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U.S. DOL Follows Circuit Courts, Adopting “Primary Beneficiary” Test to Determine Whether Unpaid Interns Are Employees

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In a move allowing increased flexibility for employers and greater opportunity for unpaid interns to gain valuable industry experience, the United States Department of Labor (“DOL”) recently issued [Field Assistance Bulletin No. 2018-2](#), adopting the “primary beneficiary” test used by several federal appellate courts to determine whether unpaid interns at for-profit employers are employees for purposes of the Fair Labor Standards Act (“FLSA”). If interns are, indeed, deemed employees, they must be paid minimum wage and overtime, and cannot serve as interns without pay.

By adopting the “primary beneficiary” test, the DOL has switched gears from its insistence that all six factors of the test it originally propounded in the late 1960s—and most recently reiterated in a Fact Sheet published in 2010—must be present for an internship to be unpaid. Indeed, under its previous test, the DOL declared that unless an internship satisfies all six factors, the intern is an employee entitled to minimum wage and overtime under the FLSA. The U.S. Courts of Appeals for the Second, Sixth, Ninth, and Eleventh Circuits rejected the six-factor standard in favor of the “primary beneficiary” test reflected in the Second Circuit’s decision in *Glatt v. Fox Searchlight Pictures, Inc.*¹ The Ninth Circuit’s ruling in *Benjamin v. B&H Education, Inc.*, issued on December 19, 2017, was the most recent appellate decision to adopt the “primary beneficiary” test and may have convinced the DOL to rethink its position. This business-friendly shift is also consistent with some of the other changes by federal administrative agencies over the past year under the current administration.

The [DOL announced](#) that it is adopting the “primary beneficiary” test in order to “conform to these appellate court rulings by using the same ‘primary beneficiary’ test ... [to] eliminate unnecessary confusion among the regulated community, and provide the Division’s investigators with increased flexibility to holistically analyze internships on a case-by-case basis.” Along with this announcement, the DOL issued a new [Fact Sheet](#).

The “Primary Beneficiary” Test

The “primary beneficiary” test examines the economic reality of the relationship between the unpaid intern and the employer to determine which party is the primary beneficiary of the

¹ Over the years, some district and circuit courts had utilized yet other tests, aside from the “primary beneficiary” test and the DOL’s six-factor test.

relationship. Unlike the DOL's previous six-factor test, the "primary beneficiary" test allows for greater flexibility for employers – as well as increased opportunity for unpaid interns – because no single factor is determinative.

The DOL's "primary beneficiary" test includes the following seven factors:

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

The DOL's Fact Sheet highlights that this is a flexible test and that "whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case." In addition, the court rulings from which the DOL adopted this standard emphasize that the above list of factors is not exclusive, and that in particular cases other considerations may be relevant to the analysis. Under this new standard, compared with the six-factor test, it may be more difficult for interns to challenge their status in class or collective actions.

What Should Employers Do Now?

With the DOL's adoption of the "primary beneficiary" test, employers now have greater flexibility to have unpaid interns. Nonetheless, employers should continue to be careful when using unpaid interns and students, including by taking the following steps:

- Determine whether the "primary beneficiary" test is in effect in the employer's jurisdiction, or whether a stricter test or one with additional factors applies.
- Review existing and/or new unpaid internship programs to ensure the unpaid intern is the primary beneficiary of the internship.
- Review existing and/or new unpaid internship programs, including any form of compensation provided to the unpaid intern, to ensure that the economic reality of the relationship does not resemble one of an employee-employer.

- Develop unpaid internship programs wherein the internships:
 - provide educational training and/or academic credit;
 - contain limited, if any, clerical work;
 - provide assignments that are appropriately tailored, such that the unpaid intern is the primary beneficiary of the internship.
- Limit the length and timing of internship programs so that they are consistent with semesters/breaks in the academic calendar.
- Avoid using unpaid interns and students to replace paid workers.

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