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DEPARTMENT OF LABOR MODIFIES INTERNSHIP PROGRAM GUIDANCE

On January 5, 2018, the Department of Labor ("DOL") adopted a new test to determine when interns in the for-profit private sector can be excluded from minimum wage and overtime requirements under the Fair Labor Standards Act ("FLSA") and issued a revised Fact Sheet ([Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act](#)).

THE DOL'S SIX-PART TEST HAS BEEN REPLACED WITH A PRIMARY BENEFICIARY TEST

Historically, the DOL had utilized six criteria in the analysis of whether unpaid interns could be utilized by a for-profit employer.

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees but works under close supervision of existing staff.
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion, its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Although this has long been the DOL's test, courts increasingly applied a different test, referred to as the "primary beneficiary test." Now, the DOL has formally adopted the primary beneficiary test (described below), replacing its long-standing six-part test.

The newly adopted primary beneficiary test asks what the "economic reality" of the intern-employer relationship is in order to determine which party is the "primary beneficiary" of the relationship. Although this test is flexible, and no single factor is determinative, the following factors should be considered.

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.
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.

If analysis of these factors reveals that an intern is actually an employee, then he or she is entitled to minimum wage and overtime pay under the FLSA, at least from the DOL's perspective.

NOTE FOR NON-PROFITS AND PRACTICAL TAKEAWAYS

This guidance specifically applies to "interns and students working for *for-profit employers*" (emphasis added). The FLSA may apply

differently to not-for-profit employers, in certain situations. The Fact Sheet specifically states that:

The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.

More information about non-profit organizations and the FLSA can be found [here](#).

Employers should evaluate whether their interns are properly classified as employees under the FLSA and applicable state law, as **misclassification can be costly**. Employers also should consult with experienced employment counsel about this issue, as the jurisdiction in which the employees work may affect the necessary analysis.

If you have questions about this topic, please contact **Mary Kate Liffri** at mliffri@hallrender.com or your regular Hall Render attorney.