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FIELD ASSISTANCE BULLETIN No. 2018-2

MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS

FROM: Bryan L. Jarrett
Acting Administrator

SUBJECT: Determining Whether Interns at For-Profit Employers Are Employees Under the FLSA

The Fair Labor Standards Act (FLSA) requires “for-profit” employers to pay employees for their work. Interns and students, however, may not be “employees” under the FLSA—in which case the FLSA does not require compensation for their work.¹ This Field Assistance Bulletin (FAB) clarifies the factors that the Wage and Hour Division (WHD) will consider when determining whether interns or students are, in fact, employees under the FLSA.

Background

WHD issued Fact Sheet No. 71 in April 2010. That fact sheet memorialized WHD’s position at the time that every intern and trainee would be an employee under the FLSA unless his or her job satisfied each of six independent criteria. Every federal appellate court that has considered the six-part test since WHD issued the fact sheet, however, has expressly rejected the test as overly “rigid” in light of United States Supreme Court precedent—which, the courts have confirmed, requires a more holistic analysis. *E.g.*, *Benjamin v. B & H Educ., Inc.*, --- F.3d ---, 2017 WL 6460087, at *4-6 (9th Cir. Dec. 19, 2017); *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1209-12 (11th Cir. 2015); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011); *see also Walling v. Portland Terminal Co.*, 330 U.S. 148, 149-53 (1947) (analyzing benefits that the employer and trainees derived from their relationship, and noting that the FLSA “was not intended to penalize [employers] for providing, free of charge, [educational] instruction at a place and in a manner which would most greatly benefit the trainees”).

¹ The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.

Instead of using the six-part test, these courts have ruled that the “primary beneficiary test” should be used to determine whether an intern or student is, in fact, an employee under the FLSA. In short, under “primary beneficiary test” test, these courts have examined the “economic reality” of the intern-employer relationship to determine which party is the primary beneficiary of the relationship. Courts have considered the following seven factors as part of the test:

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.

Courts have noted that “[a]pplying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction . . . to conclude that the intern is not an employee entitled to the minimum wage.” *Glatt*, 811 F.3d at 537; *see also Schumann*, 803 F.3d at 1212 (same). This is an inherently “flexible” test. *Glatt*, 811 F.3d at 537. Accordingly, whether an intern or trainee is an employee under the FLSA necessarily depends on the unique circumstances of each case.²

WHD’s Application of this “Primary Beneficiary Test”

WHD will conform to the federal courts of appeals’ determinations and use the same court-adopted test to determine whether interns or students are employees under the FLSA.

² In discussing this test, courts have been clear that “the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment.” *Glatt*, 811 F.3d at 536; *Benjamin*, 2017 WL 6460087, at *5 (“[T]he test acknowledges the distinction between intern-employer relationships, in which interns typically expect to receive educational or vocational benefits, and employee-employer relationships, in which employees do not necessarily expect to receive such benefits.”).

Accordingly, WHD is hereby rescinding the April 2010 version of Fact Sheet No. 71 and Section 10b11 of the Field Operation Handbook, which contain the previous six-part test that the courts expressly rejected. Applying the same “primary beneficiary test” already used by the courts will update WHD’s enforcement to align with recent case law, eliminate unnecessary confusion among the regulated community, and provide WHD’s investigators with increased flexibility to holistically analyze internships on a case-by-case basis.³

³ WHD will update its webpage and other materials to reflect the information in this FAB. Questions about this FAB should be directed to the Division of Enforcement Policy and Procedures, Fair Labor Standards Branch, through regular channels.