Labor Department's New Approach Is A Game Changer For Student Internships

Insights
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The U.S. Department of Labor rang in the new year by announcing that it will abandon its rigid six-part test for determining whether interns qualify as employees under federal wage and hour law, introducing some much-needed flexibility and reasonableness into this important legal test. By taking a step back from an all-or-nothing approach to align with several less restrictive court decisions, the agency has moved in a direction that should be a welcome development for *all* parties affiliated with internships.

Historical USDOL Test: Writing On The Wall
Historically, the U.S. Department of Labor (USDOL) has taken the position that, in most scenarios, six factors control whether an intern is, in fact, an employee under the Fair Labor Standards Act (FLSA). The USDOL's articulated test required that *each and every* of the six factors were met in order to exclude the individual from the FLSA's minimum wage and overtime protections.

This rigidity led to an increasing wave of litigation across various industries filed by those classified as "interns" but who believe they may be entitled to compensation as "employees." Essentially, one misstep on the part of the organization could call into question the individual's status—and by extension, the entire internship program.

However, the four federal circuit courts that have faced the question consistently rejected the USDOL's all-or-nothing approach. Instead, the courts favor the adoption of some version of a "primary beneficiary" test, whereby they may be guided by several non-dispositive factors that seek to determine which party receives the greater benefit from the internship arrangement.

Most recently in *Benjamin v. B&H Education, Inc.*, the 9th Circuit Court of Appeals (with jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Nevada, Montana, Oregon, and Washington) expressly rejected the USDOL's inflexible test, and instead adopted the primary beneficiary test applied by some circuit courts. This test focuses on the economic realities of the relationship, weighing seven factors:

- 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 the intern is an employee—and vice versa;

- The extent to which the internship provides training that would be similar to that offered in an educational environment, including the clinical and other hands-on training provided at educational institutions;
- The extent to which the internship is tied to the intern's formal education program by integrating coursework or qualifying the intern for academic credit;
- The extent to which the internship corresponds with the academic calendar to accommodate the intern's academic commitments;
- The extent to which the duration of the internship is limited to the period in which the intern receives beneficial learning;
- The extent to which the work performed by the intern complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
- The extent to which the intern and the employer understand that the intern is not entitled to a paid job at the conclusion of the internship.

Shortly after the 9th Circuit published its decision, the USDOL issued a January 5, 2018 press release that "clarified that going 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."

Placements Affiliated With Educational Institutions

The agency's decision to adopt the standard accepted by these circuit courts doesn't necessarily make it easier to properly establish non-employee internships. However, it could arguably put both internal and external internships affiliated with educational programs in an *even more favorable* position than before.

Historically, if the alleged employer ran afoul of any one of the test factors (for example, by displacing workers as a result of the internship), then the student could argue that an employment relationship exists, which might allow them to prevail in a legal claim by relying upon the USDOL's all-or-nothing approach. Under that test, since the organization received economic benefit from the intern's work, the intern would almost certainly be classified as an employee.

But under the new test, the USDOL analyzes factors that are primarily influenced by the institution responsible for placing the intern. Accordingly, even where some of the factors point to an employment relationship, if they were *not* under the control or influence of the placing institution, there now appears to be a fair chance that a non-employee internship might be established.

Time To Examine Your Placements

These developments are favorable to educational institutions and to any of your programs that require or otherwise promote student internships, whether students are placed internally or externally at some various entity. Still, you should be very deliberate and strategic in your actions when it comes to internships.

Decision-makers at your organization should consider the above factors along with similar tests under other laws. Also, in an effort to minimize the risk of a challenge, consult legal counsel before you determine what terms are to be mandatory for approval of an internship placement. While it may have seemed like a lost cause in some past instances, the USDOL's new test means that you can aim to ensure that *any* (if not all) of the factors weigh in favor of achieving a laudable outcome for *all* parties affiliated with an internship program.

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