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### *Labor and Employment Alert: Department of Labor Adopts a New Test for Unpaid Interns*

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In December 2017, the Ninth Circuit Court of Appeals joined the Second, Sixth and Eleventh Circuits in rejecting the U.S. Department of Labor's (DOL) six-part test for determining whether interns are employees under the Fair Labor Standards Act. In light of this, the DOL recently announced that it would adopt the "primary beneficiary" test these courts have used when evaluating internships.

As the DOL notes, courts have identified the following seven factors as part of the primary beneficiary test:

1. The extent to which the intern and the employer clearly understand there is no expectation of compensation. Promise of compensation, express or implied, suggests that the intern is an employee.
2. The extent to which the internship provides training that would be similar to that in an educational environment, including clinical and other hands-on training.
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 DOL has stated that it will update its enforcement policies "to align with recent case law, eliminate unnecessary confusion among the regulated community," and provide its investigators with "increased flexibility to holistically analyze internships on a case-by-case basis." The primary

beneficiary test is flexible, and no single factor is determinative. Accordingly, whether an intern is an employee under the FLSA depends on the unique circumstances of each case. Employers must be aware that other states may have stricter tests under their state's wage-hour laws, and other courts may disagree with the DOL's new approach. Contact your Vorys lawyer if you have questions about engaging unpaid interns in your business.

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