

**MEMORANDUM**

**To:** ES&A Clients and Friends  
**From:** Anna Elento-Sneed, Esq.  
Trisha Gibo, Esq.  
**Date:** 1/19/2018  
**Subject:** **USDOL Adopts Relaxed Intern Test**

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On January 5, 2018, United States Department of Labor (USDOL) relaxed its test for properly classifying individuals as interns under the Fair Labor Standards Act. If properly classified, employers would be allowed to forego providing minimum wage and overtime to unpaid interns as non-employees.

Previously, the USDOL utilized a rigid, all-or-nothing test, which required employers to meet all six factors, on the finite list, in order to properly classify an individual as an intern. Under this test, which was communicated via USDOL Guidance in 2010, it was almost impossible to utilize unpaid interns. In contrast, USDOL has adopted the court-favored “primary beneficiary test” which set forth in *Glatt v. Fox Searchlight Pictures Inc.*, 791 F.3d 376 (2d Cir. 2015). The *Glatt* test proscribes an individualized analysis and equally considers a non-exhaustive list of seven factors:

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.
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 when the internship concludes.



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Several circuits, including the Ninth Circuit, have adopted the *Glatt* test which has been deemed as properly considering the “economic reality” of the employer/intern relationship. This provides employers with *some* flexibility in its staffing practices.

However, given the USDOL’s shift to a more employer-friendly policy, consistent with the Trump Administration, state administrative agencies may be more aggressive in protecting the rights of employees. Therefore, employers must still be cautious when recruiting and utilizing “free labor” and continue to comply with all other, applicable federal and state laws.