination in employment based on "race, color, religion, sex, or national origin[.]"[28] It was passed because there was "mounting popular demand to extend constitutional equality to African-Americans."[29] The prohibition on sex discrimination, however, was added to the bill with the hope that it would defeat the bill.[30] Title VII was not enacted to guarantee a job to every individual, but rather it was enacted "to remove all artificial and arbitrary" barriers that were constructed to exclude certain individuals from employment.[31] Congress sought to remove those barriers by prohibiting employment decisions about "hiring or firing[,] or otherwise changing the employee's compensation, terms, conditions or privileges of employment, based solely or partially on that person's [race, sex, color, religion, or national origin]."[32] Title VII defines "employee" in a circular manner. "[E]mployee means an individual employed by an employer . . . ."[33] Thus, whether an individual is an employee under Title VII requires courts to analyze Title VII's language and legislative history.[34] The legislative history of Title VII makes it clear that Congress wanted to create discrimination-free workplaces nationwide; however, the legislative history is less clear about who Congress intended to be an employee or employer.[35] Since there is little legislative history on how to interpret "employee"—a

25. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 241, 266.

26. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 241–66 (codified at 42 U.S.C. § 2000e-2 *et seq.*).

27. Nicholes, *supra* note 18, at 83.

28. 42 U.S.C. § 2000e-2(a)(1).

29. Suzanne Sangree, *Title VII Prohibitions Against Hostile Work Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 481 (1995).

30. *Id.* at 481–82.

31. Nicholes, *supra* note 18, at 83.

32. *Id.*

33. 42 U.S.C. § 2000e(f).

34. Tara Kpere-Daibo, Note, *Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135, 138–39 (2009).

35. Patricia Davidson, Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 205 (1984).

basic component of Title VII—courts are turning to the common law and other judicially created tests to determine employee status.[36]

B. Judicially Created Title VII Tests for Employee Status

With no clear definition of who is considered an employee under Title VII, this subsection discusses five tests courts use to determine if an individual is an employee within the meaning of Title VII.[37] These five tests are: (1) the common law agency test, (2) the primary purpose test, (3) the economic realities test, (4) the hybrid test, and (5) the benefits analysis test.[38] After discussing the tests used to determine employee status, the final subsection will apply the Eighth Circuit's test to illustrate why Title VII will not protect Annie,[39] an unpaid intern in Arkansas.[40]

1. *The Common Law Agency Test*

The common law agency test is commonly used by courts to differentiate employees from nonemployees.[41] It concentrates its analysis on the amount of control the putative employer has over the putative employee. [42] Specifically, the right to control encompasses the employer's right to control the end product as well as how the employee achieves the end product.[43] The emphasis on a putative employer's control over the putative employees comes from section 220 of the Restatement (Second) of Agency.[44] Because of the emphasis on the right to control, this test is also referred to as the "'right-to-control' test."[45] In *Community for Creative Non-Violence v. Reid*,

36. *Id*. at 206–07.
37. *See infra* Section II.B.
38. *See infra* Section II.B.
39. *See supra* Section I.
40. *See infra* Section II.C.
41. Valerie L. Jacobson, *Bringing a Title VII Action: Which Test Regarding Standing is the Most Applicable?*, 18 FORDHAM URB. L.J. 95, 105–06 (1990); Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2628 (1998) ("Courts have traditionally used the 'right to control' test to distinguish between employees and independent contractors.").
42. 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, 1769 (2017).
43. Kpere-Daibo, *supra* note 34, at 144.
44. Heffernan, *supra* note 42, at 1769; Mitchell Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteer*, 9 U. PA. J. LAB. & EMP. L. 147, 161 (2006); RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).
45. Kpere-Daibo, *supra* note 34, at 143.

the Supreme Court of the United States articulated thirteen factors to determine whether an individual is an employee.[46] Those factors are:

> [1] the hiring party's right to control the manner and means by which the product is accomplished[;] . . . [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.[47]

A few years later in *Nationwide Mutual Insurance Co. v. Darden,* the Court noted that because the common law test does not have a "shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[48] Because Title VII does not have a clear definition for employee, some federal circuits have adopted the common law agency test to determine if an individual is an employee under Title VII.[49]

2. *The Primary Purpose Test*

Another judicially created test to determine whether an individual is an employee is the primary purpose test.[50] This test evaluates the relationship between the two parties "to determine . . . the primary purpose of the relationship"—whether it was an employer-employee relationship.[51] Courts that use the primary purpose test to determine employee status can evaluate all aspects the relationship to determine whether an individual is an employee.[52]

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46. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–752 (1989).

47. *Id.*

48. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992) (alterations in original) (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)).

49. *See, e.g.*, Eisenberg v. Advance Relocation & Storage, 237 F.3d 111, 113–14 (2d Cir. 2000) (analyzing applicable factors of the common law agency test to determine whether a plaintiff was an employee under Title VII); Alberty-Velez v. Corporacion de P.R. para la Difusion Publica, 361 F.3d 1, 6 (1st Cir. 2004) (deciding that the common law agency test should be used to determine if a person is an employee or independent contractor); Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004) (stating that the Sixth and Seventh Circuits use the common law agency test to determine whether a party is an independent contractor or an employee).

50. *See* NLRB v. Hearst Publ'ns, 322 U.S. 111, 124–27 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

51. Heffernan, *supra* note 42, at 1772.

52. Fredericksen, *supra* note 1, at 259

This test was established in *NLRB v. Hearst Publication, Inc.* when the Court rejected the common law agency test when it interpreted employee under the National Labor Relations Act.[53] To determine employee status, the Court stated:

> Whether . . . the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms, and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . . ." Rather "it takes color from its surroundings . . . [in] the statute where it appears," and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."[54]

In other words, employee status should be determined by the purpose of the legislation while considering the purpose of the relationship.[55] The Supreme Court noted that lower courts could consider the underlying economics of the relationship in determining an employer-employee relationship when applying the primary purpose test.[56] That note led lower courts to focus their employer-employee relationship analysis on the underlying economic relationship instead of using it as a factor.[57] That focus led to the creation of the economic realities test.

3. *The Economic Realities Test*

The economic realities test evaluates the economics of the relationship by specifically looking at how economically dependent the putative employee is on the job and the work they perform and the power dynamics of the relationship.[58] This test was created in reaction to the common law agency test.[59] The Sixth Circuit established the economic realities test in *Armbruster v. Quinn*,[60] a Title VII case.[61] The Court of Appeals for the Sixth Circuit

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53. *See Hearst*, 322 U.S. 111, 124–27 (1944), *overruled in part by Darden*, 503 U.S. 318, 323 (1992); *see also* Fredericksen, *supra* note 1, at 259.

54. *Id.* at 124 (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 545 (1940); S. Chi. Coal & Dock v. Basset, 309 U.S. 251, 259 (1940)).

55. *See id.*

56. *Id*. at 129*; see also* Rubinstein, *supra* note 44, at 163; Fredericksen, *supra* note 1, at 259; Heffernan, *supra* note 42, at 1772–73.

57. Fredericksen, *supra* note 1, at 259.

58. Heffernan, *supra* note 42, at 1773; Kpere-Daibo, *supra* note 34, at 145; Rubinstein, *supra* note 44, at 165.

59. Ortner, *supra* note 41, at 2629.

60. Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983); Ortner, *supra* note 41, at 2629 (stating the Sixth Circuit introduced this test for determining employee status under Title VII); Jacobson, *supra* note 41, at 108–09 (stating the Sixth Circuit derived the test from a Fair Labor Standards Act test for employee).

stated that "one must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to discriminatory practices which [Title VII] was designed to eliminate."[62] In other words, courts should evaluate the relationship and determine whether a putative employer can affect the working conditions the individual[63] The *Armbruster* court held that:

> [T]he term employee in Title VII "must be read in light of the mischief to be corrected and the end to be attained." The mischief to be corrected is that discrimination in employment opportunity has been made unlawful by Title VII's violation provisions, . . . the end, to rid from the world of work the evil of discrimination because of an individual's race, color, religion, sex, or national origin.[64]

The Eleventh Circuit uses the economic realities test to determine employee status.[65] In *Cuddeback v. Florida Board of Education*, Sandy Cuddeback worked in a research laboratory to satisfy her degree program's publication and dissertation requirements.[66] To determine if Cuddeback was a student or an employee, the court used the economic realities test.[67] The court stated that "the term 'employee' is 'construed in light of general common law concepts' and 'should take into account the economic realities of the situation[.]'"[68] "Specifically, the court should consider factors such as whether the defendant directed the plaintiff's work and provided or paid for the materials used in the plaintiff's work."[69] By using the economic realities test, the *Cuddeback* court determined that Ms. Cuddeback was an employee.[70] The court reasoned that she was an employee because she received a stipend and benefits, she had sick and annual leave, her employment was governed by a collective bargaining agreement, the university provided her with equipment and laboratory training, and the decision to not renew her position was because of attendance and communication issues and not aca-

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61. Davidson, *supra* note 35, at 213 (stating that only the Sixth Circuit has used the economic realities test for a Title VII claim).

62. *Armbruster*, 711 F.2d 1332, 1340, *overruled in part by* Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006) (holding the fifteen-employee requirement is an element of a claim and does not provide jurisdiction).

63. Jacobson, *supra* note 41, at 109.

64. *Armbruster*, 711 F.2d, at 1340 (quoting Dunlop v. Carriage Carpet Co. 548 F.2d 139, 145 (6th Cir. 1977)).

65. *See* Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1234 (11th Cir. 2004).

66. *Id.* at 1232.

67. *Id.* at 1234.

68. *Id.* (quoting Cobb v. Sun Papers, Inc., 673 F.2d 337, 340–41 (11th Cir. 1982)).

69. *Id.* at 1234.

70. *Id.* at 1235.

demic performance.[71] While the court stated that it applied the economic realities test, it appears that the court applied a mix of the common law test and the economic realities test.[72] The combination of the economic realities test and the common law agency test is known as the hybrid test.[73]

4. *The Hybrid Test*

The hybrid test "combines elements of the common law agency test with elements of the 'economic realities' test".[74] The District of Columbia Circuit articulated the hybrid test in *Spirides v. Reinhardt*.[75] The court described the test as an "analysis of the 'economic realities' of the work relationship[,]"[76] but stated that the "test calls for application of general principles of the law of agency[.]"[77] One of the factors in the hybrid test is the employer's "right to control the 'means and manner' of the worker's performance[.]"[78] The other factors include:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[79]

The court noted that although no factor is dispositive, "the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review[.]"[80] Many courts have adopted this approach to determining employee status.[81]

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71. *Cuddeback*, 381 F.3d at 1234.

72. The economic realities test is not uniformly applied and, therefore, there has been a blurring of the two tests. Rubinstein, *supra* note 44, at 167.

73. *Id.* at 167–68.

74. Davidson, *supra* note 35, at 214.

75. 613 F.2d 826 (D.C. Cir. 1979) (applying the hybrid test but calling it the economic realities test); Davidson, *supra* note 35, at 214.

76. *Spirides*, 613 F.2d at 831.

77. *Id.*

78. *Id.*

79. *Id.* at 832.

80. *Id.*

81. *See*, *e.g.*, Wilde v. Cnty. of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994) (internal citations omitted) (citing eight cases to illustrate how many circuits have adopted the hybrid

5. *The Benefits Analysis Test*

Lastly, courts can use the benefits analysis test alone to determine an individual's status as an employee or as a threshold factor before analyzing one of the other tests described above, which occurs more often.[82] If using the benefit analysis test as a threshold factor, courts will evaluate the benefits an individual receives from the putative employer to determine if the individual was "'hire[d.]'"[83] These benefits may be direct or indirect financial benefits to the individual.[84] If a court concludes that the individual did receive financial benefits, the court will use another test, to determine if an individual is an employee.[85] However, if the individual did not receive sufficient benefits or significant remuneration to qualify, then the court will not continue to the second issue.[86]

*O'Connor v. Davi*s demonstrates how using the benefits analysis test as a threshold issue left an intern unprotected from sexual harassment under federal law.[87] Bridget O'Connor was a social work student at a college in New York.[88] As part of her coursework, she had to complete two hundred hours of fieldwork,—an internship required for her degree.[89] In September of 1994, she began an internship at a hospital, working two days a week.[90] On the second day of her internship, one of the doctors began to refer to her as "Miss Sexual Harassment[,]" which meant to imply that Ms. O'Connor was attractive and "likely to be the object of sexual harassment."[91] Ms. O'Connor notified her supervisor at the hospital about this comment, and

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test); Deal v. State Farm Cnty. Mut. Ins. Co., 5 F.3d 117, 118–19 (5th Cir. 1993); *see also* Frederickson, *supra* note 1, at 262 (stating that "the hybrid test has gained popularity, and now a majority of courts utilize the hybrid test in Title VII employee status determinations.).

82. Heffernan, *supra* note 42, at 1770; Bryce Morgan, Note, *Compensation Isn't Everything: The Threshold-Remuneration Test for Employment Discrimination Under Title VII*, 40 IOWA J. CORP. L. 779, 782 (2015) (discussing that the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted remuneration as a threshold requirement).

83. Kpere-Daibo, *supra* note 34, at 146.

84. Heffernan, *supra* note 42, at 1770; Kpere-Daibo, *supra* note 34, at 146. In some instances, however, courts have held that an individual does not have to receive a salary or financial benefits so long as the worker receives "numerous job-related benefits." *See* Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999); *see also* Kpere-Daibo, *supra* note 34, at 146–47.

85. *See*, *e.g*., O'Connor v. Davis 126 F.3d 112, 115 (2d Cir. 1997); Graves v. Women's Pro. Rodeo Ass'n, 907 F.2d 71, 73–74 (8th Cir. 1990); *see also* Kpere-Daibo, *supra* note 34, at 146.

86. Morgan, *supra* note 82, at 781–82.

87. *See O'Connor*, 126 F.3d 112.

88. *Id.* at 113.

89. *Id.*

90. *Id.*

91. *Id.*

her supervisor told Ms. O'Connor to ignore the doctor.[92] In addition to the "Miss Sexual Harassment" name-calling, that doctor also made inappropriate sexual remarks, such as saying that Ms. O'Connor "looked tired, and that she and her boyfriend must have had 'a good time' the night before."[93] Additionally, "[the doctor] told O'Connor to remove her clothing in preparation for a meeting with him; he explained, 'Don't you always take your clothes off before you go in the doctor's office?'" [94] Ms. O'Connor later left her internship at that hospital and completed her fieldwork at a different location.[95]

The Second Circuit Court of Appeals held that Ms. O'Connor was not an employee within the meaning of Title VII.[96] The court stated that the initial question was not whether she was an employee, but rather whether she was hired by the hospital, which is a prerequisite before determining whether she was an employee under the common law test.[97] The *O'Connor* court said remuneration is an "essential condition" in the Second Circuit.[98] Therefore, it concluded that because there was no direct or indirect remuneration, Ms. O'Connor was not an employee and not entitled to the protections of Title VII.[99]

Five other circuits similarly require remuneration as a prerequisite to analyzing an employment relationship.[100] Two other circuits use the issue of remuneration as a factor to consider but do not make it dispositive.[101] By using remuneration as a threshold issue, unpaid interns struggle to convince courts that they are an employee since they do not receive direct or indirect remuneration.

C. Application of the Test Used in the Eighth Circuit for an Arkansas Intern

Annie lives and works in Arkansas, in the Eighth Circuit. The Eighth Circuit uses the benefits analysis test as threshold factor[102] and if remunera-

92. *Id.* at 113.
93. *O'Connor*, 126 F.3d at 113–14.
94. *Id.* at 114.
95. *Id.*
96. *Id.* at 116.
97. *Id.* at 115.
98. *Id.* at 116.
99. *O'Connor*, 126 F.3d 112 at 115–16.
100. Morgan, *supra* note 82, at 782 (discussing that the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted remuneration as a threshold requirement).
101. *Id.* (discussing that the Sixth and Ninth Circuits hold remuneration as a non-dispositive factor in determining an employment relationship).
102. *See* Graves v. Women's Pro. Rodeo Ass'n, 907 F.2d 71, 73–74 (8th Cir. 1990) (holding that "[c]ompensation by the putative employer to the putative employee in exchange

tion is satisfied, then the relationship is analyzed under the hybrid test.[103] Annie is unlikely to overcome the remuneration requirement because she cannot prove direct or indirect financial benefits because she is unpaid and not receiving any benefits. Therefore, Annie is unlikely to be considered an employee under Title VII in the Eighth Circuit and will be unable to hold her internship site—her workplace—accountable for sex discrimination under federal law.

III. DISCRIMINATION AND HARASSMENT PROTECTIONS UNDER STATE LAW

With little to no federal discrimination protections in place for interns, some states and Washington D.C. have extended anti-discrimination and harassment employment protections to interns.[104] In 2010, Washington D.C. enacted anti-discrimination protections for interns.[105] There were no state statutory protections for interns until 2013, when Oregon expanded anti-discrimination and harassment laws to unpaid interns.[106] New York, Illinois, and California followed thereafter in 2014.[107] Connecticut and Maryland

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for his services is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship.").

103. *See* Wilde v. Cnty. of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994).

104. *See, e.g.*, D.C. CODE STAT., § 2-1401.02(9) (2020); OR. REV. STAT. ANN. § 659A.350(1) (2020); 775 ILL. COMP. STAT. ANN. 5/2-101(A) (LexisNexis 2020); CAL. GOV'T CODE § 12940(c), (j) (Deering 2020); N.Y. EXEC. LAW § 296(1-c) (Consol. 2020); CONN. GEN. STAT. § 31-40y(a)(3) (2020); M.D. CODE ANN., STATE GOV'T § 20-610(a) (LexisNexis 2020).

105. *See, e.g.*, 57 D.C. Reg. 181 (Jan. 8, 2010) (Fiscal Year 2010 Budget Support Act of 2009); 57 D.C. Reg. 2199 (Mar. 19, 2010) (providing notice that the Fiscal Year 2010 Budget Support Act of 2009 became effective on March 3, 2010).

106. *See* Blair Hickman & Christie Thompson, *How Unpaid Interns Aren't Protected Against Sexual Harassment*, PROPUBLICA (Aug. 9, 2013, 9:00 AM), https://www.propublica.org/article/how-unpaid-interns-arent-protected-against-sexual-harassment#:~:text=In%20June%2C%20Oregon%20passed%20a,state%20to%20pass%20such%20protections; Samantha Lachman, *A Shocking Number of States Don't Protect Unpaid Interns From Discrimination and Sexual Harassment*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/unpaid-interns-harassment_n_7453826.

107. Cindy S. Minniti & Mark S. Goldstein, *New York State Becomes the Fourth Jurisdiction to Protect Unpaid Interns From Employment Discrimination*, FORBES (July 28, 2014, 12:45 PM EDT), https://www.forbes.com/sites/theemploymentbeat/2014/07/28/new-york-state-becomes-the-fourth-jurisdiction-to-protect-unpaid-interns-from-employment-discrimination/?sh=5ada26707536; Zach Schonfeld, *Illinois Is Now One of the Only States Protecting Interns From Sexual Harassment*, NEWSWEEK (Sept. 5, 2014, 10:28 AM EDT), https://www.newsweek.com/illinois-now-one-only-states-protecting-interns-sexual-harassment-268576; *Bill Protecting Unpaid Interns From Sexual Harassment Signed by Gov. Brown*, NBC BAY AREA. (Sept. 15, 2014, 7:04 AM), https://www.nbcbayarea.com/news/local/bill-protecting-unpaid-interns-from-sexual-harassment-signed-by-gov-brown/112042/.

expanded their statutory protections for interns in 2015.[108] This Section explores the statutes enacted in those states and Washington D.C., the similarities and differences among the statutes, and cases where courts have analyzed these statutes.

A. District of Columbia

The Washington D.C. City Council expanded the City's Human Rights Laws to interns by including intern in the definition of employee.[109] The Intern Anti-Discrimination Amendment Act of 2009[110] was included as part of the Fiscal Year 2010 Budget Act of 2009.[111] Its creation was a reaction to *Evans v. Washington Center for Internships & Academic Seminars*,[112] where the court held that an unpaid intern was not an employee under Washington D.C.'s Human Rights Law.[113] The Intern Anti-Discrimination Amendment was included in the budget because the Washington D.C. Office of Human Rights believed that if the amendment became law, the number of complaints they would receive would increase because of the amount of unpaid internships in the District, and thus, the Office of Human Rights would need to hire additional personnel.[114] On March 3, 2010, the amendment became law.[115] The definition of employee under Washington D.C. Human Rights Laws now states: "[e]mployee means any individual employed by or seeking employment from an employer; provided that the term employee shall include an unpaid intern."[116]

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108. Eric Sussman & James Leva, *Drawing the Line Between Intern and Employee; Court Ruling and New State Law Seek to Clarify Definitions*, CONN. L.TRIB. (July 27, 2015, 12:00 AM), https://www.law.com/ctlawtribune/almID/1202733026018/?keywords=%22Day+Pitney%22&publication=Connecticut/&slreturn=20220230200134; Guy Brenner & Alex Weinstein, *Maryland Passes Bill Protecting Interns From Employment Discrimination*, PROSKAUER (Apr. 24, 2015), https://www.lawandtheworkplace.com/2015/04/maryland-passes-bill-protecting-interns-from-employment-discrimination/.

109. *See* 2009 D.C. Code Adv. Leg. Serv. 255 (Intern Anti-Discrimination Amendment Act of 2009).

110. *Id.*

111. *Id.*

112. 587 F. Supp. 2d 148, 151 (D.D.C. 2008); Gabrielle Bluestone, *Cheh Seeks Intern Rights*, GW HATCHET (Jan. 12, 2009, 12:00 AM), https://www.gwhatchet.com/2009/01/12/cheh-seeks-intern-rights/.

113. *Evans*, 587 F. Supp. 2d at 151.

114. Memorandum from Natwar M. Gandhi, Chief Financial Officer, Gov't of D.C., to Vincent C. Gray, Chairman, Gov't of D.C. (Apr. 9, 2009), http://app.cfo.dc.gov/services/fiscal_impact/pdf/spring09/B18-62_I.pdf.

115. 57 D.C. Reg. 2199 (Mar. 19, 2010) (stating the Budget Plan became law after the thirty-day Congressional review period).

116. D.C. CODE § 2-1401.02(9) (2020).

B. Oregon

In 2013, Oregon became the first state to extend statutory discrimination and harassment protections to unpaid interns.[117] Oregon's law creates an employment relationship between the employer and the intern for the legal purpose of protecting the intern under Oregon's anti-discrimination laws.[118] The law does not protect every unpaid intern from discrimination in the workplace, only those that fit within the statutory definition.[119] The intern definition has three subsections, and the last subsection has five parts.[120] The statute states the following:

> As used in this section, "intern" means a person who performs work for an employer for the purpose of training if: (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 in writing that the person performing the work is not entitled to wages for the work performed; and (c) The work performed: (A) Supplements training given in an educational environment that may enhance the employability of the intern; (B) Provides experience for the benefit of the person performing the work; (C) Does not displace regular employees; (D) Is performed under the close supervision of existing staff; and (E) Provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer.[121]

This statutory definition describes the specific employer-intern relationship that Oregon law wants to protect because it establishes specific requirements that an intern must meet in order to be protected by Oregon's anti-discrimination laws.[122] The statutory protections were first tested in the 2018 case *Vejo v. Portland Public Schools*.[123]

Margarita Vejo was a graduate student, and as part of her degree program, she was placed in an internship at a high school in the Portland Public Schools.[124] The school district terminated internship before it was supposed to end.[125] Ms. Vejo argued that she was terminated because of her race, reli-

117. Hickman & Thompson, *supra* note 106.

118. *See* OR. REV. STAT. ANN. § 659A.350(1) (2020).

119. *See* Vejo v. Portland Pub. Sch., 204 F. Supp. 3d 1149, 1169 (D. Or. 2016) (holding that a student teacher was not an intern because she did not have a written agreement with her employer).

120. OR. REV. STAT. ANN. § 659A.350(3) (2020).

121. *Id.*

122. *Id.*; *see Vejo*, 204 F. Supp. 3d at 1169 (holding that a student teacher was not an intern because she did not have a written agreement).

123. 204 F. Supp. 3d 1149.

124. *Id.* at 1156.

125. *Id.* at 1159.

gion, and national origin.[126] The federal district court held that she was not an intern within the meaning of the statute and was not entitled to intern protections under Oregon law.[127] The court pointed to the fact that there was no written agreement between Ms. Vejo and the Portland Public Schools, which is a requirement of the statutory definition.[128] Because of the lack of a written agreement between the parties, the court stated, Ms. Vejo "was not an 'intern' within the meaning of the statute."[129]

C. New York

One year after Oregon extended anti-discrimination protections to unpaid interns, New York, in 2014, amended its Human Rights Law to include interns as a protected class[130] after *Lihuan Wang v. Phoenix Satellite Television U.S., Inc*.[131] Lihuan Wang began an unpaid internship with Phoenix Satellite Television in 2009.[132] She accepted the internship because she hoped it would help her secure employment with Phoenix in the future.[133] In early 2010, Mr. Liu, her supervisor, invited everyone at Phoenix's New York office to lunch.[134] Ms. Wang attended the lunch.[135] After lunch, Mr. Liu requested Ms. Wang to stay behind and meet with him because he wanted to discuss her performance as an intern.[136] Like most interns, Ms. Wang was eager to get feedback on her performance and discuss future job possibilities, so she stayed behind.[137] Mr. Liu asked Ms. Wang to accompany him to his hotel so he could drop off his belongings.[138] During the ride to the hotel, Ms. Wang alleged that Mr. Liu made inappropriate sexual remarks that made her "'extremely uncomfortable.'"[139] In addition to alleged inappropriate sexual remarks made during the car ride, Ms. Wang alleged that Mr. Liu invited her to his hotel room where he removed his suit jacket and

126. *See id.* at 1173.
127. *Id.* at 1169.
128. *Id.*; *see also* OR. REV. STAT. ANN. § 659A.350(3)(b).
129. *Id.* at 1169.
130. N.Y. EXEC. LAW § 296(1-c) (Consol. 2020); Minniti & Goldstein, *supra* note 107.
131. 976 F. Supp. 2d 527 (S.D.N.Y 2013); Patrick Muldowney & BakerHostetler, *Interns and Anti-Discrimination Laws: Is Wang Employers' High-Water Mark?*, JDSUPRA, https://www.jdsupra.com/post/contentViewerEmbed.aspx?fid=44a237bd-022c-4431-82dd-2322120a3ef6 (last visited Mar. 12, 2021).
132. *Wang*, 976 F. Supp. 2d at 529.
133. *Id.*
134. *Id.* at 530.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Wang*, 976 F. Supp. 2d at 530.
139. *Id.*

tie and then threw his arms around her and held her tightly before trying to forcibly kiss her.[140]

Ms. Wang pursued claims of hostile work environment and quid-pro-quo sexual harassment under New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).[141] The Southern District of New York held that she was not protected because she was not an employee.[142] It first stated that as an unpaid intern she was foreclosed from a NYSHRL or Title VII claim because of the threshold remuneration requirement. [143] The court then concluded that the same analysis would apply to interpretation of employee for the NYCHRL and Ms. Wang's claim.[144] It also noted that "the plain meaning of the NYCHRL, the case law, interpretations of analogous wording in Title VII and the NYSHRL, as well as the legislative history of the NYCHRL all confirm that the NYCHRL's protection of employees does not extend to unpaid interns."[145] Therefore, it held that her hostile work environment claims under NYCHRL failed.[146] Because Ms. Wang had no legal recourse to hold her internship accountable, New York adopted legislation that extended anti-discrimination protections to unpaid interns.[147]

The New York statute is similar to the Oregon statute; the only difference is that it does not include the writing requirement.[148] The New York statute, like the Oregon statute, has had a case dealing with applying and interpreting its "intern" definition.[149] The Southern District of New York, a few years after *Wang*, held in *Hughes v. Twenty-First Century Fox* that a guest television contributor was not an intern.[150] The court reasoned that because of her position, she was not part of the group that the legislature wanted to protect.[151] The court stated that the protections "were designed to protect college students who took internships as a valuable learning experience and a steppingstone to the job market."[152] Even though the court decid-

140. *Id.*
141. *Id.* at 528.
142. *Id.* at 529, 537.
143. *Id.* at 532–33 (discussing that compensation is a threshold issue in determining an employment relationship in the Second Circuit for Title VII claims).
144. *Wang*, 976 F. Supp. 2d at 535.
145. *Id.* at 537.
146. *Id.* at 536.
147. *See* Muldowney, *supra* note 131.
148. *Compare* N.Y. EXEC. LAW § 296(1-c) (Consol. 2020), *with* OR. REV. STAT. ANN. § 659A.350(3) (2020).
149. *See* Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp. 3d 429 (S.D.N.Y. 2018).
150. *Id.* at 445.
151. *Id.*
152. *Id.* (citing N.Y. Bill Jacket, 2014 A.B. 8201, Ch. 97 (2014)).

ed the plaintiff was not an intern, it did not evaluate her relationship with the putative employer to see if it met the statutory definition,[153] so it is unclear how the definition is applied in practice.

D. Illinois

In 2014, Illinois amended its Human Rights Laws to protect unpaid interns from sexual harassment.[154] The law states that "for purposes of subsection (D) of Section 2-102 of this Act, . . . employee also includes an unpaid intern[]" and then describes the circumstances in which a person is considered an unpaid intern.[155] The "intern" definition in the Illinois statute is almost identical to Oregon's, but it does not contain the writing requirement.[156] Subsection D of section 2-102 of the Act makes sexual harassment a civil rights violation.[157] Illinois law, however, is uniquely different from the other states discussed because, based on the statutory language, it seems to protect unpaid interns from sexual harassment but no other forms of discrimination.[158] Despite this, Illinois's expansion of protecting unpaid interns from sexual harassment is still an important step in creating safer workplaces for everyone.

E. California

California, like the District of Columbia, Oregon, and New York, prohibits discrimination and harassment against interns in the workplace.[159] California regulations define an unpaid intern as "any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer."[160]

As of writing this Comment, California has not had a case explicitly dealing with an intern using this definition in the regulation as part of his or her claim. There are only two cases that analyze a plaintiff's standing using subsection j of section 12490 of the California Government Code, but nei-

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153. *See Hughes*, 304 F. Supp. 3d 429.

154. 2014 Ill. Laws 1037 (codified at 775 ILL. COMP. STAT. ANN. 5/2-101(A) (LexisNexis 2020); Schonfeld, *supra* note 107.

155. 775 ILL. COMP. STAT. ANN. 5/2-101(A) (LexisNexis 2020).

156. *Compare id.*, *with* OR. REV. STAT. ANN. § 659A.350(3) (2020).

157. 775 ILL. COMP. STAT. ANN. 5/2-102(D) (LexisNexis).

158. *See id.*; 775 ILL. COMP. STAT. ANN. 5/2-101(A).

159. *See* CAL. GOV'T CODE § 12940(c), (j) (Deering 2020); *see also supra* Sections III.A–C.

160. CAL. CODE REGS. tit. 2, § 11008(k) (2020); *see also* BERNADETTE M. O'BRIEN ET AL., LABOR AND EMPLOYMENT IN CALIFORNIA: A GUIDE TO EMPLOYMENT LAWS, REGULATIONS, AND PRACTICES ch. 10 § 2(c)(i) (2020).

ther involved an intern.[161] *Hirst v. City of Oceanside* likely illustrates an outcome that would be most similar to an intern situation.[162] There, the court determined the plaintiff was a person "providing services pursuant to a contract" and, therefore, was an employee and able to sue under California law.[163] This is most like an intern situation because "person providing services pursuant to a contract" expanded workplace protections for individuals other than those in a typical employer-employee relationship.[164]

F. Connecticut

In 2015, Connecticut enacted legislation that extended anti-discrimination and harassment protections to unpaid interns[165] to create safer workplaces.[166] State Senator Martin Looney, who sponsored the bill, said, "[U]npaid interns are among the most vulnerable to discrimination and harassment because they have no protections for speaking out against bad employers."[167] A student intern testified in support of the bill, saying, "[Interns] should be given the same protections as other employees. A four-year degree is not always the most important factor in hiring decisions; more employers have begun to place a higher level of importance on years of workplace experience."[168]

The Connecticut definition of who qualifies as an intern is identical to that in New York and Illinois.[169] While there has not been a case in Connecticut using the definition, the Connecticut Supreme Court has used the legislative history of the law to hold that a volunteer must satisfy the remuneration test in order to be protected by Connecticut's Fair Employment Protection Act, whereas an intern will be able to use the statutory definition.[170]

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161. *See* Hirst v. City of Oceanside, 187 Cal. Rptr. 3d 119 (2015); Talley v. Cnty. of Fresno, 265 Cal. Rptr. 3d 663 (Ct. App. 2020).

162. 187 Cal. Rptr. 3d 119.

163. *Id.* at 127–32.

164. *Id.* at 129.

165. *See* Sussman & Leva, *supra* note 108; *see also* JEFFREY L. HIRSCH & LISA S. LAZAREK, LABOR AND EMPLOYMENT IN CONNECTICUT § 4-2(e) (2020).

166. S.B. 428, 2015 Sess. (Conn. 2015).

167. *Id.*

168. *Id.*

169. *Compare* CONN. GEN. STAT. § 31-40y(a)(3) (2020), *with* N.Y. EXEC. LAW § 296(1-c) (Consol. 2020), *and* 775 ILL. COMP. STAT. ANN. 5/2-101(A) (LexisNexis 2020).

170. Comm'n on Hum. Rts. & Opportunities v. Echo Hose Ambulance, 322 Conn. 154, 163–64 (2016) (citing S.B. 428, 2015 Sess. (Conn. 2015)) (explaining that the legislature enacted the law to protect unpaid interns because according to its legislative history, interns traditionally had not been considered employees under state law).

G. Maryland

Maryland enacted anti-discrimination and harassment protections for unpaid interns in 2015.[171] The law defines "intern" the same way as New York, Illinois, and Connecticut.[172] It prohibits employers from refusing 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, or disability. . . ."[173] Unlike the other statutes, the Maryland statute does not create an employment relationship, nor does it create a private cause of action.[174] It only creates access to the internal procedures to file a complaint with an employer or the ability to file a complaint with the Maryland Commission on Civil Rights for nonmonetary administrative remedies.[175] Even though Maryland does not recognize a private cause of action for unpaid interns, the anti-discrimination and harassment protections in the statute provide administrative remedies to hold employers accountable and create a safer workplace.

IV. THE ARKANSAS CIVIL RIGHTS ACT OF 1993

In the early 1990s, most states had already enacted civil rights legislation protecting their citizens from discrimination based on race, religion, national origin, gender, and disability.[176] Arkansas, however, had not.[177] That changed in 1991 when then-Governor Clinton of Arkansas, while running for president, received criticism for the lack of civil rights legislation in his state.[178] Two years later, the Arkansas General Assembly enacted the Arkansas Civil Rights Act of 1993.[179] The Arkansas Civil Rights Act gave Arkansans civil rights protections they previously did not have under state law; in particular, it established that individuals are protected from discrimination in employment.[180] Section 16-123-107(a)(1) of the Arkansas Civil Rights Act

171. Brenner & Weinstein, *supra* note 108.

172. *Compare* MD. STATE GOV'T CODE ANN. § 20-610(a) (LexisNexis 2020), *with* CONN. GEN. STAT. § 31-40y(a)(3) (2020), *and* 775 ILL. COMP. STAT. ANN. 5/2-101(A) (2020), *and* N.Y. EXEC. LAW § 296(1-c) (Consol. 2020).

173. MD. STATE GOV'T CODE ANN. § 20-610(b) (LexisNexis 2020).

174. *Id.*§ 20-610(e); Brenner & Weinstein *supra* note 108.

175. MD. STATE GOV'T CODE ANN. § 20-610(d); Brenner & Weinstein, *supra* note 108.

176. *See* Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 ARK. L. REV. 165, 168 (1997).

177. *Id.*

178. *Id.* at 168–69.

179. *Id.* at 171–72.

180. *Id.* at 173.

prohibits discrimination in employment "because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability[.]"[181] Since the prohibition on discrimination in employment is "[t]he right to obtain and hold employment without discrimination[,]"[182] the right belongs to an individual—the employee.

Under the Arkansas Civil Rights Act, "employee" is defined by who is not an employee.[183] "'Employee' does not include: (A) [a]ny individual employed by his or her parents, spouse, or child; (B) [a]n individual participating in a specialized employment training program conducted by a nonprofit sheltered workshop or rehabilitation facility; or (C) [a]n individual employed outside the State of Arkansas[.]"[184] That definition is ambiguous as to who *is* an employee under the Arkansas Civil Rights Act. By creating an ambiguous definition, the Arkansas General Assembly has left it to the courts to determine who an employee is, if the issue arises. Even though the decision has been left to the courts, section 16-123-105 of the Arkansas Civil Rights Act informs the courts they may look to federal courts for guidance when interpreting issues under the Act,[185] which the Supreme Court of Arkansas has done.[186] As subsection A will illustrate, the Supreme Court of Arkansas, in construing the Arkansas Civil Rights Act, does not interpret the protections of the Arkansas Civil Rights Act to be broader or more expansive than other federal employment discrimination protections.[187] Subsection B will discuss the implications of the Supreme Court of Arkansas's interpretations of the Arkansas Civil Rights Act and why these interpretations will leave unpaid interns unprotected.[188]

A. Interpreting the Arkansas Civil Rights Act of 1993

As discussed earlier, the Arkansas Civil Rights Act instructs the courts to look at federal civil rights law when interpreting it.[189] *Faulkner v. Arkan-*

181. ARK. CODE ANN. § 16-123-107(a)(1) (2020).
182. *Id.*
183. *Id.* § 16-123-102(4) (2020).
184. *Id.*
185. *Id.* § 16-123-105 (2020).
186. *See, e.g.*, Island v. Buena Vista Resort, 352 Ark. 548, at 556, 103 S.W.3d 671, 675 (2003); Flentje v. First Nat'l Bank of Wynne, 340 Ark. 563, at 570–71, 11 S.W.3d 351, 537 (2000).
187. *See infra* Section IV.A.
188. *See infra* Section IV.B.
189. ARK. CODE ANN. § 16-123-105(c). While the statutory language specifically states "[w]hen construing this section, a court may look for guidance to state and federal decisions interpreting the Civil Rights Act of 1871, . . ." *id.*, the Arkansas Supreme Court has construed this instruction to apply to statutory interpretation of the employment discrimination section, Arkansas Code Annotated section 16-123-107. *See Island*, 352 Ark. at 556, 103 S.W.3d at 675; *Flentje*, 340 Ark. at 570–71, 11 S.W.3d at 537 (2000).

sas Children's Hospital and *Island v. Buena Vista Resort* are two employment discrimination cases where the Supreme Court of Arkansas has had to interpret the statutory language of the Arkansas Civil Rights Act.[190] Both cases illustrate that the Supreme Court of Arkansas does not interpret the rights in the Arkansas Civil Rights Act as more expansive than federal civil rights.[191]

In *Faulkner*, the Supreme Court of Arkansas interpreted the statutory language of the Arkansas Civil Rights Act as not providing a cause of action for those "regarded as having a disability."[192] By using the statutory rules of construction,[193] the court determined that there is no express provision for that cause of action under the statute.[194] The Supreme Court of Arkansas noted that this is a material difference between the Arkansas Civil Rights Act and the discrimination provisions provided under the Americans with Disabilities Act.[195] According to the court, expanding the definition and aligning it with the federal definition would be legislating, which is a power the court does not have.[196]

The Supreme Court of Arkansas in *Island* had the opportunity to determine if sexual harassment is actionable under the Arkansas Civil Rights Act.[197] The Arkansas Civil Rights Act prohibits discrimination because of gender.[198] Discrimination "[b]ecause of gender" is defined by the Act as "mean[ing], but . . . not limited to, on account of pregnancy, childbirth, or

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190. *Faulkner*, 347 Ark. 941, 69 S.W.3d 393 (2002); *Island*, 352 Ark. 548, 103 S.W.3d 671.

191. *See Faulkner*, 347 Ark. at 954, 69 S.W.3d at 401 (holding the Arkansas Civil Rights Act does not recognize being regarded as disabled as a disability, as federal law does); *Island*, 352 Ark. at 552, 103 S.W.3d at 672 (holding that gender discrimination includes hostile work environment claims under the Arkansas Civil Rights Act, because it is available under Title VII).

192. *Faulkner*, 347 Ark. at 955, 69 S.W.3d at 402.

193. The court stated:

> The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving words their ordinary and usually accepted meaning in common language. When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly.

Id. at 952, 69 S.W.3d at 400 (internal citations omitted).

194. *Id.* at 955, 69 S.W.3d at 402.

195. *Id.* at 953, 69 S.W.3d at 401.

196. *Id.* at 955, 69 S.W.3d at 402.

197. *Island*, 352 Ark. at 556, 103 S.W.3d at 675.

198. ARK. CODE ANN. § 16-123-107(a) (2020).

related medical conditions[.]"[199] The Arkansas Civil Rights Act, like federal legislation, does not expressly state that sexual harassment is gender discrimination nor that it is prohibited.[200]

Island held that hostile work environment and quid-pro-quo sexual harassment claims are actionable causes of action under the Arkansas Civil Rights Act.[201] In *Island*, a business owner approached his female employee for sex and the owner repeatedly made lewd comments to her.[202] The trial court determined that the employee did not have a cause of action under the Arkansas Civil Rights Act.[203] The Supreme Court of Arkansas reversed and reasoned that there was a question of statutory interpretation of whether sexual harassment is actionable under the Arkansas Civil Rights Act.[204] Because the Arkansas Civil Rights Act instructs courts to look at federal civil rights law when interpreting the Act, the court looked at federal case law for guidance.[205] Since Title VII claims include hostile work environment or quid-pro-quo claims, the court concluded sexual harassment causes of actions are available under the Arkansas Civil Rights Act.[206]

B. Implications of the Statutory Construction for Unpaid Interns

Faulkner and *Island* illustrate how the Supreme Court of Arkansas does not go beyond federal protections when interprets the Arkansas Civil Rights Act.[207] The Arkansas Civil Rights Act protects those with a disability, but the Supreme Court of Arkansas has interpreted that the definition is narrower than the federal law definition.[208] In determining that sexual harassment claims are considered gender discrimination under the Arkansas Civil Rights Act, the Supreme Court of Arkansas looked at the federal approach of including both a hostile work environment and quid-pro-quo as part of

199. *Id.* § 16-123-102(1) (2020).

200. *See id.* § 16-123-107(a); 42 U.S.C.§ 2000e-2(a); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (holding that sexual harassment that results in a hostile work environment is a form of sex discrimination under Title VII).

201. *Island*, 352 Ark. at 559, 103 S.W.3d at 677.

202. *Id.* at 552, 103 S.W.3d at 673.

203. *Id.* at 554, 103 S.W.3d at 674.

204. *Id.* at 556, 103 S.W.3d at 675.

205. *Id.*; *see* ARK. CODE ANN. § 16-123-105(c).

206. *Island*, 352 Ark. at 559, 103 S.W.3d at 677.

207. *See supra* Section IV.A. However, there are instances when the Arkansas Civil Rights Act does provide a cause of action where there is not one under federal law. The availability of a cause of action under the Arkansas Civil Rights Act and not Title VII occurs when there is an express provision of the Act and not because of judicial interpretation. *See generally* Richard F. Richards, *The Arkansas Civil Rights Act: Sometimes the Only Remedy for Employment Discrimination*, 1996 ARK L. NOTES 87 (1996) (discussing the differences between Title VII causes of action and the Arkansas Civil Rights Act causes of action).

208. Faulkner v. Ark. Children's Hosp. 347 Ark. 941, 69 S.W.3d 393 (2002).

sex discrimination under Title VII.[209] Each case illustrates that the statutory language of the employment discrimination provisions of the Arkansas Civil Rights Act does not extend beyond what has been protected by the federal government. This is significant because it illustrates that to consider unpaid interns as employees under the Arkansas Civil Rights Act, the court will interpret the definition of employee by how the statute defines employee while also looking to federal case law as persuasive authority.[210] Specifically, it will first look at the statutory language and give the words in the statute "their ordinary and usually accepted meaning[.]"[211] Based on that, the Supreme Court of Arkansas will likely conclude that an intern is not an employee. This is because when the court looks at the statutory language of the definition of employee, it will see that employee is defined as who is not an employee.[212] Because of that ambiguity, the court will then look at "the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject."[213] One of the "other appropriate means" that the court can use in interpreting the statute is federal civil rights case law.[214] As discussed earlier, most federal circuits, including the Eighth Circuit have concluded that unpaid interns are not employees under Title VII.[215] Therefore, this method of statutory interpretation will likely lead the Supreme Court of Arkansas to determine that unpaid interns are not considered employees under the Arkansas Civil Rights Act and, consequently, leave unpaid Arkansas interns, like Annie, in a legal void.

V. AMENDING THE ARKANSAS CIVIL RIGHTS ACT OF 1993 TO PROTECT UNPAID INTERNS

As discussed previously, an unpaid intern in Arkansas is unlikely to be considered an employee under Title VII or the Arkansas Civil Rights Act,[216] therefore leaving them with no ability to hold their internship accountable for the discrimination or harassment they endure. Subsection A proposes a specific definition that would include unpaid interns as part of the Arkansas Civil Rights Act. Subsection B discusses failed federal attempts to protect unpaid interns, and therefore, illustrates why it is imperative that the Arkansas General Assembly act to protect unpaid interns.

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209. *Island*, 352 Ark. 548, 103 S.W.3d 671.
210. ARK. CODE ANN. § 16-123-105(c) (2020).
211. *Faulkner*, 347 Ark. at 952, 69 S.W.3d at 400.
212. ARK. CODE ANN. § 16-123-102(4) (2020).
213. *Faulkner*, 347 Ark. at 952, 69 S.W.3d at 400.
214. ARK. CODE ANN. § 16-123-105 (2020).
215. *See supra* Section II.
216. *See supra* Section II, IV.

A. Proposed Legislation

The Arkansas General Assembly should amend the Arkansas Civil Rights Act to include unpaid interns as part of the definition of employee. The legislature should adopt the definition that has been enacted by the Illinois,[217] New York,[218] Connecticut,[219] and Maryland[220] legislatures. Subsection four of section 16-123-102 of the Arkansas Code Annotated should be amended to include a provision that establishes interns as employees under the Arkansas Civil Rights Act. Specifically, the intern provision should define an intern as: a person who performs work for an employer if: (A) the employer is not committed to hiring 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: (i) supplements training given in an educational environment that may enhance the employability of the intern; (ii) provides experience for the benefit of the person performing the work; (iii) does not displace regular employees; (iv) is performed under the close supervision of existing staff; and (v) provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer.[221]

By adopting that definition, Arkansas will be protecting unpaid interns because that definition describes an unpaid internship. Internships by their very nature are temporary because they are intended to provide interns with work experience and not of a job.[222] If an intern is paid or receives benefits, then he or she likely would satisfy the remuneration test that is required by the Eighth Circuit when determining employee status under Title VII[223] and would not need state unpaid intern protections. The work interns perform supplements their educational experience, as it demonstrates their skills and talents, and may help induce future employment.[224] Additionally, an intern-

217. 775 ILL. COMP. STAT. ANN. 5/2-101(A)(1) (LexisNexis 2020).

218. N.Y. EXEC. LAW § 296(1-c) (Consol. 2020).

219. CONN. GEN. STAT. § 31-40y(a)(3) (2020).

220. M.D. CODE ANN. STATE GOV'T § 20-610(a) (LexisNexis 2020).

221. This proposed definition is based on the identical statutory language in Connecticut, Illinois, Maryland, and New York. *See* CONN. GEN. STAT. § 31-40y(a)(3) (2020); 775 ILL. COMP. STAT. ANN. 5/2-101(A)(1) (LexisNexis 2020); M.D. CODE ANN. STATE GOV'T § 20-610(a) (LexisNexis 2020); N.Y. EXEC. LAW § 296(1-c) (Consol. 2020).

222. *See* Heffernan, *supra* note 42, at 1761 (describing unpaid internships); Nicholes, *supra* note 18, at 91 (describing unpaid internships); *Intern*, Merriman Webster, https://www.merriam-webster.com/dictionary/intern, (last visited Feb. 28, 2021) ("An advanced student or graduate usually in a professional field (such as medicine or teaching) gaining supervised practical experience (as in a hospital or classroom).").

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

224. Nicholes, *supra* note 18, at 93.

ship is an opportunity to "test drive a career[,]" which allows interns to network and work under the guidance of professionals in a particular profession.[225] Lastly, if an employer uses an intern to displace other employees or to reduce costs, then it would not be a true internship and could create other legal issues that are beyond the scope of this Comment.[226] A narrowly tailored definition will clarify the statutory intent and who is protected by the statute.

This definition will not change how employers have to treat employees; it expands the scope of who is protected in the workplace. Employers in Arkansas with nine or more employees are already aware of the requirements of the Arkansas Civil Rights Act.[227] Adding the definition of an unpaid intern to the Arkansas Civil Rights Act would not require anything new from employers; rather, the definition would provide a clear framework confirming that the Act applies to unpaid interns. This will shift the power dynamics in the employer-employee relationship because unpaid interns would have undisputed employment rights under Arkansas law. That shift will empower unpaid interns to know that they are to be treated the same as a paid employee. Not only would this definition protect unpaid interns in Arkansas, but it would also continue the movement of protecting unpaid interns from workplace discrimination. More states will likely begin passing legislation to protect interns. Arkansas should be on the leading front of that movement.

B. Failed Federal Attempts at Expanding Anti-Discrimination and Harassment Protections to Unpaid Interns

Providing statutory protections is necessary because otherwise, interns exist in a legal void.[228] Some, however, may say that state statutory protections are unnecessary because the Supreme Court of the United States or Congress could include unpaid interns as part of the employee definition

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225. Hering, *supra* note 2.

226. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533–38 (2d Cir. 2016) (discussing how some unpaid internships may violate the Federal Labor Standards Act (FLSA)); *see also* Heffernan, *supra* note 42, at 1774–81 (discussing the different tests courts use to determine employee status under FLSA); Irene Hickey Sullivan, *Learning on the Job: Glatt v. Fox Searchlight Pictures, Inc.'s Primary Beneficiary Test and Its Implications for Harassment and Discrimination Protection for Unpaid Interns Under Title IX*, 2017 U. CHI. LEGAL F. 797, 805–08 (2017) (discussing the different tests courts use to determine employee status under FLSA).

227. ARK. CODE ANN. § 16-123-102(5) (2020).

228. *See* Yamada, *supra* note 1, at 216–17 (arguing student interns exist in a legal void and proposing legal and policy reforms to provide basic protections to student interns); Fredericksen, *supra* note 1, at 247 (discussing interns exist in a legal void where they are not protected by employment or education laws).

under Title VII. At this time, there is no Supreme Court guidance on whether interns are considered employees under Title VII.[229] Therefore, federal courts decide an intern's employment status based on precedent, and as discussed, the circuits are split on which test to use.[230]

Unless the Supreme Court addresses the issue, amending Title VII is the only other way to provide federal statutory protections to unpaid interns. The likelihood of an amendment happening in the near future is low. The first congressional attempt at amending Title VII to include protections for LGBTQ individuals happened in 1974.[231] From 1974 to 2019, Congress introduced seventy-one bills, and each one attempted to amend Title VII so that LGBTQ individuals could be protected.[232] It was not until 2020 when the Supreme Court announced its decision in *Bostock v. Clayton County* that LGBTQ individuals were protected under Title VII.[233]

Similar to the attempts to amend Title VII to include LGBTQ individuals, members of Congress, in recent years, have attempted to create federal protections for unpaid interns.[234] In April 2015, Representative Grace Meng introduced the Intern Protection Act in the House of Representatives.[235] The purpose of the bill was to provide certain workplace protections to interns relating to discriminatory practices.[236] It sought to make it

> an unlawful employment practice for an employer to refuse to hire or employ or to bar or to discharge from an internship an intern or to discriminate against such intern in the terms, conditions, or privileges of employment as an intern because of the intern's age, race, religion, color, national origin, sex, sexual orientation, military status, disability, gender identity, predisposing genetic characteristics, marital status, or status as a victim of domestic violence[.][237]

This bill, if it had become law, would have given interns to have the same rights as employees under other anti-discrimination employment

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229. *See generally* Heffernan, *supra* note 42, at 1781 (proposing that courts adopt one definition for FLSA and Title VII that would encompass unpaid interns and provide them with standing).

230. *See supr*a Section II.

231. Brief of Amicus Curiae for Judicial Watch, Inc. at 5, R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Emp. Opportunity Comm'n (No. 18-107) (consolidated with Bostock v. Clayton Cnty., 590 U.S. __ (2020).

232. *Id.*

233. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

234. *See infra* notes 235–57 and accompanying text.

235. Intern Protection Act, H.R. 2034, 114th Cong. (2015) (died in the House of Representatives).

236. *Id.*

237. *Id.* § 3.

laws.[238] The Intern Protection Act was referred to various committees and subcommittees, but no action was taken, and it died at the end of the 114th Congress.[239] However, that was not the end of congressional attempts to extend employment rights to unpaid interns.

Representative Elijah Cummings, in July 2015, introduced three bills in the House of Representatives that would protect interns in the workplace.[240] Two of the bills were only applicable to congressional interns or federal government interns.[241] The third bill was created to protect all unpaid interns in the United States.[242] This bill was slightly different than the bill introduced by Representative Meng because it sought to only protect interns based on race, color, religion, sex, national origin, age, or disability.[243] Essentially, it sought to extend Title VII,[244] the Age Discrimination in Employment Act,[245] and the Americans with Disabilities Act[246] to unpaid interns. It was introduced in the House of Representatives and referred to the Committee on Education and the Workforce, but it too died at the end of the legislative session. [247]

During the 115th Congress, both Representative Meng and Representative Cummings reintroduced their bills, again trying to protect all unpaid interns in the United States.[248] These bills also met the same fate as their predecessors and died at the end of the legislative session after being referred to committees.[249]

When Congress started its 116th legislative session in 2019, Representative Cummings reintroduced his bill again trying to protect unpaid in-

238. *See* 42 U.S.C. §§ 2000e–2000e-17; 29 U.S.C. §§ 621–634; 42 U.S.C. §§ 12111–12117; 42 U.S.C § 2000ff–2000ff-11; 38 U.S.C. §§ 4311–4319.

239. H.R. 2034 (died in the House of Representatives).

240. *See* Federal Intern Protection Act of 2016, H.R. 3231, 114th Cong. (2015) (passed by the House of Representatives Jan. 11, 2016); Unpaid Intern Protection Act of 2015, H.R. 3232, 114th Cong. (2015) (died in the House of Representatives); Congressional Intern Protection Act of 2015, H.R. 3233, 114th Cong. (2015) (died in the House of Representatives).

241. H.R. 3231 (passed by the House of Representatives Jan. 11, 2016, but died in the Senate); H.R. 3233 (died in the House of Representatives).

242. H.R. 3232 (died in the House of Representatives).

243. *Compare id.*, *with* H.R. 2034 (died in the House of Representatives).

244. 42 U.S.C.§ 2000e–2000e-17.

245. 29 U.S.C. §§ 621–634.

246. 42 U.S.C. §§ 12111–12117.

247. H.R. 3232 (died in the House of Representatives).

248. *See* Intern Protection Act, H.R. 2538, 115th Cong. (2017) (died in the House of Representatives); Unpaid Intern Protection Act of 2017, H.R. 651, 115th Cong. (2017) (died in the House of Representatives); Congressional Intern Protection Act of 2017, H.R. 652, 115th Cong. (2017) (died in the House of Representatives); Federal Intern Protection Act of 2017, H.R. 653, 115th Cong. (2017) (passed the House of Representatives May 17, 2017, but died in the Senate).

249. H.R. 651, (died in the House of Representatives); H.R. 652 (died in the House of Representatives); H.R. 2538 (died in the House of Representatives).

terns in the United States.[250] Representative Katherine Clark and Senator Patty Murray concurrently introduced a bill to protect unpaid interns by extending the protections in Title VII to interns.[251] The bill was titled "BE HEARD in the Workplace Act."[252] The purpose of the bill was to "prevent and reduce prohibited discrimination and harassment in employment . . . [and] to prevent and reduce discriminatory and harassing conduct in the workplace[.]"[253] More importantly, it sought "to update and clarify certain employment nondiscrimination laws[.]"[254] Under "Title III—Broadening Protections and Ensuring Transparency" of the Bill, section 301 sought to extend Title VII protections to interns.[255] Specifically, it sought to protect interns regardless of "whether or not the individual receives compensation, academic credit, or other remuneration from the covered employer or entity."[256] If this bill had become law, it would have dramatically changed the rights of unpaid interns under federal law. However, this bill, like the others, was referred to various committees and did not make it to the floor of either legislative body, dying at the end of the legislative session.[257]

This subsection was not meant to be an exhaustive list of all the congressional attempts to protect unpaid interns but rather an illustration of how attempts have been made but have ultimately failed. Until unpaid intern protections are federal law, either by judicial interpretation or legislative action, interns will be left with state law protections or no protections at all.

VI. CONCLUSION

Internships are an invaluable experience for young adults who are starting to establish their careers in that it provides work experience along with an opportunity to network and establish mentors.[258] Workplace antidiscrimination and harassment laws should not be inapplicable to an intern simply because their position in the workplace may not be within the definition of employee. Currently, under Title VII, courts are unlikely to consider an intern an employee.[259] Where federal law has fallen short, some states

250. Unpaid Intern Protection Act of 2019, H.R. 134, 116th Cong. (2019) (died in the House of Representatives).

251. BE HEARD in the Workplace Act, H.R. 2148, 116th Cong. (2019) (died in the House of Representatives); BE HEARD in the Workplace Act, S. 1082, 116th Cong. (2019) (died in the Senate).

252. H.R. 2148 (died in the House of Representatives); S. 1082 (died in the Senate).

253. H.R. 2148 § 3; S.1082 § 3.

254. H.R. 2148 § 3; S.1082 § 3.

255. H.R. 2148 § 301(a); S.1082 § 301(a).

256. H.R. 2148 § 301(a); S.1082 § 301(a).

257. H.R. 2148 (died in the House of Representatives); S. 1082 (died in the Senate).

258. Hering, *supra* note 2.

259. *See supra* Section II.

have extended state statutory employment anti-discrimination and harassment laws to unpaid interns.[260] Because an unpaid intern in Arkansas, like Annie, currently is unlikely to be considered an employee under Title VII[261] and the Arkansas Civil Rights Act,[262] Arkansas should join these states and provide unpaid interns with statutory anti-discrimination and harassment protections.

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260. *See supra* Section III.
261. *See supra* Section II.C.
262. *See supra* Section IV.B.

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