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Intern or Employee? Second Circuit Outlines Test to Determine Unpaid Interns' Status Under Fair Labor Standards Act and New York Labor Law

The U.S. Court of Appeals for the Second Circuit July 2 handed down a significant decision in *Glatt v. Fox Searchlight Pictures, Inc.* in connection with a pair of lawsuits challenging the legality of unpaid internships under federal and New York law, establishing a new test for determining whether a person is an unpaid intern or a paid employee and enumerating a list of seven non-exclusive factors that a court should consider in making this fact-specific determination.

In the underlying cases, *Glatt v. Fox Searchlight Pictures and Wang v. The Hearst Corporation*, both filed in the U.S. District Court for the Southern District of New York, plaintiffs had argued that their substantial duties as interns entitled them to classification as employees under the Fair Labor Standards Act (FLSA) and New York Labor Law, and therefore to minimum wages and other protections. The district court in *Glatt* granted a motion for partial summary judgment in favor of two plaintiffs, concluding that they had been improperly classified as unpaid interns under the FLSA and New York Labor Law. The court also granted a third plaintiff's motion to certify a class of New York interns and conditionally certified a nationwide FLSA class. In the *Wang* case, the court denied the plaintiffs' motion for partial summary judgment as to their employment status.

On appeal, the Second Circuit vacated the summary judgment orders in both cases and remanded the cases back to the district court. The court recognized that the U.S. Supreme Court has yet to address the difference between unpaid interns and paid employees under the FLSA. A close precedent, however, is a 1947 case, *Walling v. Portland Terminal Co.*, in which the Supreme Court held that unpaid railroad brakemen trainees should not be treated as employees where (1) the trainees did not displace any regular employees, and their work did not expedite the employer's business; (2) the trainees did not expect to receive any compensation and would not necessarily be hired upon successful completion of the course; (3) the training course was similar to one offered by a vocational school; and (4) the employer received no immediate advantage from the work done by the trainees.

Based in part on the *Walling* decision, the U.S. Department of Labor (DOL) published informal guidance in 1967 for when a trainee is an employee, and similar guidance in 2010 for unpaid interns working in the for-profit sector. The 2010 guidance, set forth in DOL Fact Sheet #71, provides that an employment relationship

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exists only if *all* factors in a six-factor test are met: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees but works under close supervision of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The Second Circuit held that the DOL's test is essentially a distillation of the facts discussed in *Walling* and "too rigid" because it attempts to fit the particular facts in *Walling* to all workplaces. Instead, the court found that a "primary beneficiary" test (*i.e.*, whether the intern or the employer is the primary beneficiary of their relationship) that considers the totality of the circumstances is the correct test, because it both focuses on what the intern receives in exchange for her work and accords courts the flexibility to examine the economic reality between the intern and the employer while also reflecting a "central feature of the modern internship - the relationship between the internship and the intern's formal education."

To aid courts in determining whether a worker is an employee for purposes of the FLSA, the Second Circuit set forth seven non-exhaustive factors to consider:

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.

In considering these factors, a court must weigh and balance all of the circumstances. No one factor is dispositive, and every factor need not point in the same direction for a court to determine that the intern is not an employee entitled to minimum wage. A court also may consider relevant evidence beyond the seven factors in appropriate cases.

The Second Circuit in *Glatf* also vacated the lower court's decision certifying a class and collective action. The court held that "the question of an intern's employment status is a highly individualized inquiry" given the nature of the "primary beneficiary" test. The

court explained that “common evidence cited by the plaintiff would not help answer the questions of whether a given internship was tied to an education program, whether and what type of training an intern received, whether the intern continued to work beyond the primary period of learning, or the many other questions that are relevant to each class member’s case.”

Following the same reasoning, the Second Circuit in the *Wang* case upheld the lower court’s denial of class certification.

Practical Implications

There are many practical implications of the *Glatt* and *Wang* cases:

- The DOL’s six-factor test is no longer valid in the Second Circuit (Connecticut, New York and Vermont). It is unclear, however, whether the six-factor test will be applied outside of the Second Circuit. Employers with multistate operations must be cognizant of the law in their respective jurisdictions. Until it becomes clearer which standard applies in their jurisdictions, employers may wish to devise internships that comply with both the “primary beneficiary” test and the DOL’s six-factor test.

The educational aspects of an internship are critical to satisfying the “primary beneficiary” test. Ideally, interns should be students. Internships should emphasize training, including presentations, mock projects, mentoring programs, instruction and constructive feedback on work. School credit should be offered, if possible. Otherwise, companies should contact the intern’s school to get the internship approved or sponsored. Internship dates should also be tied to the school’s calendar to accommodate the intern’s academic commitments.

- Significantly, under the “primary beneficiary” test, an intern may perform “work” so long as it does not displace the work of an employee. Although employers may derive some benefit from the work performed by interns, they must take care to ensure that the primary beneficiary of the internship is the intern. The educational aspects of the internship are critical to this requirement.
- Employers should provide, and require interns to countersign, offer letters stating, among other things, that the internship is unpaid and that the internship does not entitle the intern to a job at the conclusion of the internship.
- Given the individualized inquiry now required for certification of class or collective actions involving interns, it will be much more difficult for interns to proceed on this basis, and it is likely that there will be fewer of these actions.

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