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‘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.

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