

# DOL Says Goodbye to Six-Factor Unpaid Internship Test

## Labor & Employment Law Update

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On Friday, the Department of Labor abandoned its six-part test for determining whether an intern must be paid, and replaced with the more employer-friendly “primary beneficiary test.” This announcement came less than a month after the Ninth Circuit became the fourth federal appellate court to expressly reject the DOL’s six-factor test in favor of the primary beneficiary test.

### Background

Under the Fair Labor Standards Act (FLSA) employers must generally pay employees minimum wage for all hours worked, and overtime for all hours worked over 40 in a week. The FLSA, however, exempts certain individuals from these requirements, including *bona fide* interns. To determine whether an intern was *bona fide*, the DOL introduced a six-factor test in 2010, which required that:

1. The internship was similar to training that would be offered in an education environment;
2. The internship experience was for the benefit of the intern;
3. The internship was not displacing a regular employee;
4. The training provide by the employer to the intern may have impeded the employer’s operations;
5. The intern was not expecting a permanent position at the conclusion of the internship; and
6. Both the employer and the intern understand that there was no compensation.

According to the DOL, if even one of these factors did not apply, the individual was an employee — not an intern — and was required to be paid minimum wage and overtime.

### The Primary Beneficiary Test

First articulated in 2015 by the Second Circuit Court of Appeals, the primary beneficiary test is a case-by-case approach that gives consideration to the following seven 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.

Importantly, no single factor is dispositive, and the employee/intern distinction will be based on the unique circumstances of each case.

#### **Bottom Line**

While the primary beneficiary test will provide more flexibility for businesses preparing for the 2018 internship season, employers must still be careful in designing internship programs. As the above factors indicate, the primary beneficiary of any program must still be the intern — not the employer.

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