



## STOKES WAGNER

ATTORNEYS AT LAW

ATLANTA • ITHACA • LOS ANGELES • PITTSBURGH • SAN DIEGO

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#### ***New Primary Beneficiary Test and U.S. Department of Labor's Revised Guidance Provides Employers with More Flexibility for Internship Programs***

Prior to 2018, the United States Department of Labor (“DOL”) had applied a rigid six-part test to determine whether interns must be treated as employees or unpaid interns. However, on January 5, 2018, the DOL announced that, in an effort to eliminate confusion and align itself with recent case law, it would adopt the “Primary Beneficiary” test to determine whether interns are employees under the Fair Labor Standards Act (“FLSA”).

#### ***Primary Beneficiary Test***

Under the Primary Beneficiary Test, courts evaluate whether the intern or the employer is the primary beneficiary of the work relationship. In doing so, the new test focuses on what interns receive in exchange for work performed, is less restrictive on the court’s ability to examine the economic reality of the intern’s relationship with the employer, and emphasizes the fact that, unlike the employer-employee relationship, interns enter the intern-employer relationship with the expectation of receiving educational benefits.

**Questions?** Contact Stokes Wagner.

### ***Evaluation of Unpaid Internship Programs***

Unlike the DOL's 2010 test, the seven factors of the Primary Beneficiary Test are not exhaustive and no one factor is dispositive. In evaluating internship programs under the new test, courts consider the extent to which:

1. The intern and the employer understand that the intern is not entitled to compensation;
2. The internship provides training that would be given in an educational environment;
3. The duration of the internship program is limited to the period when the internship educates the intern;
4. The internship corresponds with the academic calendar;
5. The intern's completion of the internship program entitles the intern to academic credit;
6. The intern's work complements the work of paid employees while providing significant educational benefits; and
7. Both parties understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship program.

Each factor of the Primary Beneficiary Test is used to determine which party is the primary beneficiary of the intern-employer relationship. If the employer is the primary beneficiary, an employment relationship is established and the intern must be paid wages. But, if the intern is found to be the primary beneficiary, an unpaid arrangement will likely be acceptable.

### ***What Does This Mean for Employers?***

With the DOL's recent decision to adopt the Primary Beneficiary Test comes a fresh opportunity for employers to reevaluate their unpaid internship programs, policies and recruiting materials. However, employers should be aware that the DOL's guidance only applies to federal law, which means state and local governments may impose more stringent requirements. Also, employers should

be conscious of the fact that the new test and the DOL's guidance are limited to private sector for-profit employers—meaning all pre-January 5, 2018 laws specific to unpaid internships in the religious, charitable and government sectors remain unchanged. Lastly, despite the increased flexibility offered to private sector employers by the Primary Beneficiary Test, unpaid interns still cannot be used to displace the work of paid employees and an employer's legal obligation to pay wages for services performed cannot be circumvented merely by labeling the work relationship an internship.