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Still Using Unpaid Interns? Be Sure to Comply With Federal and Applicable State Law

For years, employers' use of unpaid interns has been under siege. However, the U.S. Department of Labor (USDOL) recently relaxed the standard employers must meet to employ unpaid interns by adopting a balancing test rather than requiring certain enumerated factors. The need for caution still very much exists since some state laws continue to differ.

In 2010, the USDOL instituted a crackdown on employers that failed to pay interns, in violation of the Fair Labor Standards Act (FLSA), increasing its investigations and assessing fines. In conjunction with this new level of enforcement, the USDOL issued Fact Sheet #71, which outlined a six-factor test a for-profit employer[1] must meet to exempt an intern from FLSA's minimum wage and overtime provisions. Under that test, it would be almost impossible for a for-profit employer to employ unpaid interns without violating the FLSA.

Since its issuance, several courts have rejected the Fact Sheet #71 test as inconsistent with the FLSA. As such, on January 5, the USDOL amended the Fact Sheet to adopt the "primary beneficiary" test used by four federal appellate courts in deciding whether interns are employees who must be paid in accordance with the FLSA. The most significant change between the old test and the newly-adopted one is the elimination of the requirement that the employer not receive any immediate benefit from the intern's work. Under the new test, the following non-exhaustive list of factors should be considered and *balanced* to determine whether the individual functions more like an employee or an intern:

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 degree to which the internship is tied to a formal educational 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.

None of the above factors is determinative on its own, and the outcome of the analysis will depend on the unique circumstances of each case. Ultimately, on balance, employers that receive more from their unpaid interns than the interns gain from the experience will likely be violating the FLSA.

Employers must also be aware of applicable state laws that may differ or be more restrictive. Indeed, several states, including New York, New Jersey, Connecticut, and Massachusetts, still require strict compliance with enumerated criteria demonstrating that the responsibilities of an intern are materially different from those of regular employees — including that the employer cannot receive a benefit from the intern's services unless, in some cases, the intern receives educational credit.

Mistakes are costly — a Boston private equity firm was recently assessed more than $550,000 in back wages and penalties for misclassifying employees as unpaid interns. Employers must think carefully about whether an individual is working for his/her own benefit or that of the employer, is displacing the legitimate work of an employee, and is receiving academic credit for his/her work. When in doubt, employers should continue to compensate such individuals at a rate of at least the applicable minimum wage.

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[1] Individuals who volunteer to perform services for a state or local governmental agency or for non-profit entities of a religious, charitable, civic, or humanitarian nature with a mutual understanding that there will be no compensation are generally exempt from the FLSA's minimum wage and overtime requirements. This is generally true under state laws as well.

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