

Employers: Do You Owe Your Interns Wages? The Answer May Surprise You

For years, employers wishing to use unpaid interns had to strictly follow a six-factor test promulgated by the U.S. Department of Labor ("DOL"). Employers that failed to correctly classify their interns run the risk of owing the "intern" back wages and penalties.

But this test may be changing. Two federal courts recently rejected the DOL's six-factor test, holding that it does not accurately reflect the role that internships play in the modern economy, and both courts promulgated a new seven-factor test:

- The extent to which the intern and employer understand that there is no expectation of compensation
- The extent to which the internship provides training similar to that which would be given in an academic environment
- The extent to which the internship is tied to a formal academic program
- The extent to which the internship accommodates the intern's academic schedule
- The extent to which the internship's duration is limited to a period of time that provides beneficial learning
- The extent to which the intern and employer understand that there is no expectation of a paid position at the end of the internship
- The extent to which the internship complements, rather than displaces, the work of paid employees

Under the seven-factor test, an employment relationship may still be found to exist between the intern and the employer even if some factors support an "intern" classification—courts are to consider the totality of the circumstances.

Employers must analyze whether their interns are actually employees who must be paid minimum wage and overtime. That analysis is further complicated for Wisconsin employers because Wisconsin continues to use the DOL's six-factor test. And because it is unclear whether Wisconsin will reevaluate its use of the traditional DOL test in light of the recent federal decisions, Wisconsin employers should consider utilizing both the six-factor and the new seven-factor test.

If you currently have, or are contemplating, internships, please contact Rob Driscoll, Katie Triska or your Reinhart attorney for more information.

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