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DOL Adopts New Standard for Determining Whether Unpaid Interns Are 'Employees'

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The US Department of Labor will now apply a "primary beneficiary" test, which was previously adopted by several courts and provides greater flexibility in structuring internship programs.

The US Department of Labor (DOL) announced on January 5 that it would no longer use its six-factor test for determining whether an intern at a for-profit company is an "employee" entitled to compensation under the Fair Labor Standards Act (FLSA). Instead, the DOL will now apply the "primary beneficiary" test that has been adopted by several federal district and appeals courts. The primary beneficiary test is a more holistic test than the DOL's prior six-factor test and should allow for-profit employers with unpaid internship programs greater flexibility in structuring legally compliant internship programs.

Background

Under the DOL's old six-factor test, a for-profit employer needed to satisfy all six factors in order for an intern not to be considered an employee under the FLSA. Many companies found that the six-factor test was overly rigid, particularly the one that stated that the company could not derive an "immediate advantage from the activities of the intern," meaning the company could not get any benefit from the internship. In recent years, several courts, including the Second, Sixth, Ninth, and Eleventh Circuit Courts of Appeal, had criticized the DOL's six-factor test and, rather than adopt that test, analyzed whether an intern is an employee by focusing on whether the intern or the entity is the "primary beneficiary" of the relationship. Specifically, this primary beneficiary test examines both the benefits the intern receives in exchange for participation in the internship program as well as the economic reality that exists between the intern and employer. If the primary beneficiary of the relationship is the intern, then the intern is not an employee under the FLSA.

Factors DOL Will Now Analyze in Determining Primary Beneficiary

In determining whether the intern or the company is the primary beneficiary of the relationship, the

DOL will examine several factors, including 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;
- 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;
- the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
- the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
- the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
- the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
- 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 stated that in applying these factors, no one factor is dispositive and that "whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case." *See* DOL's Internship Program Fact Sheet. This guidance follows similar language issued by courts, which have held that the analysis of intern classification is a fact-specific inquiry.

DOL Reiterates Its Position on Volunteers and Internships for Public Sector and Nonprofit Charitable Organizations

In its fact sheet discussing its adoption of the primary beneficiary test for interns at for-profit companies, the DOL also reiterated its prior position that people who volunteer to perform services for a state or local government agency, or who volunteer for humanitarian purposes, are exempt from the FLSA's minimum-wage and overtime requirements. DOL stated that it "recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible."

Next Steps and Practice Pointers

This new guidance provides an excellent opportunity for employers to examine their internship programs to ensure compliance with the law. Although the DOL's new test makes it more likely that, when structured correctly, an intern may be found not to be an employee under the FLSA, this new test should not be interpreted to give employers carte blanche to classify all students as unpaid interns. The intern must be the primary beneficiary of an internship which, under the factors noted

above, should tie in very closely to the intern’s academic and career progression. Moreover, employers will want to ensure that stricter tests under state law do not apply in their respective locations. Thus, although the DOL’s new guidance is certainly welcome news for employers with internship programs, risk still remains anytime an employer engages unpaid interns, and employers should consult with knowledgeable counsel when developing or implementing an unpaid internship program.

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