CLIENT ALERT: United States DOL Rescinds Rigid Test Used to Determine Whether Interns Are Considered Employees – By Amy Carlin and Stephanie M. Merabet

In recent years, internships have become an increasingly popular and mutually beneficial way for students and others to gain knowledge and experience in a field of interest, and for employers to benefit from additional support. The prevalence of internship programs sparked a debate about whether interns must be paid for their work as employees under the Fair Labor Standards Act of 1938 ("FLSA"), the federal minimum wage law. In 2010, the U.S. Department of Labor ("DOL") took the position that most private employers' unpaid internship programs were unlawful, and announced that interns would be considered employees under the FLSA, unless the internship comported with six rigid requirements—including that the employer "*derive[d] no immediate advantage from the activities of the intern*." (See MBJ Client Alert dated May 10, 2013 entitled, Summer Hiring – Employers Must Tread Carefully When Engaging Summer Interns and Other Student Hiring).

After several appellate courts rejected the DOL's strict criteria for unpaid internships, on January 5, 2018, the DOL rescinded its prior test, and adopted the courts' more flexible "primary beneficiary" test, which uses seven non-exhaustive factors to determine whether the benefits provided to the intern are greater than the intern's contribution to the employer. Although this test is more fact-specific, it acknowledges that under certain circumstances, an intern may not be considered an employee under the FLSA, even if the employer derives some benefit from the internship.

Now, employers should consider the following factors in determining whether their interns are covered by the federal minimum wage law:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation,

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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; and
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.

Private employers should evaluate their internship programs under the DOL's new set of criteria, and should take the following precautions before offering unpaid internships:

- Clearly state, in writing, that the internship is unpaid and that a job is not guaranteed upon completion of the internship;
- Consider hiring interns through academic programs that provide students with academic credit for participating in student internships; and
- Assign the intern substantive tasks that will provide a meaningful learning experience, rather than menial or administrative tasks that are unrelated to the intern's academic background.

Public employers and non-profit organizations will not need to apply the "primary beneficiary" test to evaluate their internship programs, as the FLSA specifically exempts individuals who volunteer their time for religious, charitable, civic, or humanitarian purposes, or who volunteer to perform services for a state or government agency—provided the individuals volunteer without expectation of compensation. To avoid any misunderstandings, public employers and non-profit organizations should specify in writing that the internship is unpaid when posting the position or offering the position to

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applicants.

Employers are encouraged to contact their MBJ attorney with questions about how this change may impact their internship programs.

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