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ALERT

Department of Labor Issues New, Tougher Intern Test; Focuses on “Primary Beneficiary”

By Bennett Pine

On January 5, 2018, the U.S. Labor Department embraced a new test for determining whether an individual should be considered an unpaid intern or a paid employee under the Fair Labor Standards Act. The new test, referred to as the so-called “primary beneficiary” test, focuses on whether it is the individual or the employing entity that benefits most from the arrangement — a standard that should prove tougher for employers than the previous one. The primary beneficiary test was set forth by the Second U.S. Circuit Court of Appeals in *Glatt v. Fox Search Light Pictures Inc.*, 811 F.2d 528, 536-7 (2nd Cir. 2016) and has been adopted by at least three other appellate courts.

The *Glatt* test now adopted by the Labor Department is a seven-factor test by which courts look at the “economic reality” of an intern’s relationship with their employer to determine which party is the “primary beneficiary.”

If the employer is the primary beneficiary, the intern must be paid. But, if, on the other hand, the intern is the primary beneficiary of the relationship, the intern may be unpaid.

The Labor Department set forth the following seven factors as part of the economic realities test to determine whether interns and students working for “for profit” employers are employees entitled to minimum wages and overtime:

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.

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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 Labor Department explained that, as described, the primary beneficiary test is a flexible test and that no single factor is determinative. Thus, the question of whether an intern or student is an employee under the law "necessarily depends on the unique circumstances of each case."

It should be noted that the department's new test applies to "for profit" businesses. Unpaid internships for public sector and non-profit charitable organizations where an intern may "volunteer" without expectation of compensation continue to be permissible.

Employers with interns should examine their internship programs under the Labor Department's new test to determine compliance with the Fair Labor Standards Act.

We will continue to monitor developments and interpretations of the new internship test. ▲

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