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PAVING THE WAY FOR UNPAID INTERNS: TRUMP ADMINISTRATION RELAXES THE STANDARDS

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Internships are often a great way for students and young people to get their foot in the door and land their first job. But employers must ask themselves: is your unpaid intern ***actually*** an intern, or is the "intern" really an employee entitled to wages? Last week, the Department of Labor ("DOL") aimed to provide clarity and flexibility when it revised its guidance for determining whether an unpaid intern is an "employee" who must be paid under the federal Fair Labor Standards Act ("FLSA").

Unpaid internships have been the focus of some legal uncertainty over the past several years. The source of that uncertainty may be the FLSA's simplistic definition of "employee" as "an individual employed by an employer." The Supreme Court has yet to fully address the difference between unpaid interns and paid employees, but in 1947, the Court recognized that unpaid trainees should not be treated as employees for purposes of the FLSA. In *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the Court relied on several factors in determining that certain railroad trainees were not "employees," including that the trainees did not displace any regular employees, their work did not expedite the employer's business, they did not expect to receive any compensation, and they would not necessarily be hired after completing training.

Despite the obvious changes in the workforce since 1947, the DOL and federal courts have continued to rely on the reasoning in *Portland Terminal* ever since. For example, in 2010, under the Obama Administration, the DOL published guidance for unpaid interns working in the for-profit private sector that borrowed heavily from *Portland Terminal*. This "Fact Sheet" provided that an employment relationship does **not** exist, but only if **all** of the following factors apply:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; **and**

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If even **one** factor was missing, then an unpaid intern was deemed to be an employee entitled to compensation under the FLSA. Federal courts have taken a different approach. For example, the Second Circuit overturned a district court's ruling that unpaid interns for a movie production company were "employees" under the FLSA. In *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528 (2d Cir. 2015), the court noted the DOL's Fact Sheet, but decided a more flexible balancing test was appropriate. Additionally, the court found that the proper question was whether the intern or the employer is the "primary beneficiary" of the relationship. Similarly, in *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993), the Tenth Circuit rejected an "all or nothing" approach, concluding instead that these factors are relevant but that a reviewing court must consider the "totality of the circumstances."

Last week, the DOL updated its guidance, rescinded the 2010 Fact Sheet, and essentially adopted the more flexible "primary beneficiary" test from *Glatt* and similar federal caselaw. According to the new guidance, employers should focus on the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship. The new guidance spells out the following seven factors to consider:

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 DOL's interpretation is now closely aligned with most federal courts. Employers must still carefully evaluate whether their interns are truly interns. For example, assume that an employer offers an unpaid internship to a recent graduate. Some of the seven factors listed above no longer apply (e.g., integrated coursework and academic credit). But under the new DOL guidance, there is no single determinative factor under its "flexible test." How will the other factors balance out? Does the intern receive *enough* coaching and training such that the work he or she provides to the employer renders the intern the primary beneficiary? Has the employer clearly conveyed, either through a written agreement or other communication, that the intern will not be paid, and is not guaranteed a paid position when the internship ends? Put simply, internship programs are often valuable, mutually-beneficial arrangements, but employers should make sure that they are not incurring potentially hefty legal bills and FLSA liability.

Bryan Cave LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess their FLSA obligations. If you or your organization would like more information on the DOL's guidance on internships or any other employment issue, please contact an attorney in the Labor and Employment practice group.

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