

Compliance



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DOL Announces New Standard for Unpaid Interns

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| Highlights: | <ul style="list-style-type: none">▪ The DOL has replaced its six-part test for unpaid interns in favor of the primary beneficiary test.▪ The primary beneficiary test has been used by several federal appellate courts.▪ The primary beneficiary test requires considering the totality of the circumstances to determine employee status under the FLSA. | Important Dates: | January 5, 2018 <ul style="list-style-type: none">▪ The DOL begins using the primary beneficiary test to determine whether interns are employees under the FLSA. |
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OVERVIEW

On **Jan. 5, 2018**, the U.S. Department of Labor (DOL) [announced](#) that it would adopt a new standard for determining whether interns and students are “employees” who must be paid under the Fair Labor Standards Act (FLSA).

The DOL clarified that, going forward, it would abandon its six-part test and instead adopt the “primary beneficiary” test used by federal courts.

The six-part test provides that an intern at a for-profit company is an employee unless all six factors of the test are met. The primary beneficiary test has a more flexible approach, focusing on whether the intern or the business benefits more from the relationship.

ACTION STEPS

- Employers should review how the primary beneficiary test applies to interns at their organizations. The DOL has provided an updated [fact sheet](#) for employers to use.
- Employers should also make sure that any unpaid intern programs primarily benefit their interns and not the company.

The Old Six-part Test

The six-part benefit test is very specific and allows for interns to be unpaid only if all of the following factors are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and, on occasion, its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The Primary Beneficiary Test

The primary beneficiary test looks at the “economic reality” nature of the employment relationship and includes seven factors to consider. However, unlike the six-part test, these factors provide only a reference frame to determine who is benefiting more from the intern-employer relationship.

The seven factors are:

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.

Not every factor must be met, and not all factors must be given the same weight during the analysis. Instead, the courts will consider these seven factors and evaluate whether, in the totality of the circumstances, the employer is benefiting more from the relationship than the intern is. When an employer is the primary beneficiary of the relationship, the intern is an employee for purposes of the FLSA. When the intern is the primary beneficiary, he or she is not considered an employee under the FLSA.

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Page 2