

DOL Endorses 'Primary Beneficiary' Test for Determining Whether Interns Qualify as Employees

January 8, 2018

The Department of Labor ("DOL") has formally endorsed a test used by several appellate courts in order to determine if an intern qualifies as an employee under the Fair Labor Standards Act ("FLSA"). The Jan. 5, 2018, announcement resolves ambiguity between the DOL's enforcement position and the standards applied by the courts when reviewing claims for wages and overtime by individuals classified as interns. Under the FLSA, interns are not employees subject to the minimum wage and overtime requirements of the regulations.

The DOL previously applied a six-factor test found in its 2010 Intern Fact Sheet's guidance for determining if unpaid interns working in the for-profit private sector should be considered employees.

This new test, called the "primary beneficiary" test, was articulated by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016), which was subsequently followed by three other federal appellate courts. The test takes into account the economic realities of the relationship to determine if the employer or intern is the primary beneficiary of that affiliation. The test includes seven factors to aid the courts:

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.

The purpose of the adoption of the "primary beneficiary" test is to eliminate confusion regarding which factors should be analyzed when determining whether or not interns qualify as employees. The new test also adds more flexibility for analyzing interns' relationships with employers on a case-by-case basis. As a result, the Wage and Hour Division will update its enforcement policies to solidify this change.

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Contact your Miller Canfield employment attorneys with questions regarding how this new test may affect your relationship with your interns or to learn more about our recommended best practices when instituting an internship program.