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To Pay or Not to Pay? What the DOL's New Test Means for Summer Internship Programs

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By Jordan Faykus and Emily Harbison of Baker McKenzie

(June 20) – With summer nearly here, many Texas companies soon will be welcoming their summer interns into the workplace. For companies considering unpaid internships, this year marks a substantial change to the legal standard for determining whether or not interns are actually entitled to pay as employees.

Earlier this year, the U.S. Department of Labor did away with its previous six-factor test and announced that it would now be utilizing the “primary beneficiary test” to determine whether interns and students working for for-profit employers are entitled to minimum wages and overtime pay under the Fair Labor Standards Act.

Employers are required to pay employees for their work, but in some circumstances, interns may not actually be employees under the FLSA and therefore can be unpaid. While the DOL’s previous test required all six factors to be present for the intern to qualify as unpaid, the DOL has stated that the new test “allows increased flexibility to holistically analyze internships on a case-by-case basis.” With the new flexibility, it is believed that more internship programs could qualify as unpaid.

Background

Until earlier this year, the DOL used the following six factors for determining unpaid intern status:

1. The internship work is similar to the

training the intern would receive in a vocational or academic environment;

2. The training or internship is primarily for the benefit of the intern;

3. The intern does not displace regular employees, but works under their close supervision;

4. The employer company derives no immediate advantage from the activities of the intern, and occasionally, its operations may actually be impeded;

5. The interns are not necessarily entitled to a job after completion of the internship; and

6. The employer company and the intern both understand that the intern is not entitled to wages for the time spent in training or the internship.

As mentioned above, the DOL’s prior test required that all six factors be present for the intern to qualify as unpaid.

However, a few years after the DOL implemented its six-factor test in 2010; the U.S. Court of Appeals for the 2nd Circuit rejected the test and adopted a different, non-exhaustive, seven-factor test. Later the 11th and 7th circuits also rejected



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the test.

After the 9th Circuit became the fourth federal appellate court to expressly reject the DOL's six-factor test in December 2017, the DOL officially abandoned that test and adopted the primary beneficiary test.

The primary beneficiary test

The DOL's newly-adopted primary beneficiary test looks at whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test consists of the following seven factors and is described as a flexible test, with no single factor being determinative.

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, expressed 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 DOL's Fact Sheet #71 addressing Internship Programs Under the Fair Labor Standards Act can be found [here](#). As explained, the FLSA requires for-profit employers to compensate employees for their work.

However, if it is determined through the primary beneficiary test and the above seven factors that the intern is the primary beneficiary of the relationship, the intern will not be considered an employee under the FLSA and can be unpaid.

Conclusion

It remains to be seen how the DOL will apply the new test, but this change should provide employers with more flexibility to have unpaid interns when the intern is the primary beneficiary of the internships.

If your company is already planning to bring on unpaid interns, or is simply exploring the possibility of a new unpaid internship program, you will need to consider the DOL's new primary beneficiary test to ensure that your program is complaint and to protect your organization against costly claims for pay and overtime.

Jordan Faykus and Emily Harbison are partners in Baker McKenzie's Employment Counseling and Litigation Practice Group in Houston.