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Intern or Employee? When "Take Your Children to Work" Day Backfires

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In late April each year, tens of millions of employees and millions of employers participate in Take Your Sons and Daughters to Work Day. Of course, the vast majority of the child participants are elementary school kids, or perhaps young teenagers, who visit their parents' workplaces for a few hours and then return to their everyday lives. But what happens when the "child" is actually a young adult who, under the guise of a training internship, arrives with his father at the workplace every day for over a year? As one employer recently learned, that so-called trainee might in fact be deemed an employee, to whom the minimum wage and overtime pay requirements of the FLSA apply.

In *Axel v. Fields Motorcars of Florida, Inc.*, 2017 U.S. App. LEXIS 19524 (11th Cir. Oct. 6, 2017), the plaintiff's father, who worked as a wholesaler for the employer, approached the general manager of the dealership about finding a job for his son who, with a poor employment record, a DUI arrest and a drug history, apparently was having difficulty finding work. The general manager declined to hire the son but agreed to allow him to "shadow" his father without compensation, with the open-ended possibility that he would replace his father upon the latter's retirement. For over a year, the son would arrive at work with his father and observe his father's activities throughout the morning. However, during the afternoons, he would spend several hours posting cars for sale on an internal auto auction website, on e-Bay and on Craigslist; research cars for sale at auction; and purchase cars from other dealerships, all under the guidance of the used car manager. This pattern continued for about fifteen months, at which time the father's employment was terminated and the son likewise stopped coming to work. The son then sued the employer, claiming that he was in fact an employee and was entitled to pay under both the FLSA and the Florida Minimum Wage Act (FMWA) for the time he was working at the dealership. The plaintiff estimated that during his 15-month tenure, he worked in excess of sixty (60) hours per week.

The district court granted summary judgment to the employer, concluding that the plaintiff was not an employee and therefore not entitled to wages under either federal or state law. On appeal, the Eleventh Circuit Court of Appeals vacated the summary judgment ruling and remanded the case for further consideration. In doing so, the Court of Appeals relied on the seven "non-exhaustive" factors it had set forth in *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015), and which it had borrowed from the Second Circuit's decision in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d

376 (2nd Cir. 2015), in determining whether the “primary beneficiary” of the relationship was the employer, in which case the individual would likely be deemed an employee, or the intern/trainee, in which case the FLSA’s protections would not apply.

After agreeing with the district court that three of the factors were irrelevant to the unique circumstances of the case, the Court of Appeals noted that two of the factors – the extent to which the intern and employer clearly understand that there is no expectation of compensation and the extent to which the intern and employer understand that the internship is conducted without entitlement to a paid position at the conclusion of the internship – weighed in favor of finding an actual internship, given that both parties clearly understood there was no expectation of compensation during the training or of a guaranteed position following its conclusion. Moreover, the Eleventh Circuit held that another of the factors – “the extent to which the internship’s duration is limited to the period during which the internship provides the intern with beneficial learning” – “[did] not clearly cut one way or the other,” given that the nature of the goals of the training, and whether they were ever accomplished, was unclear. However, given that the only possible end date ever discussed – and an indefinite one at that – was the retirement of the plaintiff’s father, and further given that the plaintiff allegedly was working 60 hours per week, the Court of Appeals suggested that the length of the training may have been excessive.

With respect to the remaining factor – the extent to which the intern’s work complements, rather than displaces, the work of paid employees – the Court of Appeals pointed to the fact that the plaintiff was spending a considerable amount of his work time performing retail sales tasks under the direction of managers outside of the wholesaling arena in which his father worked, tasks that may have been displacing the work of those managers or other employees. Ultimately, the Eleventh Circuit concluded that it lacked sufficient information regarding the amount of time plaintiff devoted to wholesaling tasks under the tutelage of his father versus the retailing tasks he performed at the direction of others, but noted that “the proper outcome may not be an ‘all-or-nothing’ determination.” Thus, the case was remanded to the district court for further consideration.

The *Axel* case provides cautionary guidance to employers who may be considering some type of informal internship or training arrangement under the belief that the participants in such a program are not employees subject to the same wage laws.

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