

JANUARY 10, 2018 | WAGE & HOUR COMPLIANCE

U.S. Department of Labor Changes Position on Internships under the FLSA

✖ Although summer seems far away, now is the time when most employers begin to prepare for their summer internship programs. Internships are a great way to give college students or new professionals some hands-on experience in your industry. However, one major question that has plagued employers over the past decade is whether an intern must be paid under the Fair Labor Standards Act ("FLSA") based on the duties he or she performs in the intern role and the structure of internship program.

While some employers offer paid internships, other internships are unpaid or only provide a stipend lower than the minimum wage. Given the recent string of high-profile class action cases brought by unpaid interns, for-profit, private sector employers must be aware of the FLSA's requirements as it relates to unpaid interns. Specifically, employers need to carefully evaluate whether an intern qualifies as an "unpaid intern" or an "employee" entitled to compensation. Earlier this month, the U.S. Department of Labor ("DOL") revised its guidance on this issue and the applicable analysis to determine whether an intern is considered an employee – aligning its guidance with the standard set out by the U.S. Courts of Appeals for the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.2d 528 (2d Cir. 2016) and providing employers much needed clarification. In light of this recent change, employers should take time to review their internship programs and evaluate each intern, on a case-by-case basis, to determine whether they satisfy the DOL's revised guidance regarding whether an intern must be compensated.

History of Unpaid Interns and the Law

A string of lawsuits in the early 2000's brought by unpaid interns demanding compensation for their services garnered national attention, and forced the DOL to issue guidance for employers. In 2010, the DOL Wage and Hour Division issued a Fact Sheet to help clarify the agency's position on unpaid interns, and the applicable analysis.

The test provided that an unpaid intern at a for-profit employer would be deemed an employee under the FLSA unless six factors were met. Under this rigid framework, the DOL starts from the presumption that internships in the "for-profit" private sector "will most often be viewed as employment," and puts the burden on the employer to show the existence of *all six* of the following required criteria:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training

which 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 test was not well-received by the public, employers, or the courts. Despite some initial success, the DOL position was largely rejected, and for-profit employers were forced to reconcile conflicting court opinions and the DOL's position. Between 2010 and 2015, several high-profile cases garnered national attention, including lawsuits against NBCUniversal, Viacom, and Fox Searchlight Pictures and Fox Entertainment Group.

While many of these high-profile cases were settled, more employers began defending these lawsuits. Over time, the courts strayed away from the DOL analysis to evaluate whether an intern is considered an employee, and created a new standard of review. Specifically, the U.S. Courts of Appeals for the Second Circuit, the Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit rejected the DOL's analysis and instead adopted a "primary beneficiary" test – wherein the court analyzes and weighs 7 factors to distinguish employees from bona fide interns

DOL Revises Fact Sheet #71 to Adopt the "Primary Beneficiary Test"

Recognizing this as a major defeat to the former six factor test, which was no longer accepted in a number of jurisdictions, the DOL decided to scrap the six-factor test entirely, and adopt the seven-factor test announced by the Second Circuit in *Glatt*. On January 5, 2018, the DOL made several changes to its policies, including updating [Fact Sheet #71](#) to reflect the "primary beneficiary test." Ultimately, the test examines the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship, using 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.

Unlike the DOL's former rigid six-factor analysis, courts have described the "primary beneficiary test" as a flexible test, with no single factor being determinative. Therefore, whether an intern is an employee under the FLSA necessarily depends on the unique circumstances of each case.

Conclusion

This significant revision to the DOL's guidance and expected update to its enforcement policies eliminate unnecessary confusion within the regulated community, and provides for-profit employers a uniform standard to assess whether an intern is considered an employee entitled to compensation. Although the DOL has aligned its position with the courts, employers should still proceed with caution in implementing or expanding unpaid internship programs.

For-profit employers should carefully evaluate their internship program to ensure that it complies with both the FLSA and any applicable state laws. Ultimately, unpaid interns are not substitutes for paid employees, and they certainly cannot be treated as such. Employers should make sure that they exercise significant supervisory authority over each intern, and closely monitor the type of work that they are doing. Specifically, interns should not be performing substantial productive work for an employer. The new seven factor test makes clear that the internship must be tied predominantly to an intern's education, and not simply a benefit for the employer.