Second Circuit Disregards U.S. Department of Labor Unpaid Intern Test

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The Second Circuit (Connecticut, New York, and Vermont) recently delivered a highly anticipated ruling on whether companies may continue to use unpaid interns. In what represents a clear victory for companies, the Court adopted a more flexible "primary beneficiary" test to determine whether workers should be properly classified as interns or employees.

In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit considered this issue of first impression: "when is an unpaid intern entitled to compensation as an employee under the FLSA?" There, the plaintiffs worked as unpaid interns either on the film *Black Swan* or at the Fox corporate offices in New York. They claimed Fox failed to pay them as employees per the United States Department of Labor's (DOL) longstanding six-part test, see the DOL's Intern Fact Sheet. The United States District Court for the Southern District of New York agreed, granting summary judgment in favor of two plaintiffs.

On appeal, however, the Second Circuit determined that the DOL's test is "too rigid," too limited to the facts of old case law involving unpaid railroad trainees, and out of touch with modern economic realities. The Second Circuit instead applied a more flexible "primary beneficiary" test, which balances the following factors:

- 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.
- 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.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- 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.
- 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 also emphasized that in applying this test, "[n]o one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage." The Court vacated the summary judgment order in favor of the two plaintiffs and remanded the matter for further proceedings.

Employers should be aware of this new focus on the educational aspects of internships, at least in the Second Circuit. Further, while it appears that the Second Circuit's revised standard is beneficial to employers, the standard should not be interpreted or viewed as to eliminate the risks associated with misclassifying individuals as interns.

If you have any questions regarding the structure of your existing internship program, or you need assistance with the development of a program, please contact George Morrison (646.837.5776; morrisong@whiteandwilliams.com), another member of our Labor and Employment Group, or any member of the firm whom you regularly contact.

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