

Are Interns Actually Employees? The DOL Offers New Guidelines

On January 5, 2018, the Department of Labor ("DOL") clarified that it will use the "primary beneficiary" test to determine whether an intern is actually an employee entitled to minimum wage and overtime under the Fair Labor Standards Act ("FLSA").

The DOL's recent announcement alleviates nearly eight years of confusion created by the DOL in 2010 when it announced a six factor test via an informal guidance document. Although several courts initially applied this six factor test, others rejected it, applying a more flexible and employer-friendly "primary beneficiary" test to determine whether an intern is actually an employee under the FLSA. Reinhart reported on this development in "[Employers: Do You Owe Your Interns Wages? The Answer May Surprise You.](#)"

Under the primary beneficiary test, an intern is not an employee if the tangible and intangible benefits provided to the intern are greater than the intern's contributions to the employer's operation.

To determine whether the intern or the employer is the primary beneficiary of the internship, courts use seven nonexhaustive factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment.
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

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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 DOL has now formally disavowed its six factor test and has adopted the "primary beneficiary" test used by many courts. In its January 5, 2018 News Release, the DOL stated that it will update its enforcement policies, "eliminate unnecessary confusion among the regulated community" and provide investigators "increased flexibility to holistically analyze internships on a case by case basis."

Although the DOL's decision to adopt the primary beneficiary test will likely result in a more flexible and employer friendly application of the FLSA, employers should remain vigilant when classifying individuals as interns, especially if they are unpaid. If you have any questions about whether your interns are properly classified under the FLSA, contact [Rob Driscoll](#) or your Reinhart attorney.

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