

Labor Department Adopts More Flexible Stand on Intern Status

by Grant S. Gibeau - Tuesday, January 09, 2018



In a major reversal of Obama-era precedent, the Department of Labor (DOL) has issued a **new Guidance** that simplifies the analysis for determining when a worker is considered an intern instead of an employee under the Fair Labor Standards Act (“FLSA”).

Interns are not considered to be employees under the FLSA and they therefore are not subject to the minimum wage and overtime requirements of that law. However, the FLSA does not actually define when an individual may be considered an intern rather than an employee.

The Prior Approach Was Considered Too Rigid

In 2010 the Obama-era DOL adopted a six-factor test to determine when a worker qualifies as an intern. In order to be considered an intern, employers were required to show that all of the six enumerated factors were met.

The rigidity of the 2010 approach drew criticism from the courts because whether or not a worker was an intern was a “highly individualized inquiry” that was difficult to break down into six set-in-stone factors. Indeed, on December 19, 2017, the Ninth Circuit issued a ruling that made them the fourth federal appeals court to expressly reject the 2010 approach.

New Interpretation Is More Flexible

The DOL's new Guidance, issued on January 5, 2018, adopts the "primary beneficiary test." Under this test, the "economic reality" of the intern-employer relationship is examined to determine which party, either the intern or the employer, is the "primary beneficiary" of the relationship. If the employer is the primary beneficiary of the internship, then the "intern" is an employee under the FLSA, and entitled to be paid as an employee; if the intern primarily benefits, then they do not have employee status.

The new rule specifically lists seven factors which have been traditionally identified as relevant to evaluating an individual's intern status:

1. The extent to which the parties understand that there is no expectation of compensation;
2. The extent to which the internship provides training that would be similar to an educational environment;
3. The extent to which the internship is tied to the intern's formal education program (i.e. if they are receiving academic credit);
4. The extent to which the internship corresponds and accommodates the academic calendar;
5. The extent to which the internship's duration is limited to the period in which it provides the intern with beneficial learning;
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees; and
7. The extent to which the intern and the employer understand that the internship does not carry the promise of a paid job at its conclusion.

Unlike the 2010 approach, the new Guidance provides that intern status can be determined by looking at **any** of the relevant factors. This offers a much more flexible test, and allows the employee determination to be made on a more tailored case-by-case basis.

Bottom Line

Employers historically have had greater success establishing intern status when applying the primary beneficiary test rather than the rigid six-factor test from 2010. It would seem that the current DOL is announcing that employers can now confidently provide valuable internship opportunities for students and other individuals without having those opportunities impeded by an overly rigid test that makes them employees.