Patterson Belknap Webb & Tyler LLP

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Unpaid Internships Revived?: Second Circuit Gives the Green Light to Unpaid Internships So Long as the Intern "Benefits"

On July 2, 2015, the United States Court of Appeals for the Second Circuit issued its highly anticipated decision concerning unpaid internships, *Glatt v. Fox Searchlight Pictures, Inc*., No. 134478-cv (2d Cir. July 2, 2015). In a victory for employers, the Court adopted a flexible "primary beneficiary" test to determine whether or not a worker is an intern or an employee.

Plaintiffs worked for Fox Searchlight Pictures as interns, performing tasks such as making photocopies, arranging travel and running errands for "Black Swan" Director Darren Aronofsky (including getting him a hypoallergenic pillow, a scented candle, and his favorite tea). Although they often worked eight hours a day, five days a week, the interns received no wages. The district court found that these interns were actually employees entitled to minimum wage and overtime under the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL).

On appeal, Plaintiffs urged the Court to adopt a test under which interns would be considered employees whenever the employer received an immediate advantage from the interns' work. The U.S. Department of Labor (DOL) submitted a brief in support of Plaintiffs, urging the Court to adopt its six-factor test for an employer to properly classify someone as an "intern." These factors include, for example, whether the internship experience is for the benefit of the intern, whether the intern displaces regular employees, and whether the employer derives an immediate advantage from the intern's work. The DOL urged the Second Circuit to conclude that all factors must be met to classify someone as an intern.

The Court rejected these arguments in favor of the flexible "primary beneficiary" test advanced by Defendants. This test asks whether the primary beneficiary of the internship is the intern or the employer. If the intern is the primary beneficiary, he or she is a true "intern" and is not covered by the minimum wage and overtime provisions of the FLSA and NYLL. If the employer is the primary beneficiary, the intern is actually an employee entitled to minimum wage and overtime.

When applying this test, the Court emphasized that the determination should rest largely on the internship's educational benefits and set out a non-exhaustive list of factors for courts to weigh when evaluating the primary beneficiary:

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.[1]

Unlike DOL's six-factor test, all seven *Glatt* factors need not be satisfied in order to properly classify someone as an intern; they serve only as guide posts in a court's analysis of the circumstances of the working relationship. Courts are free to look to other factors, and the failure to satisfy any one factor is not dispositive. In reaching its decision, the Court highlighted that unpaid internships can be very advantageous to the interns: "When properly designed, unpaid internship programs can greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates."[2]

While this decision is a positive development for employers, it does not sanction all internship programs. Indeed, it did not even decide whether the Fox workers were properly classified as interns or not, leaving that decision to the lower court.

As a result, employers should closely review the factors outlined by the Court when structuring a new internship program or evaluating an existing program.[3] As the Court explained, the key to a lawful intern classification lies in the educational component of the program. A bona fide internship must "integrate classroom learning with practical skill development in a real-world setting."[4] Thus, employers should ensure that any unpaid internship has some indicia of an educational experience, as the Second Circuit has made clear that the lawfulness of an unpaid internship is linked to its educational value. Put another way, fetching a director's tea is unlikely to be a central part of an intern's educational journey. Moreover, given the importance of clear expectations, employers should consider obtaining signed acknowledgments to ensure that all parties understand that the internship will be unpaid, will end on a specific date, and that a permanent position is not promised upon completion.

In addition to adopting a flexible "primary beneficiary test," the Court also restricted the ability of unpaid interns to bring group-wide claims, reversing the lower court's decision to allow a class action to proceed consisting of everyone who interned at Fox Searchlight between 2005 and 2010. In so holding, the Court noted that an "intern's employment status is a highly individualized inquiry" and that "the most important question in this litigation cannot be answered with generalized proof."[5] The Court held that Fox Searchlight interns simply do not have enough in common to join together in a single lawsuit. This decision makes it considerably more challenging for former and current interns to aggregate their small-value claims against a single employer.

Finally, New York employers should keep in mind that the New York Department of Labor applies a different test to determine whether unpaid interns qualify as employees; it requires consideration of factors in addition to those adopted by the Second Circuit. While the Second Circuit treated the question of whether interns are "employees" as the same under New York state law and federal law,[6] the New York Department of Labor has not indicated that it agrees. New York employers should continue to keep the New York Department of Labor's guidance on classifying interns in mind when deciding whether interns must be treated as employees.[7]

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1 *Glatt v. Fox Searchlight Pictures, Inc*., No. 134478-cv, at *14-15 (2d Cir. July 2, 2015).
2 Slip Op. at 11.
3 The Court noted that its opinion applies only to for-profit employers. Slip Op. at 14, n. 2.

4 Slip Op. at 16.
5 *Glatt v. Fox Searchlight Pictures, Inc*., No. 134478-cv, slip op. at 19-20 (2d Cir. July 2, 2015).
6 New York defines "employee" in "nearly identical terms" to the federal definition and, therefore, the Court "construe[d] the NYLL definition as the same in substance as the definition in the FLSA." Slip Op. at 9 (citing *Zheng v. Liberty Apparel Co*., 355 F.3d 61, 78 (2d Cir. 2003)).
7 The New York Department of Labor's test is described in its "Wage Requirements for Interns in For-Profit Businesses" fact sheet, available at https://www.labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf.

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