

DOL Adopts the “Primary Beneficiary” Test for Internship Programs

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As summer months approach and students begin searching for seasonal employment, many employers are faced with the logistics of internship programs, specifically whether an unpaid internship meets the requirements of the Fair Labor Standards Act (“FLSA”). In other words, does an individual qualify as an “intern” – such that they are not required to be paid per the FLSA – or is he or she actually functioning as an “employee” who must be paid accordingly? A recent development in this arena is discussed herein.

On January 5, 2018, the U.S. Department of Labor (“DOL”) announced in a press release that it was abandoning the six-part test it has used for years to determine whether interns are “employees” for purposes of the FLSA. The DOL declared that it was adopting the “primary beneficiary” test which has been favored by federal circuit courts.

This move by the DOL followed a December 19, 2017 ruling in the Ninth Circuit Court of Appeals expressly rejecting the DOL’s six-part test for determining whether interns and students are considered “employees” under the FLSA. In making this ruling, the Ninth Circuit joined a number of other federal circuit courts that have previously rejected the six-part test in favor of the so-called “primary beneficiary” test.

The DOL’s former six-part test rigidly required that an unpaid internship meet all of the six factors. One of the factors – that the employer derive “no immediate advantage from the activities of the intern” – was particularly problematic for federal circuit courts. The “primary beneficiary” test loosens these requirements and is a flexible, seven-factor test without a single determining factor. The DOL asks courts to examine, among other things, the “economic reality” of the intern-employer relationship to determine which party is the “primary beneficiary” of the relationship.

In connection with the adoption of the new test, the DOL issued a new Fact Sheet on internship programs under the FLSA.¹ The Fact Sheet lists seven factors, to be considered holistically, in determining whether an intern is an employee:

- 1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

¹ Fact Sheet can be found [here](#).

- 2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- 3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- 4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- 5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- 6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- 7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

This change in enforcement practice by the DOL represents a move toward flexibility and an intent to align with relevant case law. Employers should review this new "primary beneficiary" standard to evaluate whether its internship programs, which may have previously been paid-internships, could possibly qualify as unpaid under this less rigid standard.

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