

Intern implications

How new Department of Labor guidelines will affect unpaid internships

In 2010, the U.S. Department of Labor (DOL) issued guidance limiting for-profit companies' ability to have unpaid interns. However, courts increasingly rejected that stringent six-part test.

On January 5, 2018, the DOL's Wage and Hour Division published its decision to adopt the "primary beneficiary" test for determining whether interns and students are employees under the Fair Labor Standards Act (FLSA).

"The Department of Labor is using the primary beneficiary test to conform to four Circuit Courts' rulings adopting the same standard," says Joseph Fluehr, an attorney at Semanoff Ormsby Greenberg & Torchia, LLC.

Smart Business spoke with Fluehr about the new FLSA guidelines, how employers will be impacted, and the importance of abiding by the new regulations.

What are the new guidelines for unpaid internships?

The FLSA requires that employees of for-profit employers are paid pursuant to minimum wage and overtime requirements. Previously, the DOL maintained a six-part test for determining whether a worker was properly labeled as an unpaid intern. However, the DOL's new guidance follows the Second, Sixth, Ninth and Eleventh Circuit Courts' decisions in providing for the examination of the 'economic reality' of the intern-employer relationship to determine which party is the 'primary beneficiary' of the relationship.

The seven factors, as stated by the DOL, include:

1) The extent to which the intern and the employer clearly understand that there

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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.

How will employers be impacted?

The DOL's adoption of the 'primary beneficiary test' has increased flexibility in determining who is properly labeled an intern. This increased flexibility aids employers in the fight to utilize unpaid interns. However, as no single factor is determinative, the DOL does not provide definitive guidance to for-profit employers, who should still ensure that an unpaid intern is, in fact, the 'primary beneficiary' of the relationship.

What should employers do to abide by the new guidelines?

Simply naming someone an unpaid intern will not survive a challenge to the intern's status. The DOL's guidelines suggest a balancing of the seven factors in determining whether the intern or the employer is the primary beneficiary of the relationship.

The most important take-away from the change by the DOL is that for-profit employers should ensure that the unpaid intern gets more out of the relationship than the employer. Therefore, employers should consult an attorney familiar with the relevant case law relied upon by the DOL as well as the provisions of the FLSA in reviewing their internship programs. ●