

Insights: Alerts

# U.S. Department of Labor Issues Updated Guidelines for Internship Programs Under the Fair Labor Standards Act

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On January 5, 2018, the U.S. Department of Labor's Wage and Hour Division issued Fact Sheet #71, which sets forth new federal guidelines for determining whether an intern or student at a for-profit company must be paid under the Fair Labor Standards Act ("FLSA").

## **The Test for Unpaid Interns and Students**

The FLSA requires "for profit" employers to pay employees for their work, but if interns and students do not qualify as "employees" under the FLSA, they may not need to be compensated for their work under federal law. Conversely, if an intern or student does qualify as an "employee," then they are entitled to both minimum wage and overtime pay under the FLSA.

In order to determine whether an intern or student qualifies as an "employee," the Department of Labor's Fact Sheet recognizes the "primary beneficiary test" to examine the "economic reality" of the intern-employer relationship. Specifically, it identifies the following seven factors as part of the test to determine which party is the "primary beneficiary" of the relationship:

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.

When an analysis of these factors leads to the conclusion that the employer is the primary beneficiary of the relationship, the intern or student will be designated an employee of the employer. The "primary beneficiary" test is meant to be flexible—no single factor is determinative—so the determination of whether an intern or student is an employee will always depend on the specific factual circumstances of each case.

These guidelines are published only as general information and do not have the weight of a regulation. They represent, however, the Department of Labor's enforcement position on this issue on a go-forward basis. The new guidelines replace a rigid, six-part test previously applied by the Department of Labor in determining the employee status of interns and students.

The issuance of this Fact Sheet comes on the heels of two recent federal appellate court opinions analyzing whether unpaid interns at for-profit employers were employees under the FLSA: *Wang v. Hearst Corp.*, issued December 8, 2017, and *Benjamin v. B&H Educ., Inc.*, issued December 19, 2017. Both cases conducted their analysis using the "primary beneficiary" test and the seven factors outlined above. In *Wang*, the court found that summary judgment in favor of the employer was appropriate, reasoning that an intern may perform complementary tasks and, in doing so, confer tangible benefits on the employer, without being transformed into an employee. The court also explained that, while the interns sought to minimize the experience they received, the fact was that the internships did provide beneficial training, including day-to-day training in the professional environments. The court in *Benjamin* found that former students at a cosmetology and hair design school were interns and not employees when the students acknowledged they would not be paid for their clinical services, they received hands-on training and academic credit for their work, the clinical work satisfied the practical hours required prior to taking state licensing exams, and they did not displace paid employees of the school, despite the fact that the school derived some income from individuals receiving the salon services.

### **Practical Implications**

For-profit employers assessing an existing internship program, or contemplating one, should analyze the program under the seven factors above to ensure its interns would not qualify as employees under the FLSA. It is clear that the new guidelines, and cases that have applied the "primary beneficiary" test, make the distinction



that internships are for educational training rather than having interns do the work of regular employees, and any internship program should be designed accordingly. For-profit employers should also be mindful of any applicable state wage and hour laws that may apply different standards in determining whether interns and students are employees entitled to compensation. The new guidelines are applicable to for-profit employers. Non-profit organizations continue to have broad leeway in using the services of unpaid volunteers.

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