

## **Alert** | Labor & Employment



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### **U.S. Department of Labor Reverses Course on Employment Status of Interns**

On Jan. 5, 2018, the United States Department of Labor (DOL) announced that it will utilize the so-called “primary beneficiary” test to determine whether interns are employees under the Fair Labor Standards Act (FLSA). This announcement marks a significant policy change from the DOL’s previous guidance which had been criticized by several courts as overly rigid.

A basic tenet of the FLSA is that individuals must be paid for services performed. However, in certain instances, such as with a compliant unpaid internship arrangement, the FLSA does not apply so that the intern is not entitled to minimum wage or overtime pay protections. Since 2010, the DOL has utilized a six-part test (2010 Test) in determining whether interns must be treated as employees. See April 2012 GT Alert: *Intern or Employee? Unpaid Internships May End Up Costing Employers*.

#### **Primary Beneficiary Test**

Starting with the Second Circuit’s opinion in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016), four different U.S. Appeals Courts have rejected the DOL’s 2010 Test and have found that the “primary beneficiary” test is more appropriate. In other words, the courts have reviewed whether, on balance, the intern or the employer is the primary beneficiary of the arrangement. If the employer is the primary beneficiary, the arrangement should be viewed as an employment relationship requiring payment of wages. If the intern is the primary beneficiary, an unpaid arrangement may be acceptable.

The primary beneficiary test has three salient features. First, it focuses on what the intern receives in exchange for his work. Second, it accords courts the flexibility to examine the economic reality as it exists between the intern and the employer. Third, it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment. *Glatt*, 811 F.3d at 536.

### **Evaluation of Unpaid Internship Programs**

In evaluating internship programs under the primary beneficiary test, the courts have considered the following factors:

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.

Unlike the DOL's 2010 test, the primary beneficiary test is intended to be flexible. The seven factors are nonexhaustive and no one factor is dispositive.

### **Final Considerations**

The following considerations should be kept in mind when evaluating the legality of an unpaid internship program. First, the primary beneficiary test and the DOL's revised guidance apply to private sector for-profit employers. Pre-existing law that permits unpaid internships in the government, charitable, and religious sectors remains unchanged. Second, the DOL's guidance is limited to federal law. State and local governments may impose stricter requirements than federal law. Finally, merely labeling an employment relationship as an internship does not provide an exemption from the legal obligation to pay wages for services performed. While the primary beneficiary test provides private sector employers with

increased flexibility in developing internship programs, unpaid interns cannot be used to simply displace the work of paid employees.

## Author

This GT Alert was prepared by **Terence P. McCourt**. Questions about this information can be directed to:

- **Terence P. McCourt** | +1 617.310.6246 | [mccourt@gtlaw.com](mailto:mccourt@gtlaw.com)
- Or your **Greenberg Traurig** attorney

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