

# Department of Labor Scraps Prior Unpaid Intern Test and Adopts More Flexible Approach

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Employment

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The U.S. Department of Labor (DOL) recently announced that it will apply a new, more flexible test for determining whether interns working for “for-profit” companies are entitled to minimum wage and overtime protection under the federal Fair Labor Standards Act (FLSA). The new test is set forth in [DOL Fact Sheet #71](#) (updated January 2018).

The FLSA requires employers to pay “employees” minimum wage and overtime. It has long been recognized, however, that certain categories of workers are not “employees” for purposes of the FLSA. This includes unpaid interns. Prior to this announcement, the DOL applied a strict test that required private employers to establish six different factors to demonstrate that workers were appropriately classified as unpaid interns. In the past few years, as litigation over the use of unpaid interns increased, that test had been rejected by courts, including the United States Courts of Appeals for the Second and Ninth Circuits. Decisions issued by those courts favored a more flexible test that holistically examines the relationship between an intern and employer to determine who is the “primary beneficiary” of the relationship.

The announcement by DOL is intended to align its enforcement policies with this more recent case law and provide DOL investigators with greater flexibility in analyzing issues involving unpaid interns on a case-by-case basis.

## The Old Six-Factor Test

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Under the 2010 test, the Department of Labor applied six criteria to determine whether interns of for-profit, private sector companies were employees for purposes of the FLSA. The criteria that an employer had to establish in order for interns to be appropriately classified included that: (1) the training was similar to what would be provided in a vocational school or academic educational institution; (2) the training was for the benefit of the interns; (3) the interns did not displace regular employees, but worked under their close supervision; (4) the employer derived no immediate advantage from the activities of the interns and occasionally had their operations impeded; (5) the interns were not necessarily entitled to a job after completion of the program; and (6) it was understood that the interns were not entitled to wages for the time spent training.

All six of these criteria needed to be satisfied in order to establish that an intern was not an employee and thus, not covered by the FLSA.

## The New Primary Beneficiary Test

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Under the new test, rather than inflexibly focusing on six factors that each have to be established, the DOL will examine the “economic reality” of the situation and assess whether the intern or the employer derives the primary benefit from the relationship.

To assist in this, the DOL will now examine seven *non-exhaustive* factors. These are: (1) the extent to which the intern and employer clearly understand there is no expectation of compensation; (2) the extent to which the internship provides training similar to what would be provided in an educational environment; (3) the extent to which the internship is tied to the intern’s formal education program such as through integrated coursework; (4) the extent to which the internship accommodates the intern’s academic commitments; (5) the extent to which the internship’s duration is limited to the period in which it provides the intern with beneficial learning; (6) the extent to which the intern’s work complements (but does not displace) the work of paid employees and provides significant educational benefits to the intern; and (7) the extent to which the intern and employer understand that the internship is conducted without an entitlement to employment at its conclusion.

The DOL’s new test only applies to interns in the “for-profit” environment. Fact Sheet #71 specifies that unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. A separate test, however, is used by the DOL to assess whether someone is a true “volunteer.”

## Takeaway

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As noted, the new DOL test aligns its enforcement policies with recent case law on the issue of whether interns are entitled to the protection of the FLSA and will be used going forward in enforcement actions by DOL. While the new test provides greater flexibility in the use of unpaid interns, given the spate of litigation over these issues in the past few years and the fact-specific nature of the test, employers should carefully examine the issue and seek the advice of counsel with respect to their use of unpaid internships.

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