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Unpaid Intern or Employee?

On July 2, the Court of Appeals for the Second Circuit rejected the DOL's test for evaluating whether an intern is entitled to be paid as an employee. Adopting a "primary beneficiary" test for determining the proper classification of interns, the court focused on who benefits most from the internship and the economic realities of the intern-employer relationship. While employers in Connecticut, New York and Vermont now may be less likely to face class or collective intern-initiated lawsuits, they still will want to approach unpaid internship programs with caution.

Background

Both the Fair Labor Standards Act (FLSA) and the New York Labor Law require employers to pay their workers a minimum wage, and overtime at time and one-half for hours worked in excess of 40 per week. While both laws apply only to employees, neither defines the term. The FLSA defines "employee" as an "individual employed by an employer," and "employ" as "to suffer or permit to work." The New York law defines "employee" in nearly identical terms, as "any individual employed, suffered or permitted to work by an employer."

Both the DOL and the New York State Department of Labor (NYSDOL) have issued guidance on when unpaid internship or training programs are permissible under the FLSA and applicable state wage and hour laws. In guidance issued in 2010, the DOL laid out a six-factor test to determine whether interns at for-profit businesses are employees and must be paid. Under that test, an employment relationship does not exist and the internship may be unpaid only if all of the following factors are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Like the FLSA, the New York State Minimum Wage Act and Wage Orders extend protections only to employees. In a 2010 opinion letter, the NYSDOL explained the 11-factor test — the DOL's six factors and five additional factors — it uses to evaluate whether an employment relationship exists. Unless all 11 factors are satisfied, the internship is subject to the state's minimum wage and wage payment laws.

Recently, high-profile employers — largely in the music, media and fashion industries — have faced multimillion-dollar lawsuits brought by unpaid interns who claim that they are "employees" entitled to be paid minimum wage and overtime under the FLSA. Because many of these cases have been settled, courts have not generally had to determine the employment status of interns — until recently.

NYSDOL Wage Requirements for Interns in For-Profit Businesses

In evaluating whether a for-profit business that has interns must pay them according to the state minimum wage and overtime rules, the **NYSDOL** uses the same six criteria as the DOL and the following five of its own.

1. Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.
2. The trainees or students do not receive employee benefits.
3. The training is general, and qualifies trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program.
4. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program.
5. Advertisements, postings or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

Second Circuit Rejects DOL Internship Test

On July 2, the Second Circuit Court of Appeals announced a new test for determining whether interns are employees. In *Glatt v. Fox Searchlight Pictures,* the court rejected the DOL's six-factor all-or-nothing approach in favor of a more flexible "primary beneficiary test" that weighs the internship's benefits to the intern against those to the employer.

> **Comment.** The Sixth Circuit Court of Appeals has also rejected the DOL's six-factor test, concluding that the proper test for determining whether an employment relationship exists in the context of a training or learning situation is which party derives the primary benefit from the relationship.

The Facts

Plaintiffs worked as unpaid interns either on the Fox Searchlight distributed film *Black Swan* or at Searchlight's corporate offices in New York City. They contended that the defendants violated the FLSA and the New York Labor Law by failing to pay them as employees during their internships.

The Interns. When he started working on *Black Swan*, Eric Glatt was enrolled in a non-degree graduate program at New York University that did not offer him credit for his internship. Glatt worked five days a week and roughly 10 hours per day as an accounting intern, copying and filing documents; tracking purchase orders; transporting paperwork; maintaining employee personnel files; and answering questions about the accounting department. Glatt had similar responsibilities during a subsequent five-month internship in *Black Swan's* post-production department.

Alexander Footman was not enrolled in a degree program when he interned in the *Black Swan* production department. Generally working 10-hour days, three days a week for roughly five months, Footman performed

similar low-level tasks. Among other things, he set up office furniture; answered phones; watermarked scripts; drafted daily call sheets; photocopied; made deliveries; compiled vendor lists; did internet research; sent invitations; and ran errands.

Eden Antalik worked as an unpaid publicity intern in Searchlight's corporate office while enrolled in a degree program at Duquesne University that required an internship. For three and one-half months, she summarized media mentions of Searchlight films; made travel arrangements; organized catering; sent documents; and set up rooms for press events.

Lower Court Proceedings

In 2012, the former interns brought a class action against Fox Searchlight and its parent company seeking unpaid minimum wages and overtime for themselves and similarly situated individuals. Glatt and Footman later abandoned their class claims and proceeded as individuals. After discovery, they moved for partial summary judgment, contending that they were employees under federal and state law. About that time, Antalik moved to certify a class of New York state interns working at certain Fox divisions to bring state law claims and a nationwide FLSA collective action of interns working at those same divisions.

Workplace Protections of Interns

Last year, both NYC and New York state extended protections from workplace harassment and discrimination to unpaid interns under the city's Human Rights Law and the state's Executive Law. (See our **April 30, 2014** and **August 15, 2014** editions of *For Your Information*.) Effective October 1, a new Connecticut law (Public Act 15-56) will protect unpaid interns in that state from workplace harassment and discrimination.

Businesses that offer internships in New York state, NYC or Connecticut will want to ensure that their interns are afforded the same statutory protections from workplace harassment and discrimination as paid employees.

In 2013, the district court ruled that Glatt and Footman were employees under the FLSA and New York law, and granted their motion for partial summary judgment. The same court also granted the class and conditional collective action certifications sought by Antalik. Fox Searchlight appealed.

The "Primary Beneficiary" Test

On July 2, the Second Circuit held that courts within its jurisdiction (Connecticut, New York and Vermont) should use a new test — the "primary beneficiary test" — to determine the employment status of interns. Emphasizing the educational aspects of internships, the court's more flexible approach to intern classification focuses on what the intern receives in exchange for his work and the economic reality of the intern-employer relationship.

Calling the DOL's test "too rigid," the Second Circuit laid out a broader, non-exhaustive list of key factors to consider when determining the primary beneficiary of that relationship, including the extent to which:

1. The intern and 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 internship provides training that would be similar to that given in an education environment, including the clinical and other hands-on training provided by educational institutions.
3. The internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The internship's duration is limited to the period in which it provides the intern with beneficial learning.
6. The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

No one factor is dispositive. Rather, the court takes a totality of the circumstances approach, weighing and balancing all of the considerations in each case. Under this more employer-friendly approach than the DOL's six-factor test, unpaid interns will not automatically be treated as employees because they perform some work and employers receive some benefit from their work, provided they do not displace paid employees. No wages will be required if the intern is the primary beneficiary of the internship. Importantly, the decision focused on the educational aspects of the internship, emphasizing that a flexible standard "reflects a central feature of the modern internship — the relationship between the internship and the intern's formal education."

New York State Claims

The Second Circuit's decision is instructive — but not binding — on New York state courts. Whether a state court would apply the primary beneficiary test in unpaid intern cases rather than the NYSDOL's 11-factor test remains to be seen. It may be that plaintiffs opt to avoid federal court and instead pursue their claims under the New York Labor Law only in state court, expecting state courts to apply the stricter test before intern classification.

Perhaps equally as important for employers, the Second Circuit vacated the lower court's class certifications. Concluding that the primary beneficiary test requires "highly individualized inquir[ies]" rather than the common, generalized proof required for the certification of class actions, the court sent the cases back for reconsideration. Because courts must consider individual aspects of the intern's experience under the primary beneficiary test the court set forth, obtaining class or collective certification may prove more difficult in intern-initiated actions.

In Closing

In the face of increasing lawsuits, some employers have discontinued internship programs and others have been rethinking their programs. Because the existence of an employment relationship is to be determined on a case-by-case basis under the court's new standard, employers in Connecticut, New York and Vermont may be less likely to face lawsuits by large groups of interns. However, they should continue to approach unpaid internships with caution — particularly internship programs that are not directly tied to educational programs.

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