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Second Circuit Establishes New Test for Unpaid Intern Claims

Article By:

Christopher A. Parlo

Samuel S. Shaulson

The *Second Circuit*'s ruling provides employers with greater leeway for unpaid internship programs and a stronger defense for class-action lawsuits brought by unpaid interns.

In a long-awaited decision, the US Court of Appeals for the Second Circuit established a new standard for determining whether interns should be classified as "employees" eligible for minimum and overtime wages, among other legal protections. In two related cases, ***Glatt, et al. v. Fox Searchlight Pictures, Inc., et al.*** **and** ***Wang, et al., v. The Hearst Corp.*****,** the Second Circuit adopted a new "primary beneficiary" test and identified seven nonexclusive factors relevant to the classification of unpaid interns. In so doing, the court rejected strict application of the ***US Department of Labor's (DOL's)*** six-factor test and confirmed that "courts may consider relevant evidence beyond [their own] specified factors[.]" The court further held that the question of an intern's employment status is a "highly individualized inquiry," thus raising the bar for future interns who may seek to bring class-action claims against companies.

Background

The Second Circuit decisions come on the heels of a wave of intern litigation since the US District Court for the Southern District of New York's summary judgment ruling in favor of the plaintiff interns and approval of class certification in *Glatt* on June 11, 2013. In contrast, just a few weeks before the *Glatt* ruling, in *Wang*, the Southern District of New York denied those plaintiff interns' motions for summary judgment and class certification. In the two years since those decisions, dozens of intern class-action lawsuits have been filed, primarily against companies in the fashion and entertainment industries. Given the legal uncertainty and inevitable litigation-defense fees, companies throughout these and other industries have had little choice but to reevaluate their internship programs, sometimes while simultaneously defending class-action lawsuits. With these new decisions, employers now have a more defined framework for creating and implementing unpaid internship programs, as well as strong precedent to defend potential or current class-actions claims.

New Factors Relevant to Intern Classification Established

In *Glatt*, the Second Circuit found that the DOL test (which requires, in part, that a company receive no immediate advantage or benefit from interns) was unpersuasive and overly rigid. Instead, the Second Circuit held that a more appropriate analysis would focus on the key question of whether an intern or an employer is the "primary beneficiary" of the relationship. The court explained that this primary beneficiary test is inherently flexible and focuses on both the benefits that the intern receives in exchange for his or her participation in the internship program as well as the economic reality that exists between the intern and employer. The court articulated the following seven factors to aid courts in determining whether an intern is an employee under the federal Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL):

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 year.

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.

The Second Circuit instructed courts to no longer treat any single factor as dispositive. Rather, the seven enumerated factors are a nonexhaustive list, and other relevant factors may also be considered. Further, each factor need not favor a party for a court to conclude that the intern(s) in question was not an "employee" under the FLSA and NYLL. Perhaps most important, the Second Circuit rejected the use of the DOL's requirement that there be *no* benefit to the company. Instead, the new test articulated by the Second Circuit is focused on who is the "primary beneficiary" of the internship (and with significant emphasis on the extent to which the internship is tied to the intern's overall educational experience).

The Second Circuit's new test is far more employer-friendly than the six factors previously identified by the DOL, and employers may now further rely on the flexibility of this test when developing and implementing unpaid internship programs. Provided that an intern receives a significant educational benefit and doesn't serve as a direct replacement for paid employees, the fact that the employer is receiving benefits does not mean that the intern should automatically be treated as an employee.

These factors also illustrate the importance of making sure that an employer's internship program

emphasizes educational development. As the Second Circuit explained, “The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real world setting.” This focus on the close relationship between internship programs and education is meant to more accurately reflect the role of internships in the modern economy and their tool as a training and development mechanism for young adults.

Application to Class-Action Certification

In what could potentially be a far more influential portion of the *Glatt* and *Wang* decisions for companies defending lawsuits, the Second Circuit declared that “an intern’s employment status is a highly individualized inquiry” not conducive to class-action treatment. Indeed, the court noted that even if a plaintiff could establish that its employer had a policy of replacing paid employees with unpaid interns, that fact alone would not mean that each intern in the putative class would prevail under the primary beneficiary test. As the Second Circuit described it, that precise question is “the most important issue in each case.” Therefore, because the questions requiring individualized proof were more substantial than those that could be answered with generalized proof, the Second Circuit ordered that, on the current facts, neither the *Glatt* or *Wang* cases could proceed on a class basis under Federal Rules of Civil Procedure Rule 23 (FRCP 23). The court did not, however, categorically preclude the possibility of certification if other facts emerge on remand.

Notably, the Second Circuit explained that although it was presented with the question of whether a higher standard applied to FLSA conditional certification motions after discovery was taken, it did not need to address this question because the proposed intern class would not even meet the “minimal pre-discovery” standard for conditional certification. The court stated, “Under the primary beneficiary test we have set forth, courts must consider individual aspects of the intern’s experience.” Therefore, and referring back to the reasons that the court ruled that FRCP 23 certification was improper, it vacated the *Glatt* district court’s order conditionally certifying a rule 23 class.

Finally, although the Second Circuit’s language that a trial court must conduct an individualized fact-specific inquiry will make it difficult for future cases brought by interns to proceed on a class basis, as noted above, the court did state that it was nonetheless possible for a class to be certified under the appropriate circumstances. Thus, the door is still open for other former interns to bring wage and hour litigation, either on an individual or representative basis.

Next Steps and Practice Pointers

With the Second Circuit’s guidance now available, employers should take this opportunity to review any existing internship programs to ensure compliance with the new test. Given the greater flexibility these decisions afford employers, employers may consider expanding the scope of existing internship programs or implementing a new (paid or unpaid) internship program. Despite this guidance, risk still remains any time an employer engages unpaid interns, and employers should consult with knowledgeable counsel when developing or implementing an unpaid internship program.

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