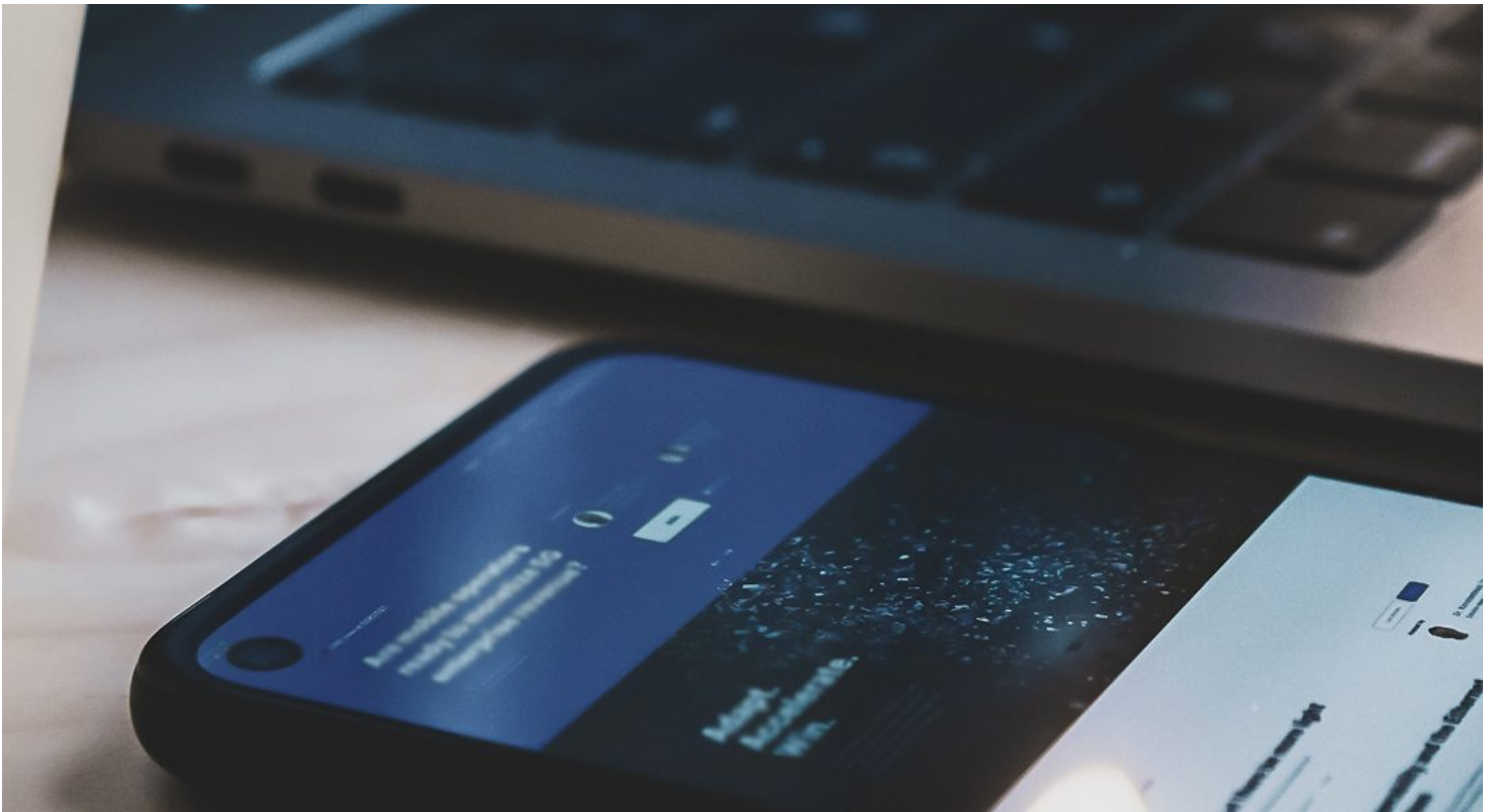


NEWS & INSIGHTS

U.S. Department of Labor Announces Revised “Intern Test”

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Interns may be entitled to backpay according to the newly released seven-factor analysis by the U.S. Department of Labor (DOL).

In a January 5, 2018 news release, the U.S. Department of Labor (DOL) announced that it has changed the six-factor analysis it previously used to determine whether interns are considered employees for purposes of the Fair Labor Standards Act (FLSA). The DOL will now follow the lead of several Federal Circuit Courts of Appeal and adopt the “primary beneficiary” test.

Under the “primary beneficiary” test, the DOL will “examine the ‘economic reality’ of the intern-employer relationship to determine which party is the ‘primary beneficiary’ of the relationship.” Which simply means, is the internship a primarily benefit for the employer or the intern?

The seven factors that constitute the test include:

- (1) Whether there exists a clear understanding that no compensation will be paid;
- (2) The extent to which the internship provides training similar to that which would be offered in an educational setting;
- (3) Whether the internship is connected to the intern’s formal education program, coursework, and academic credits;
- (4) Whether the internship accommodates or corresponds to the intern’s academic calendar;
- (5) The duration of the internship;
- (6) Whether the intern’s duties complement, rather than replace, the work of paid employees; and
- (7) Whether there exists an understanding between the employer and the entity that the internship does not entitle the intern to a paid job after the internship.

Unlike the DOL’s prior six-factor test, no single element is determinative. Under the prior test, even if only one of the factors was not met, the intern was classified as an employee and subject to the requirements of the FLSA, including, but not limited to, payment of minimum wage and overtime.

The liability risks of misclassification of interns is high. Under the FLSA, an individual wrongly classified as an intern may be entitled to backpay, liquidated damages, and payment of their attorneys’ fees. While the new “primary beneficiary” test offers employers more flexibility with respect to their determinations, employers should familiarize themselves with the DOL’s new test and consider each factor carefully. Best practices include, but are not limited to:

- Committing the understanding between the parties to writing,
- Detailing the specifics as to the educational aspects of the internship
- Preparing a checklist as it relates to the factors offering an explanation as to the reasons for your determination that the individual should be classified as either an employee or an intern.

If you have any questions regarding the DOL’s new “intern test,” or any other question related to your obligations under the FLSA, please feel free to contact a member of Saxton & Stump’s [Employment Law Group](#).

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