

# ‘Primary Beneficiary’ Test Determines Employee Status of Unpaid Interns, Federal Appeals Court Rules

By Paul DeCamp, Richard I. Greenberg and Noel P. Tripp

August 10, 2015

How should an employer determine whether unpaid interns at a for-profit employer are employees under the Fair Labor Standards Act entitled to compensation for services provided?

According to the U.S. Court of Appeals for the Second Circuit, in New York, “the proper question is whether the intern or the employer is the primary beneficiary of the relationship.” *Glatt v. Fox Searchlight Pictures, Inc., et al.*, Nos. 13-4478-cv, 13-4481-cv (2d Cir. July 2, 2015). The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

The interns urged the Court to adopt a test granting them employee status whenever the employer receives an immediate advantage from their work. The Department of Labor, in a friend-of-the-court brief in support of the interns, argued that each of the six factors enumerated in its [Intern Fact Sheet](#) must be present for the intern to avoid qualification as an employee. The defendants-employers, on the other hand, urged the Court to adopt a nuanced primary beneficiary test.

Siding with the employers, the Second Circuit held that “the proper question is whether the intern or the employer is the primary beneficiary of the relationship,” identifying two significant features of the test. First, it “focuses on what the intern receives in exchange for his work,” the Court said. Second, it “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.”

The Court provided the following non-exhaustive set of considerations, none of which alone is dispositive, that must be weighed and balanced:

1. The extent to which the intern and the provider of the internship clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee.
2. The extent to which the internship provides training similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by education 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 beneficial learning to the intern.
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 provider of the internship understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Such a flexible standard, the Court said, “reflects a central feature of the modern internship—the relationship between the internship and the intern’s formal education.”

In addition, the Court vacated the district court’s certification of a class action under New York law and

## Meet the Author



**Paul DeCamp**  
Shareholder  
Washington, D.C. Region  
703-483-8305  
DeCampP@jacksonlewis.com



**Richard I. Greenberg**  
Shareholder  
New York  
212-545-4080  
GreenbeR@jacksonlewis.com



**Noel P. Tripp**  
Shareholder  
Long Island  
631-247-4661  
TrippN@jacksonlewis.com

a collective action under the FLSA. It deemed issues relating to classification of the interns too individualized to permit certification either under Federal Rules of Civil Procedure Rule 23 (which governs the procedure and conduct of class actions suits brought in federal court) or even the lenient standard applied at the preliminary stage of a collective action under the FLSA.

The Court explained that even where a provider of internships has a policy of replacing paid employees with unpaid interns, it is far from certain that every intern would prevail on a claim that he or she was an employee under the primary beneficiary test. Therefore, certification was improper, the Court said. Even “assuming some questions may be answered with generalized proof,” the Court held, “they are not more substantial than the questions requiring individualized proof.”

Similarly, as to collective action certification under the FLSA, the Second Circuit observed that “courts must consider individual aspects of the intern’s experience” and that such analysis may be sufficient to find that unpaid interns are not similarly situated, even at first-stage conditional certification.

Providers of internships, of course, should continue to be vigilant in reviewing their classifications of individuals as employees or unpaid interns.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

---

©2015 Jackson Lewis P.C. This Update is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. Reproduction in whole or in part is prohibited without the express written consent of Jackson Lewis.

This Update may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.

Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.

---

## Related Articles You May Like

July 23, 2015



### Washington High Court: Piece Rate Compensation Alone Does Not Satisfy Rest Break Pay Requirement

The Washington Supreme Court has ruled that employers must provide agricultural piece rate workers with extra compensation for their rest periods, rejecting the employer’s argument that its piece rate already included compensation for the required rest periods. *Demetrio v. Sakuma Bros. Farms, Inc.*, 2015 Wash. LEXIS 807 (Wash. July...

July 13, 2015



### Oregon Legislative Update

Oregon employers must comply with new laws signed by Governor Kate Brown mandating the provision of sick leave benefits, prohibiting inquiring into or considering an applicant’s criminal conviction history on an employment application form or prior to an interview, limiting non-competition agreements to no longer than 18 months...

July 8, 2015

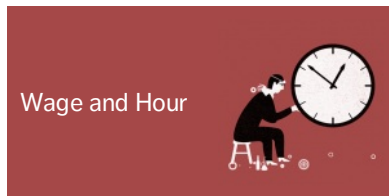


### Oregon Governor Signs ‘Ban the Box’ Legislation

Legislation restricting employers from inquiring about an applicant’s criminal background during the initial stages of the application process has been signed into law by Governor Kate Brown on June 26, 2015. The “Ban the Box” law, H.B. 3025, will take effect on January 1, 2016. The legislation applies to all...

---

## Related Practices



\*Honolulu, Hawai'i is through an affiliation with Jackson Lewis P.C., a Law Corporation  
©2015 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

[Privacy Policy](#), [Disclaimer](#) & [Copyright](#)