

# Labor Department Adopts ‘Primary Beneficiary’ Test for Determining Employee Status of Interns, Students

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The Department of Labor has decided to align its analysis under the Fair Labor Standards Act (FLSA) of the intern-vs.-employee determination with that of the majority of federal appellate courts to have addressed the issue, abandoning the stricter Obama-era analysis. The agency announced on January 5, 2018, that it was adopting the “primary beneficiary” test to determine the employee status of interns and students.

Interns and students working for “for-profit” employers are entitled to minimum wages and overtime pay if they are determined to be employees under the FLSA. To determine whether interns and students are employees, the primary beneficiary test focuses on the economic realities of the relationship to decide whether the intern or the employer is the primary beneficiary of the internship program.

## Background

In December 2017, the U.S. Court of Appeals for the Ninth Circuit became the fourth federal appellate court to expressly reject the DOL’s standard for determining whether interns and students are employees under the FLSA. The DOL followed with its announcement that it would employ the primary beneficiary test approved by three of those four appellate courts, abandoning its six-factor test.

The DOL six-factor test, adopted in 2010, required that all six factors be present for the intern to avoid qualification as an employee subject to the FLSA’s minimum wage and overtime requirements. The most controversial factor was the requirement that the employer could derive no “immediate advantage” from the intern’s work.

## Primary Beneficiary Test

The U.S. Court of Appeals for the Second Circuit, in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015), rejected the DOL’s six-factor test. Instead, the Second Circuit adopted a non-exhaustive, seven-factor test aimed at assessing whether the employer or the individual was the “primary beneficiary” of the relationship. (For details of the decision, see our article, [‘Primary Beneficiary’ Test Determines Employee Status of Unpaid Interns, Federal Appeals Court Rules.](#))

Those factors include:

1. The extent to which the intern and the provider of the internship clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee;
2. The extent to which the internship provides training similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by education 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 beneficial learning to the intern;
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; and
7. The extent to which the intern and the provider of the internship understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.



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Under the Second Circuit's analysis, no one factor is dispositive or preclusive in determining whether an individual is an intern or an employee. The *Glatt* analysis subsequently was adopted by the U.S. Court of Appeals for the Eleventh Circuit in *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015). Most recently, it was adopted by the U.S. Court of Appeals for the Ninth Circuit in *Benjamin v. B&H Education*, 2017 U.S. App. LEXIS 25672 (9th Cir. Dec. 19, 2017). The U.S. Court of Appeals for the Seventh Circuit also rejected the DOL's former analysis, in *Hollins v. Regency Corp.*, 867 F.3d 830 (7th Cir. 2017), although that appeals court did not expressly adopt *Glatt's* primary beneficiary test.

## WHD Enforcement

Finally, the DOL said, "[The] Wage and Hour Division will update its enforcement policies to align with recent case law, eliminate unnecessary confusion among the regulated community, and provide the Division's investigators with increased flexibility to holistically analyze internships on a case-by-case basis."

An updated "[Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act](#)" is available on the Wage and Hour Division website.

The DOL's adoption of the "primary beneficiary" test gives employers a more uniform standard to apply when implementing internship programs.

Please contact Jackson Lewis with any questions about the intern-vs.-employee analysis or any other wage and hour issues.

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