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New Test in Second Circuit for Intern v. Employment Relationship

On July 2, 2015, the United States Court of Appeals for the Second Circuit issued a ruling in the highly publicized case of *Glatt v. Fox Searchlight Pictures, Inc.* (See our previous [client alert](#) on the topic). Plaintiffs were unpaid interns who worked either on the film *Black Swan* or at the Fox corporate office in New York City; the interns sued seeking unpaid minimum wages and overtime for themselves and all other similarly situated individuals. Two of the plaintiffs moved for partial summary judgment on the issue of their employment status, claiming that they were employees under the Fair Labor Standards Act and the New York Labor Law. Relying on a version of the [Department of Labor's \(DOL\) six-factor test](#), the District Court granted the plaintiff's motion, finding that Eric Glatt and Alexander Footman had been improperly classified as unpaid interns instead of employees. A third plaintiff moved to certify a class of interns who worked at certain Fox divisions between 2005 and 2010 and to conditionally certify a nationwide collective of all interns who worked at those divisions between 2008 and 2010.¹ The District Court certified the New York class and conditionally certified the nationwide collective.

On appeal, the Second Circuit vacated these rulings and rejected the DOL's test, finding it "too rigid" and unpersuasive. Instead, the Court adopted the "primary beneficiary" test proposed by the Defendants. Under that test, if the primary beneficiary of the relationship is the employer, rather than the intern, then an employment relationship is established. As the Court described it, the test has two salient features: (1) "it focuses on what the intern receives in exchange for his work"; and (2) it allows "flexibility to examine the economic reality as it exists between the intern and the employer". The Court then listed a non-exhaustive set of factors to consider in the context of unpaid internships with for-profit employers:

- (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation,

¹ The Court noted that the Fair Labor Standards Act "collective" differs from a "class" created under the Federal Rules of Civil Procedure "because plaintiffs become members of the collective only after they affirmatively consent to join it."

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 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 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.

The Court noted that no particular factor is dispositive, and that the analysis requires consideration of all of the relevant circumstances, including relevant evidence beyond the scope of the specified factors, to determine whether an intern is really an employee. The Court also concluded that, because both the Fair Labor Standards Act and the New York Labor Law define "employee" in nearly identical terms, the New York Labor Law's definition of employee is "the same in substance as the definition in the" Fair Labor Standards Act. Therefore, the above balancing test would seem to apply both for state and federal wage and hour claims, though it unclear whether the New York DOL would agree with this conclusion, particularly given that New York DOL imposes a more stringent [eleven factor test](#).²

² Also on July 2, the Court issued a summary order in *Wang v. Hearst Corp.*, another intern wage case argued in tandem with *Glatt*. There, the Court vacated the denial of summary judgment for consideration in light of the factors detailed in *Glatt*, and upheld the denial of class certification.

The Court also vacated the District Court's order certifying the New York class of interns. To certify a class in a class action, the plaintiff must demonstrate, among other things, that common questions of law or fact predominate over questions affecting only individual members. On appeal, the Court highlighted the discussion of the primary beneficiary test and the need for an individualized inquiry when analyzing the factors noted above. For example, the Court stated that the internship programs at issue varied greatly across different departments and common evidence would not assist in answering whether the internship was tied to an education program, what type of training the intern received (if any), and whether the intern continued to work beyond the primary learning period, among other questions. Therefore, class certification was inappropriate based on the record set forth before the District Court. The Court also vacated the District Court's conditional certification of the nationwide collective. In determining whether to certify a collective, the Court considers, among other things, whether the "opt-in plaintiffs" are similarly situated to the named plaintiffs. For reasons similar to those stated above regarding class certification, the Court found the potential members of the collective not similarly situated to the named plaintiffs, specifically noting that the "collective presents an even wider range of experience than [the] proposed class because it is nationwide in scope, rather than limited to just New York interns."

Although the decision in *Glatt* is likely more accommodating to employers seeking to offer unpaid internship opportunities than the DOL six-factor test has been, properly classifying individuals as interns or employees is still an important and complex issue of concern for many employers. Misclassifying an employee as an unpaid intern can have serious consequences for a company, including liability for unpaid minimum wage and overtime payments, liquidated damages, attorneys' fees, tax penalties, or other penalties for failing to contribute to the state unemployment insurance or failing to provide workers' compensation coverage. If you have any questions or concerns regarding your internship program, please contact Kristina Grimshaw at (212) 758-7792, or any other attorney at the Firm.

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