

The DOL Just Flipped Its Position on Paying Interns

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Late last week, the DOL effectively revamped the standards for unpaid interns, reversing a rule that had been in place since 2010 and giving private, for-profit employers whiplash.

The FLSA does not define “intern.” However, “[a] person whose work serves only his own interest” is not considered to be “an employee of another person who gives him aid and instruction.” *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

2010 DOL Standard

The DOL upended that long-standing rule in 2010 when it issued a test under which any internships in the “for-profit” sector generally would have to be paid, unless an employer could successfully meet *all of these factors*:

- The internship is similar to training that would be given in an educational environment
- The internship is for the benefit of the intern
- The intern does not replace regular employees, but works under close supervision of existing staff
- The employer derives no immediate advantage from activities of intern, and may even be impeded
- The intern is not necessarily entitled to a job offer at conclusion of work
- The employer and intern understand that the intern is not entitled to wages

Since then, and particularly in the last few years, several federal courts have adopted a “primary beneficiary” test, which focuses on the economic reality of the intern-employer relationship to determine whether an intern should be paid.

New DOL Standard

Based on those recent court decisions, the DOL just updated its policy with a seven-factor test:

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

Most importantly, unlike the previous standard, an employer need not prove all of these elements and no single factor is determinative and the assessment of whether an intern should be paid is left to the facts of a particular case.

The revision significantly changes whether employers that offer positions to students and interns actually need to pay these individuals. Accordingly, it would be prudent to consider revisiting how employers classify certain workers to assess compliance with current law.

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