DOL Rejects Its Six-Factor Test and Adopts "Primary Beneficiary" Test

Jan 10, 2018

Categories:

Publications

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On January 5, the Department of Labor (DOL) announced that it will no longer use its six-factor test to determine whether interns working at for-profit employers are subject to the FLSA. This announcement comes on the heels of the Ninth Circuit expressly rejecting the six-factor test in *Benjamin v. B&H Education, Inc.,* 2017 WL 6460087, at *4-5 (9th Cir. Dec. 19, 2017). The *Benjamin* decision marked the fourth circuit court (including the Second, Sixth and the Eleventh Circuits) to expressly reject the DOL's six-factor test since its implementation in 2010. In its announcement the DOL stated that:

> [G]oing forward, the Department will conform to these appellate court rulings by using the same 'primary beneficiary' test that these courts use to determine whether interns are employees under the FLSA. The Wage and Hour Division will update its enforcement policies to align with recent case law, eliminate unnecessary confusion among the regulated community, and provide the Division's investigators with increased flexibility to holistically analyze internships on a case-by-case basis.

Under the abandoned six-factor test, an intern was deemed an employee unless all of the following factors were met:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

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- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The DOL has now adopted the "primary beneficiary" test that was laid out in *Glatt v. Fox Searchlight Pictures, Inc.,* 811 F.3d 528, 536-37 (2d Cir. 2015). The "primary beneficiary" test is a flexible test, and no single factor is determinative. In Fact Sheet #71, the DOL provides the following factors for the "**primary beneficiary**" test:

- 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.
- 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. This factor weighs in favor of the employer if the internship provides training that is similar to the educational environment.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit. An internship that is tied to a college or other education program, including the receipt of credit, suggests that the interns are not employees.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. For example, internships tied to summer or winter school breaks weighs in favor of the interns not being employees.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning. Limited time internships weigh in favor of the intern not being treated as an employee.

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- 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. This factor weighs in favor of the employer if the interns do not displace the work of paid employees.
- 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. This factor weighs in favor of the employer if there is no promise or expectation of a job immediately after the internship or schooling is completed.

Whether an intern is an employee under the FLSA depends on the unique circumstances of each case. The "primary beneficiary" test is friendlier than the six-factor test for those employers who wish to establish internship programs. Even in Circuits that have not formally adopted the "primary beneficiary" test, courts are more likely to apply the "primary beneficiary" test now that the DOL has abandoned its alternative test. However, employers should still focus on the nature of these programs. The program and scheduling must clearly focus on the educational purpose and explain that there is no expectation of compensation.

For more information, please contact Neal Shah, Brice Smallwood, or any attorney in Frost Brown Todd's Labor and Employment Practice Group.

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