



## **e-Alert: Intern or Employee? — DOL Adopts New Test to Decide**

The US Department of Labor (DOL) announced its adoption of a new test on January 5, 2018, to determine whether interns of for-profit companies count as employees under the Fair Labor Standards Act (FLSA). The former six-part test has been replaced by the “primary beneficiary” test, which uses seven factors to determine whether the employer or the intern is the primary beneficiary of the relationship. The new test has been in use by the federal appellate courts.

### **The 7 factors in the primary beneficiary test**

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.

The new test is considered more flexible than the previous one, in that no single factor determines the primary beneficiary; rather **all factors will be considered in each individual case**. If analysis determines the intern is an employee, they will be entitled to both minimum wage and overtime pay, under the FLSA.

HR Knowledge previously offered guidance on [summer internships](#). The statement from the DOL can be read [here](#). Please [contact us](#) with any questions.

### **Next Steps for Employers**

Employers should take steps to ensure their interns meet this test. Each internship should be evaluated on a case-by-case basis. In doing so, employers should carefully consider the structure of their internship programs and those of the schools with which they affiliate any compensation and the methods of payment, and any agreements with the interns or the schools. The safest approach for employers is to pay their interns at least minimum wage. Additionally, if the intern is working in a jurisdiction with sick leave requirements, such as Massachusetts, they are most likely entitled to earned sick time as well.

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