

Client Alert

Second Circuit Confirms Employers' View on Unpaid Internships

July 16, 2015 – Recognizing the inconsistent approach taken by federal district courts in evaluating the legality of unpaid internships in the private sector, the United States Court of Appeals for the Second Circuit Court has issued a long anticipated ruling that will provide employers with some clarity regarding whether their interns are required to be paid minimum wage and overtime compensation in accordance with the Fair Labor Standards Act (“FLSA”) and New York Labor Law. In the case of *Glatt v. Fox Searchlight Pictures* (“Fox”), the Second Circuit ruled that the lower court erred in finding that the interns should have been treated as employees because Fox derived some benefit from their work.

The Second Circuit expressly rejected the U.S. Department of Labor’s (“DOL”) 6-factor test that courts have previously utilized to determine if an intern’s involvement with a business entity is excluded from the wage requirements of the FLSA. Finding the DOL’s test to be “too rigid,” the Second Circuit adopted a “primary beneficiary” test that focuses more on what the intern receives in exchange for his or her services. In doing so, the Court effectively adopted the standard that employers have urged lower courts in the Second Circuit to follow. As a result, the *Glatt* ruling clearly makes it more difficult for unpaid interns to prevail on wage claims. Specifically, the Second Circuit in *Glatt* articulated a non-exhaustive set of factors to consider when evaluating and determining the primary beneficiary of an unpaid internship program:

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; the absence of such a promise or understanding suggests the opposite conclusion.
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.

No one factor is dispositive and employers must evaluate the experience of every intern on an individual basis. The Court recognized that an intern's employment status is a "highly individualized inquiry" given the totality of factors that need to be evaluated. So long as the intern is the primary beneficiary of the relationship, then there is no obligation to compensate the intern as an employee pursuant to the relevant wage statutes. This newly articulated test will provide courts with more flexibility than the DOL's 6-factor test to evaluate the economic realities that exist between the intern and the employer while simultaneously acknowledging the educational benefits associated with a legitimate internship program that integrates classroom learning with the workplace. Indeed, the Court acknowledged that "[t]he purpose of a *bona fide* internship is to integrate classroom learning with practical skill development in a real-world setting."

At the same time as its decision in *Glatt*, the Second Circuit also upheld the lower court's decision in the related case of *Wang v. Hearst Corp.* in which class certification to a group of unpaid interns was denied. Relying on its decision in *Glatt*, the Second Circuit reiterated in *Wang* that "courts must analyze how the internship was tied to the intern's formal education, the extent of the intern's training, and whether the intern continued to work beyond the period of beneficial learning." While there is still no bright line rule that distinguishes an intern from an employee, the Second Circuit has made clear that claimants' advocates will no longer be able to rely on the rigid DOL test that previously made it very difficult for employers to prevail in these types of cases.

What Employers Need To Know:

Although unpaid interns are permitted to perform work that benefits the business entity for which it is providing services, employers must be careful to monitor the workflow of all interns to ensure that they remain the primary beneficiaries of the relationship. Companies should designate an employee to serve as an internship program coordinator to ensure that education and

training are prioritized and that interns are not being used to displace regular employees. Additionally, even if an intern is not receiving course credit for his or her participation in the internship program, the internship coordinator should communicate with the school, college or graduate program attended by the intern to establish a clear record that the internship is primarily geared towards education. Handbooks should also be updated to document formally the differences between unpaid interns and employees.

Finally, notwithstanding that the Second Circuit's ruling in *Glatt* makes it more difficult for interns to prevail on potential wage claims, there are still no guarantees that those who advocate for interns will cease instituting actions seeking compensation for their clients. To that end, we recommend that employers maintain detailed workflow reports and time records for all interns in order that they may contest any minimum wage or overtime claims brought by or on behalf of interns who may choose to exaggerate their duties and responsibilities or the hours that they expended participating in the program.

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