



# USDOL's Inflexible Intern Test Headed To The Shredder

Insights

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The U.S. Department of Labor (USDOL) just announced that it will abandon its six-part test for determining whether interns qualify as employees after yet another court favored the alternative, primary beneficiary test. As we have blogged about [before](#), the agency historically has taken the position that six factors control whether an intern of a for-profit employer is, in fact, an employee. The USDOL's articulated test required that each and every factor be met to exclude the individual from the FLSA's minimum wage and overtime protections. But with Friday's announcement, the agency instead lined up with a number of federal courts that have adopted a more flexible approach.

## Overwhelming Lack Of Support For USDOL Test By Federal Courts

In recent years, there has been a wave of litigation filed by "interns" across various industries. However, the four federal circuit courts that have faced the question have consistently rejected the USDOL's clunky, all-or-nothing approach. Instead, the courts favored adopting some version of a primary beneficiary test, whereby they may be guided by several different, non-dispositive factors that seek to determine who receives more of the 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 "rigid" test adopted by the USDOL, and instead adopted the primary beneficiary test as articulated by the [2nd Circuit](#). This test focuses on the economic realities of the relationship, weighing and balancing seven different factors:

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.

Shortly after the recent 9th Circuit decision was released, the USDOL issued a press release which "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." The agency has updated [Fact Sheet #71](#) to reflect the more flexible test, though it remains to be seen exactly how it will address the test in its weightier [materials](#).

### **Bottom Line**

Since no circuit court adopted the USDOL's test, the agency's decision to abandon it and adopt the standard accepted by these circuit courts is not surprising. Having said that, the decision doesn't necessarily mean that it will be easier to properly establish non-employee internships. An employer that currently has unpaid interns, or is considering unpaid interns in the future, should be very deliberate and strategic in its actions. Decision makers should carefully review the primary beneficiary test with legal counsel before concluding that the interns are, in fact, non-employees for FLSA or other purposes.

### ***Related People***

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**Marty Heller**

Partner  
404.231.1400  
Email