DOL Adopts Court Favored "Primary Beneficiary Test" For Internship Programs

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On January 5, 2018, the US Department of Labor (DOL) announced that it would no longer follow the six-factor test to determine whether interns are employees for purposes of the Fair Labor Standards Act (FLSA). According to the announcement, the DOL will now follow the "primary beneficiary test," which is favored by a number of federal courts.

The "primary beneficiary test" focuses more on the economic realities of the relationship and examines, among other factors, whether the intern or employer is the primary beneficiary of the relationship. The DOL issued a new Fact Sheet on internship programs under the FLSA. This Fact Sheet lists seven factors for determining whether an intern is an employee:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, expressed or implied, suggests that the intern is an employee.
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 Fact Sheet further provides that "Courts have described the 'primary beneficiary test' as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case."

Misclassifications remain a concentrated area of focus for enforcement actions by the DOL. Providers of internships should continue to be vigilant in reviewing their classifications of individuals as employees or unpaid interns. White and Williams' attorneys are available to answer inquiries regarding this and other workplace developments.

If you have questions or would like additional information, please contact George Morrison (morrisong@whiteandwilliams.com; 646.837.5776) or any member of our Labor and Employment Group.