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Second Circuit Establishes New Standard To Determine When An Intern Is An Employee Under The FLSA

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In July, the United States Court of Appeals for the Second Circuit issued a ground breaking decision in *Glatt v. Fox Searchlight Pictures, Inc.*, establishing a new standard to determine when interns are "employees" who must receive compensation for all hours worked under the Fair Labor Standards Act ("FLSA"). The new standard gives employers more flexibility in shaping their internship programs.

In *Glatt*, the plaintiffs were hired as unpaid interns for a film production company. They claimed that they should have been compensated for their work under the FLSA and New York Labor Law. The matter was filed as a putative class action on behalf of all other unpaid interns in New York who worked for defendants and as a putative collective action on behalf of all other unpaid interns nationwide. After discovery, the district court granted partial summary judgment for the plaintiffs finding that they should have been treated as employees entitled to compensation. In reaching its decision, the district court relied on the U.S. Department of Labor's ("DOL") six factor test:

- The internship is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees;
- 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;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages.

The district court also certified a class of all New York interns working for defendants between 2005 and 2010 and conditionally certified a nationwide collective of all interns working for defendants between 2008 and 2010. Defendants appealed.

On appeal, the Second Circuit confronted the issue of when an intern should be classified as an employee entitled to compensation under the FLSA. The plaintiffs argued that interns should receive compensation whenever the putative employer receives an immediate advantage from the intern's work. The defendants argued that an employment relationship is only created when the tangible and intangible benefits provided to the intern do not outweigh the intern's contributions to the employer. The DOL contended that its six factor test is the appropriate test to be used and it stressed that in order for an intern to be classified as a non-employee, all six factors must be met.

The Second Circuit rejected the tests proposed by the plaintiffs and the DOL. In doing so, the Second Circuit held that the DOL standard was "too rigid" and out of touch with the "central feature of the modern internship – the relationship between the internship and the intern's formal education."

Instead, the Second Circuit adopted the defendants' "primary beneficiary" relationship test, which takes into account the economic reality between the intern and the employer. The Second Circuit's primary beneficiary relationship test has seven factors:

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 examining these factors, no one factor is dispositive and courts should weigh the factors to determine the appropriate result depending upon the facts before them. The factors are also not exhaustive and, in certain situations, additional evidence may be appropriate to consider.

The *Glatt* court also decertified the class and collective actions. The Second Circuit decertified the class action noting that under its new test the "question of an intern's employment status is a highly individualized inquiry." Therefore, the plaintiffs could not establish that generalized proof could answer all questions concerning the employment status of all class members. Similarly, the Second Circuit held that under the primary beneficiary test courts must consider individual aspects of the intern's experience and thus it would be inappropriate for the case to proceed as a collective action.

As a result of this decision, employers must undertake a thorough examination of their unpaid internship programs in order to determine whether they are in compliance with the minimum wage laws. Indeed, employers should review their unpaid internship programs to determine the educational benefits provided to the interns and whether the intern, or the company, is the primary beneficiary of the internship program.

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