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Summer Internship Season: Revisiting Whether Employers Must Pay Interns Regardless of the Time of Year

June 18, 2018 – With the summer season now underway, it is important that employers be reminded about how to handle workplace internships in general. While certain businesses have concluded that the scarcity of available positions for college students and entry-level employees gives them license to make use of cheap or free labor, employers should be careful about implementing unpaid internships in a manner which is contrary to best practices.

On January 5, 2018, the U.S. Department of Labor (DOL) announced in an updated Fact Sheet that it was abandoning its prior six-part test for intern status in connection with for-profit companies and replacing it with the more definitive "primary beneficiary test," first endorsed by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478 (2d. Cir. July 2, 2015). The announcement officially overruled the DOL's previous 2010 guidance and 60-year old U.S. Supreme Court precedent that several appellate courts viewed as inconsistent with the Fair labor Standards Act (FLSA).

For example, the 2010 DOL guidance classified any unpaid intern working at a for-profit company as an "employee" under the FLSA unless six factors were met. These six factors effectively required the internship to function primarily as a classroom environment, where the employer "derive[d] no immediate advantage from the activities of the intern." Interns that failed to meet all six factors were entitled to minimum wage, overtime and other protections under the FLSA.

The 2010 DOL standard sparked considerable misclassification and wage and hour lawsuits over the past several years, and courts grew to disfavor such claims over time. The Second Circuit's 2015 ruling in *Glatt* delivered the critical blow to the six-factor test, however, when it held that test "too rigid" and declined to adopt it. The *Glatt* court instead laid out a new seven-factor test, whereby courts analyze the "economic reality" of an intern's relationship with the for-profit employer to determine which party is the "primary beneficiary" of the relationship. The Second Circuit identified a set of non-exhaustive factors that must be weighed and balanced, a test which has since been adopted by several appellate courts, most recently the Ninth Circuit in *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139 (9th Cir. 2017).

The DOL then scrapped its 2010 standard when it issued its new 2018 Fact Sheet, adopting the standard laid out in *Glatt*. The Fact Sheet restated the standard *verbatim*, which includes the following seven factors:

1. The extent to which the intern and the provider of the internship 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 similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by education 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 beneficial learning to the intern;
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 provider of the internship understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The 2018 Fact Sheet explains that "primary beneficiary test" is a flexible standard. No one factor is dispositive and whether an intern is an employee "necessarily depends on the unique circumstances of each case." As the Second Circuit Court of Appeals bluntly framed the inquiry late last year in *Wang v. Hearst Corp.*, 877 F.3d 69, 71 (2d Cir. 2017), a court must decide, using the seven factors above, whether the employer "furnishes *bona fide* for-credit internships or whether it exploits student-interns to avoid hiring and compensating entry-level employees." Accordingly, one of the more significant criteria examined in determining whether an intern may be unpaid is the question of whether or not such individual receives college credit in compensation for the internship. If the answer to this criterion (factor #3) is NO and an analysis of the other six factors yields a determination that the intern or student is, in fact, an employee, then he or she is entitled to minimum wage, overtime and other protections under the FLSA.

The DOL's adoption of "primary beneficiary test" is a welcome change for employers seeking to host interns this summer and throughout the year. As demonstrated in the *Wang* opinion, it provides broader protection from coverage under the FLSA than its six-part predecessor and reduces ambiguity by aligning the DOL's position with that of the federal courts.

The New York State Department of Labor (NYSDOL), however, has still not promulgated more definitive state guidelines concerning internship programs since the DOL's adoption of the "primary beneficiary test" in January. As such, New York employers should understand and appreciate that any state standard may impose more stringent requirements on internship programs than those articulated by DOL or enforced by the federal courts. For example, the previous NYSDOL guidance concerning internship programs, issued in July 2016, explained that an internship program is properly classified as unpaid under the New York Minimum Wage Act

only where it met *eleven* different criteria.[1] We will update you if and when the NYSDOL releases new guidance on this issue. In the interim, however, New York employers are advised to pay interns minimum wage[2] and overtime pay where there is any possibility that the intern's relationship with the for-profit employer may be deemed primarily for the benefit of the employer.

New York employers should further note that the New York City Human Rights Law ("NYCHRL") extends anti-discrimination and harassment protections to interns, regardless of their status as "employees."[3] As such, interns have the same workplace protections as traditional employees in terms of their ability to bring lawsuits for sexual harassment and other forms of unlawful discrimination.

Employers contemplating an internship program, or assessing an existing program, should be mindful of these factors and confer with employment counsel to determine whether their program meets this standard.

If you have any questions about interns or internship programs in general, please feel free to contact us.

Jeffrey P. Englander
(212) 735-8720
jenglander@morrisoncohen.com

Keith A. Markel
(212) 735-8736
kmarkel@morrisoncohen.com

Christopher W. Pendleton
(212) 735-8783
cpendleton@morrisoncohen.com

Basil C. Sitaras
(212) 735-8849
bsitaras@morrisoncohen.com

[1] The eleven different factors consisted of the six criteria found from the previous six-part 2010 DOL test and five separate criteria created by the NYSDOL. You can access the NYSDOL fact sheet containing those eleven factors here.

[2] Minimum wage rates in New York State through December 30, 2018 are as follows:

- $13.00 per hour for New York City employers with 11 or more employees;
- $12.00 per hour for New York City employers with 10 or less employees;
- $11.00 per hour for Long Island or Westchester County employers; and
- $10.40 per hour for employers located across the rest of New York State.

Overtime must be paid at one and a half times the employee's regular rate of pay. New York employers are advised to review the NYSDOL's General Minimum Wage Rate Schedule and prepare for the December 31, 2018 wage rate increase accordingly.

[3] You may access the 2014 amendment to NYCHRL, extending anti-discrimination protections to all unpaid interns in New York City here.