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Labor Relations

Expert Analysis

Unpaid Intern Update: Significant Rulings From Two Circuit Courts

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Unpaid internships historically have been used by employers to allow students to gain experience and potential entry into competitive industries. However, employers have been more and more hesitant to use unpaid interns since the U.S. Department of Labor's 2010 issuance of Fact Sheet #71. The Fact Sheet sets forth six criteria that, according to the Labor Department, must be satisfied in order for a for-profit company to employ an intern without paying a minimum wage, including the controversial requirement that the employer "derives no immediate advantage from the activities of the intern." DOL, Wage & Hour Div, Fact Sheet #71, Internship Programs Under the FLSA (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

In a highly publicized 2013 decision, a federal district court applied the Labor Department's six-part test and ruled the company should have classified and paid a group of former interns who worked on the film "Black Swan" as employees. See *Glatt v. Fox Searchlight Pictures*, 293 FRD 516 (SDNY 2013). However, in two groundbreaking rulings this past July, the U.S. Court of Appeals for the Second Circuit declined to follow Fact Sheet #71 and instead applied a primary beneficiary test—i.e., whether the intern or the employer is the primary beneficiary of the relationship—to determine an intern's employment status. And in September, the U.S. Court of Appeals for the Eleventh Circuit adopted the Second Circuit's approach and rejected the Labor Department's views as being inappropriate to an assessment of the "modern internship." With these rulings, which now potentially open the door to certain unpaid internships, we have dedicated this month's column to a review of current law on unpaid internships.

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Second Circuit

In the long-awaited decisions in *Glatt v. Fox Searchlight*, Nos. 13-4478-cv, 13-4481-cv (2d Cir. July 2, 2015), and *Wang v. Hearst Corp.*, No 13-4480-cv (2d Cir. July 2, 2015), the Second Circuit adopted the employer-proposed "primary beneficiary" test to determine whether an unpaid intern should be considered an employee under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) and thus entitled to compensation.

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In both cases, the plaintiffs—unpaid interns working on Fox Searchlight's "Black Swan" movie and at Hearst magazines, respectively—alleged they should have been classified as employees under the FLSA and NYLL and brought claims for, among other things, unpaid wages on a class-wide basis. The district court in *Glatt*, relying heavily on the Labor Department's six-factor test laid out in Fact Sheet #71, granted summary judgment on the issue that interns were employees and granted the plaintiffs' motions for class and collective action certification.

According to the Fact Sheet, employers must classify and pay interns as if they were employees unless the employer-intern relationship meets every one of the following six criteria: the internship is similar to training that would be given in an educational environment; the internship experience is for the benefit of the intern; the intern does not displace regular employees but works under close supervision of existing staff; the employer derives no immediate advantage from the activities of the intern and may have operations impeded at times; the intern is not necessarily entitled to a job at the conclusion of the internship; and the employer and intern understand the intern is not entitled to wages for the time spent in the internship.

The district court in *Wang* also held Fact Sheet #71 suggests a framework for an analysis of the employee-employer relationship. Yet, it denied plaintiffs' summary judgment motion, finding Hearst's showing of some educational training, some benefit to individual interns, some supervision, and some impediment to Hearst's regular operations, supported a view that the interns were properly classified.

The Second Circuit accepted tandem interlocutory appeals of the Glatt and Wang decisions. As a preliminary matter, the court rejected Fact Sheet #71, finding it unpersuasive and too rigid. Instead, the Second Circuit held the more appropriate analysis would focus on the key question of whether an intern or an employer is the "primary beneficiary" of the relationship, and identified a list of seven non-exhaustive factors that courts should consider, no one of which is dispositive.

These are the extent to which: the intern and the employer clearly understand there is no expectation of compensation; the internship provides training similar to that which would be given in an educational environment; the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; the internship accommodates the intern's academic commitments by corresponding to the academic calendar; the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; the intern's work complements, rather than displaces, the work of paid employees; and the intern and the employer understand the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Notably, the Glatt court stated, "The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education." The Second Circuit remanded both cases back to the district courts to determine whether the interns were properly classified as such under the primary beneficiary test.

Significantly, the Second Circuit in *Glatt* also vacated the district court's decision certifying a class and collective action, holding "the question of an intern's employment status is a highly individualized inquiry" given the nature of the primary beneficiary test. It found the evidence offered by the plaintiffs could not conclusively answer the question of whether each intern was entitled to compensation.

State Test

The Glatt and Wang decisions are instructive in New York State court cases, particularly since the decisions looked at the interns' claims under the NYLL. It is unclear whether a New York state court would similarly apply the primary beneficiary test to claims by interns under the NYLL in lieu of the New York Department of Labor's (NYDOL) intern classification test. In addition to the six factors listed in Fact Sheet #71, the NYDOL's test sets forth five more factors necessary to establish an unpaid internship. The five additional factors are: any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity; trainees or students do not receive employee benefits; training is general and qualifies trainees to work in any similar business; the screening process for the internship is not the same as for employment; and advertisements for the program clearly discuss education or training rather than employment. NYDOL, Wage Requirements for Interns in For-Profit Businesses, available at https://www.labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf.

The Second Circuit in *Glatt* and *Wang* construed the NYLL's definition of employee as the same as the FLSA definition, so the court's analysis only analyzed the FLSA. It remains to be seen whether the NYDOL will issue new guidance to align with the Second Circuit's recent rulings.

Eleventh Circuit

On Sept. 11, 2015, in *Schumann v. Collier Anesthesia*, No 14-13169 (11th Cir. Sept. 11, 2015), the Eleventh Circuit joined the Second Circuit in rejecting the Labor Department's six-part unpaid internship test. *Schumann* involved FLSA claims for allegedly unpaid minimum wages and overtime brought by 25 former student registered nurse anesthetists (SRNAs) enrolled in a master's program. The SRNAs claimed to be entitled to compensation for work performed in connection with a clinical curriculum. The clinical program was required by Florida law before the SRNAs could obtain their degrees and become certified.

The Florida district court granted summary judgment to the defendants, finding the SRNAs were not FLSA employees.

The district court applied an "economic realities" test, which previously had been advocated by the Eleventh Circuit in *Kaplan v. Code Blue Billing & Coding*, 504 F App'x 831 (11th Cir. 2013) ("In determining whether an employer-employee relationship exists under the FLSA, we must consider the 'economic realities' of the relationship, including whether a person's work confers an economic benefit on the entity for whom they are working."); see also *Griffiths v. Parker*, No 13-cv-61247 (M.D. Fla. May 20, 2014) (applying economic realities test to determine whether employer benefitted from intern's labor). The district court in *Schumann* stated that although Fact Sheet #71 provides some guidance, it cannot be followed with "rigid adherence." Rather, the court used the Labor Department's six-factor test as a guide to determine whether the economic realities supported a finding of an employment relationship.

The plaintiffs appealed, arguing the Labor Department's view should apply, that is, interns are employees under the FLSA unless all six of the Labor Department's criteria are satisfied. The Eleventh Circuit determined, instead, the Second Circuit's primary beneficiary test was specifically tailored to account for the unique qualities of a modern-day internship for academic credit and professional certification.

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The court embraced the Second Circuit's seven, non-exhaustive factors, reasoning they take into account that both the intern and the employer might receive significant benefits through such internships. The court cautioned employee status may not always be an all-or-nothing determination, stating it could be possible to classify the individual as an intern for some of his or her work and as an employee for other work. The Eleventh Circuit directed the lower court to reconsider the facts in light of these new principles.

Other Circuits

The Fourth, Fifth and Sixth circuits also have applied the primary beneficiary test to determine when a worker is an employee under the FLSA. In *Wolfe v. AGV Sports Group*, No CCB-14-1601 (D. Md. Nov. 3, 2014), a recent unpaid intern class action, a Maryland district court stated the U.S. Court of Appeals for the Fourth Circuit unequivocally applies a "primary beneficiary" test for interns and refused to defer to Fact Sheet #71. In the Fourth Circuit, the test focuses on "the nature of the training experience"—what interns do, what they learn, and what guidance they receive. See *McLaughlin v. Ensley*, 877 F2d 1207 (4th Cir. 1989).

The U.S. Court of Appeals for the Fifth Circuit applied the primary beneficiary test in *Donovan v. American Airlines*, 686 F2d 267 (5th Cir. 1982), in examining the applicability of the FLSA to unpaid flight attendant trainees. The court found the primary benefit flowed to the trainees rather than the employer, and thus the trainees were not FLSA employees, because the training was given at great cost to the employer, regular employees were not displaced by the trainees, and the trainees were able to obtain employment they otherwise would have been unable to obtain.

Likewise, in *Solis v. Laurelbrook Sanitarium & School*, 642 F3d 518 (6th Cir. 2011), the U.S. Court of Appeals for the Sixth Circuit applied the primary beneficiary test when examining whether high school students who spent a half day in class and a half day learning practical skills were entitled to minimum wage under the FLSA. Ultimately, the court held the students were not FLSA employees because the students received the primary benefit of the work.

On the other hand, the U.S. Court of Appeals for Tenth Circuit, in *Reich v. Parker Fire Protection District*, 992 F2d 1023 (10th Cir 1993), adopted a totality of the circumstances test to determine whether firefighter trainees were employees during their training time at the academy. Utilizing a six-factor test provided by the Labor Department (nearly identical to Fact Sheet #71), the court explicitly rejected an all-or-nothing application of the six factors, acknowledging the factors were important but not determinative. Considering the situation as a whole, the Tenth Circuit concluded firefighter trainees were not FLSA employees because five of the six factors weighed in favor of the employer.

Conclusion

The recent Second and Eleventh Circuit rulings provide guidance for unpaid internship programs, particularly where the programs are offered in connection with a related academic program. However, because this is a developing area of the law and the Labor Department and NYDOL have not wavered on their unpaid intern tests, employers are still advised to be cautious when deciding whether and under what circumstances to offer unpaid internships.

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