Legal Alerts

U.S. Department of Labor Issues New Guidelines for For-Profit Corporate Internship Programs

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- While students line up for unpaid internships as a means of gaining valuable work experience, employers must be cautious about how they structure internship programs. An internship that looks too much like an employment relationship may be treated as one, in which case the organization may be required to pay minimum wage and overtime, and abide by other wage and hour laws. New U.S. Department of Labor (DOL) guidelines provide employers more guidance on this topic.
- For a number of years, the DOL maintained a rigid six-part test for distinguishing between interns and employees of for-profit employers. In January 2018, the DOL adopted a new test. Under both tests, if an intern qualifies as an employee, he or she is entitled to both minimum wage and overtime pay under the Fair Labor Standards Act. However, an intern who is not an employee may be unpaid.
- The DOL's new test offers some additional flexibility for employers. It looks at the "economic reality" of the intern-company relationship to determine who is the "primary beneficiary" of the working relationship. If the intern is the primary beneficiary of the relationship, he or she is not an employee and no wages are owed. If the company is the primary beneficiary, the intern is entitled to minimum wage and overtime pay. The DOL has identified seven factors to determine who is the primary beneficiary:

1. **Whether there is an expectation of compensation**. A promise of compensation suggests that the intern is an employee; an understanding that the intern will be unpaid suggests that the intern is not an employee.
2. **Whether the internship provides training similar to the training given in an educational environment**. Training resembling the activities of a student in a clinical or other hands-on training program provided by a school suggests that the intern is not an employee.
3. **Whether the internship is tied to a formal educational program**. If the intern receives class credit or the program is integrated with school coursework (for example, if the intern will write a paper for school about the internship experience), the intern is less likely to be considered an employee than if the program is entirely independent of the intern's formal education.
4. **Whether the internship accommodates the intern's academic commitments**. Does the internship program correspond to the academic calendar? Is it scheduled to last approximately the length of the school semester or the course of the summer break? Does the intern's work schedule accommodate the intern's academic classes? If the answer is "Yes" to these questions, it suggests that the intern is not an

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employee.

5. **Whether the length of the internship will last only so long as the internship provides the intern with beneficial learning**. An internship that continues indefinitely or which "grossly exceeds" the period of beneficial learning suggests an employment relationship rather than a true internship. An appropriate length for an internship depends on the skills and experience the intern is expected to gain from the internship.
6. **Whether the intern's work complements or displaces the work of paid employees**. Work performed by an intern that would otherwise be done by a paid employee suggests an employment relationship. Work that complements, but does not displace the work of paid employees, and work that provides educational benefits to the intern, suggest that the intern is not an employee.
7. **Whether there is an expectation that the intern will receive a paid job at the end of the internship**. The expectation that the intern will become a paid employee at the conclusion of the internship suggests an employment relationship.

- These factors alone do not determine whether the participant can be an unpaid intern or must be paid as an employee, and some of the factors might even conflict. Ultimately, the answer to the intern-or-employee question depends on the unique circumstances of the internship. This flexibility is a big change from the DOL's former test, which had considered all interns to be employees unless the company met each of six specific requirements.
- The new test also eliminates the requirement that the employer derive "no immediate advantage" from the intern's work. Under the new test, the fact that an employer receives some benefit from an intern's efforts does not automatically transform the intern into an employee. After all, an unpaid intern may provide some value to an employer, but still be the "primary beneficiary" of the working relationship – like when an intern receives academic credit or mentoring and hands – on experience that advances educational or career goals. But, the intern must be more than just free labor, so employers should design programs that provide educational or vocational benefit to interns.
- The DOL's new test is consistent with the court decisions that have applied this seven-factor test for several years. Most recently, the 9th Circuit Court of Appeals used the test to uphold a decision that beauty school students were not entitled to compensation for their unpaid work in a school-operated salon, as the students received academic credit and hands-on training from their work. Another court recently found that unpaid interns for various magazines did not qualify as employees, in part because they received valuable mentorship, familiarity with an industry through day-to-day experience and development of "practical skills."
- If you have questions about internship programs at your company and how the new DOL guidelines apply, please contact Foster Garvey's Employment & Labor group.

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