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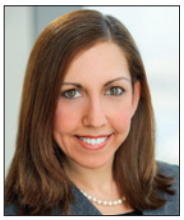
Expert Analysis

Intern or Employee? The New Federal Test



By **David E. Schwartz**

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On Jan. 5, 2018, the U.S. Department of Labor (DOL) announced it would replace its six-part test for determining when an intern is entitled to minimum wages and overtime pay as an employee under the Fair Labor Standards Act (FLSA), and adopt instead a flexible "primary beneficiary" test which has been applied by four federal courts of appeals. In short, the DOL's new test allows courts to examine the economic realities of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship.

Old Test

The DOL promulgated its six-part test in 2010 in reliance upon the U.S. Supreme Court case *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), which found unpaid railroad brakemen trainees were not employees and were, instead, beyond the reach of the FLSA's minimum wage protections. Under the six-part test, in order for a worker to be properly classified as an unpaid intern rather than an employee entitled to rights and protections under the FLSA, all of the following six conditions had to be met: (1) the internship, even though it included operation of the employer's facilities, had to be similar to training which would be given in an educational environment; (2) the internship experience had to be for the benefit of the intern; (3) the intern could not displace regular employees, and had to work under close supervision of existing staff; (4) the employer that provided the training could derive no immediate advantage from the activities of the intern, and on occasion its operation might actually be impeded; (5) the intern was not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understood that the intern was not entitled to wages for the time spent in the internship.

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One often problematic requirement was that employers could not properly classify a worker as an unpaid intern if the employer derived "immediate advantage" from the individual's work. This element came from the Supreme Court's *Portland Terminal* decision which held unpaid railroad brakemen trainees were not employees under the FLSA, noting that, "the

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railroads receive[d] no 'immediate advantage' from any work done by the trainees."

The DOL's test was viewed by many employers as making it unfeasible to have unpaid interns. Many class action lawsuits were filed, relying on these requirements, claiming former interns were entitled to back wages and other damages. In the wake of those actions, a number of employers disbanded unpaid internship programs.

Primary Beneficiary

Despite the DOL's promulgation of the stringent, six-part test in 2010, four federal courts of appeals have since conducted their own analysis of *Portland Terminal*, and expressly rejected the DOL's requirements. Instead, the courts articulated a more flexible, fact specific, factor-based test which focuses on determining the "primary beneficiary" in a given working relationship. Under this analysis, if the primary beneficiary of the relationship was the individual worker, then the individual worker could properly be considered an intern. On the other hand, if the employer was the primary beneficiary of the relationship, then the individual worker must instead be considered an employee.

The Second Circuit, though not the first circuit court that expressly rejected the DOL's six-part test, developed the non-exhaustive seven-factor test later applied by both the Eleventh and Ninth Circuits. The DOL adopted this seven-factor test last month. In *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (2d Cir. 2015), amended and superseded by 811 F.3d 528 (2d Cir. 2015), three former unpaid interns of Fox Searchlight Pictures sought to certify a class and collective action against Fox for violations of the FLSA and New York Labor Law by failing to pay them as employees during their internships. The Second Circuit expressly declined to apply the DOL's six-part test, holding it was not entitled to deference and that the proper test under *Portland Terminal Co.* was a flexible one aimed at determining the "primary beneficiary" of the individual's work. The court stated: "By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors, which were derived from a 68-year-old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen."

The Second Circuit outlined the following seven, non-exhaustive, factors for determining the primary beneficiary of the relationship: (1) the extent to which the intern and the employer clearly understand there is no expectation of compensation; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment, including 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; and (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. The Second Circuit stated that no one factor would be viewed as dispositive. Recently, the Second Circuit again applied this flexible seven-factor test in *Wang v. Hearst*, 877 F.3d 69 (2d Cir. 2017) (finding participants in unpaid internship programs could not be classified as employees and therefore were not entitled to compensation for their internships).

In adopting the flexible seven-factor test, the Second Circuit credited the Sixth Circuit's *Solis v. Laurelbrook Sanitarium & Sch.*, 642 F.3d 518 (6th Cir. 2011), which found the

proper approach for determining whether an employment relationship existed in the context of a training or learning situation involved ascertaining which party derived the "primary benefit" from the relationship. The *Solis* court found students enrolled in a vocational training program at an accredited vocational high school were not employees entitled to minimum wage and overtime protections, reasoning the students learned practical skills about work and responsibility in a way consistent with the religious mission of their school and, while the school derived some benefit from work performed by the students, the students did not displace compensated workers.

Citing *Glatt*, both the Eleventh Circuit in *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015), and the Ninth Circuit in *Benjamin v. B & H Educ.*, 877 F.3d 1139 (9th Cir. 2017), also found the proper interpretation of the Supreme Court's decision in *Portland Terminal* was not the DOL's six-part test, but was instead the "primary beneficiary" test articulated first by the Sixth Circuit and then more fully developed by the Second Circuit.

The DOL's newly articulated guidance, in an update to its Fact Sheet #71, adopts the flexible seven-factor test outlined by the Second Circuit in *Glatt* and adopted by the Eleventh Circuit and Ninth Circuit in *Schuman* and *Benjamin*, respectively. Acknowledging that no single factor is dispositive, the DOL explained that the test allows courts to examine the economic reality of the intern-employer relationship to determine which party is the primary beneficiary.

New York State

It remains unclear whether the New York State Department of Labor (NYSDOL) will adopt the DOL's new flexible seven-factor "primary beneficiary" test when determining intern status under the New York Minimum Wage Act. The NYSDOL has had its own longstanding test for determining whether an individual should be classified as an intern or employee. The NYSDOL test incorporates the DOL's 2010 six-part test and includes the following six additional requirements (all of which must be satisfied for an individual to be properly classified as an intern): (1) the trainees or students are notified, in writing, that they will not receive any wages and are not considered employees for minimum wage purposes; (2) any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity; (3) the trainees or students do not receive employee benefits; (4) the training is general, and qualifies trainees or students to work in any similar business—it is not designed specifically for a job with the employer that offers the program; (5) the screening process for the internship program is not the same as for employment, and does not appear to be for that purpose—the screening only uses criteria relevant for admission to an independent educational program; and (6) advertisements, postings or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

Employers must comply with the strictest standard in each jurisdiction in which they have employees.

Conclusion

The DOL's new test could encourage more employers to re-instate or continue unpaid internship programs. As the new DOL factors make clear, however, any unpaid internships still must be primarily for the benefit of the intern and predominantly educational in character. The risks of misclassification are still high, as the FLSA authorizes the DOL and aggrieved employees (e.g., misclassified interns) to bring suit for back pay, liquidated damages and attorney fees.

Moreover, some states may continue to have more rigorous tests for unpaid interns under their own wage and hour laws. Employers must comply with the strictest standard in each jurisdiction in which they have employees.