

## Unpaid Intern or Employee? Recent Decision Announces New Test for Intern Misclassification Cases

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### *Second Circuit Court of Appeals Adopts New Test for Determining Whether Unpaid Interns Should Be Classified and Paid as Employees*

Unpaid internship programs have come under heightened scrutiny in recent years by the Department of Labor, the Internal Revenue Service, and other regulatory agencies, as well as the subject of a number of high-profile lawsuits. One such close-watched suit involves former unpaid interns for Fox Entertainment Group who worked on the film “Black Swan” or in the company’s corporate office. Their complaint alleged that they worked between 30-50 hours per week doing administrative or manual labor tasks for which they did not receive academic course credit. Arguing that they (a class of similarly-situated individuals) actually functioned as “employees,” as that term is defined in the Fair Labor Standards Act (“FLSA”), they sued in the Southern District of New York to recover payment for at least minimum wage for their work.

After prevailing in the trial court—both on the merits of their claim and on their motion to certify a class—the Second Circuit Court of Appeals reversed the judgment. Though recognizing that the U.S. Supreme Court has not yet weighed in on this issue, the Second Circuit articulated a new “primary beneficiary” test to determine whether an intern is properly classified; that is, is the intern or the employer the primary beneficiary of the relationship? The court did not adopt a rigid set of factors to be applied in making this determination; rather, it suggested that courts look at the following non-dispositive, non-exhaustive factors:

- the parties’ understanding regarding expectation of compensation;
- the similarity of the internship training to that available in an educational environment;
- whether the internship is tied to the intern’s education and accommodates the intern’s academic commitments;
- the duration of the relationship;
- whether the intern’s work complements, rather than displaces, paid employees;

- and the parties' expectation about a permanent job offer at the end.

The Second Circuit remanded the case back to the trial court to analyze the facts under this newly-announced test, but quite importantly, also reversed the trial court's certification of a class, finding that even proof of common policies across Fox's internship programs would not necessarily mean that every Fox intern was likely to prevail on his claim that he was an FLSA employee under the primary beneficiary test. Because this individualized analysis predominated over common issues, the Second Circuit concluded that class proceedings were improper.

Although the "primary beneficiary" test applies only in the Second Circuit at this time (which includes Connecticut, New York, and Vermont), the decision provides helpful guidance to employers regarding how to structure internship programs to minimize FLSA exposure. And, while each case must be decided on its unique facts, the decision suggests that individualized assessments may become crucial in analyzing intern classification, hopefully striking a blow in the use of class and collective actions to aggregate such claims.

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