DOL UPDATES TEST FOR UNPAID INTERNS AND STUDENTS UNDER THE FLSA

On January 5, 2018, the U.S. Department of Labor (DOL) announced that it would no longer be using the six-factor test it had adhered to since 2010 to determine whether interns are employees — and consequently, entitled to minimum wage and overtime — under the Fair Labor Standards Act (FLSA). Instead, the DOL will now utilize the "primary beneficiary" test articulated by several U.S. Circuit Courts of Appeals (including those covering New York and California) to make such a determination.

THE SIX-FACTOR INTERNSHIP TEST

Under the DOL's prior standard, an internship fell outside the reach of the FLSA, and therefore, could be unpaid, only if all six factors were met – one of which was that the employer "derive[s] no immediate advantage from the activities of the intern" and another of which stated that the internship had to be "for the benefit of the intern." However, this rule was rejected as overly rigid by the courts — the first being the Second Circuit Court of Appeals in New York, which established its own standard, a seven-factor "primary beneficiary" test, in 2016. This test was followed by a number of other federal courts (including the Ninth Circuit Court of Appeals in California) and forms the basis for the "primary beneficiary" standard now adopted by the DOL.

THE "PRIMARY BENEFICIARY" TEST

The "primary beneficiary" test – as set forth in the DOL's new Fact Sheet addressing internship programs under the FLSA – consists of the following seven, non-exhaustive factors regarding the extent to which:

THE BOTTOM LINE

The DOL will now rely on the "primary beneficiary" test when determining whether interns are eligible for minimum wage and overtime pay. This is good news for employers who want to establish internship programs without running afoul of the FLSA, and also gives employers more flexibility in structuring such programs.

Nonetheless, hiring interns can still be risky, even under the new test. To minimize liability under the FLSA, employers should design internship programs with a focus on education and training for the intern and pay the intern at least minimum wage.

Employers should also review the written terms of any internship program to ensure that they comply with the requirements of the new test, and clearly communicate such terms to the intern(s). Whenever possible, employers should obtain a signed acknowledgement of such terms from each intern.

- 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.

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- The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

No single factor is determinative. Rather, whether or not an intern is considered an employee for the purposes of the FLSA depends on the individual circumstances of each case. The main consideration, however, is whether the intern or the employer is the primary beneficiary of the working relationship. If the employer is found to be the primary beneficiary, the intern would be considered an employee for purposes of the FLSA and, accordingly, entitled to minimum wage and overtime compensation.

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