



Second Circuit Rulings Provide Hope For Companies' Use of Unpaid Interns

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Internships have traditionally been used by companies in various industries to allow students to gain experience and potential entry into competitive fields. Recently, a surge of wage and hour class and collective claims have been causing employers to reconsider unpaid intern programs.

In *Glatt v. Fox Searchlight Pictures, Inc.*, a federal district court in New York decided that Fox Searchlight Pictures, Inc. had violated federal and New York minimum wage laws by not paying interns who had worked on its film "Black Swan" and at its corporate offices. The interns alleged that they performed menial tasks, such as retrieving lunch, which should have been performed by paid employees. The judge relied on the U.S. Department of Labor's ("DOL") 6-factor test and ruled that considering the totality of the circumstances, the interns should have been classified as "employees" under New York law and the U.S. Fair Labor Standards Act ("FLSA"). The district court also certified a class of New York interns and a collective nationwide action of interns working at Fox Searchlight ("Fox").

The decisions in Fox Searchlight and a companion case, *Wang v. The Hearst Corp.*, were appealed, and the recent decisions by the U.S. Court of Appeals for the Second Circuit have provided potential relief to employers concerning unpaid internship programs. *Glatt v. Fox Searchlight Pictures, Inc.*, 2015 U.S. App. LEXIS 11435 (2d Cir. N.Y. July 2, 2015); *Xuedan Wang v. The Hearst Corp.*, 2015 U.S. App. LEXIS 11516 (2d Cir. N.Y. July 2, 2015)

GLATT v. FOX SEARCHLIGHT PICTURES, INC.

On appeal, the Second Circuit vacated the district court's ruling that the interns were employees and its certification of the class and collective actions. Significantly, the Court of Appeals rejected the plaintiffs' proposed test that interns should be considered employees whenever the employer receives an immediate advantage from their work. The Court of Appeals also declined to defer to the DOL's 6-part test for assessing whether an employment relationship exists, stating that the DOL's test was "too rigid" and unpersuasive.

Instead, the appellate court accepted Fox's more nuanced "primary beneficiary" test that considers the totality of the circumstances, under which an employment relationship will not be found if the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation. The Court of Appeals outlined a non-exhaustive set of factors to be considered in determining whether the intern, or the employer, is the primary beneficiary of the relationship. Those factors include:

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;
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment;
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; and
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 appellate court indicated that this approach reflects a central feature of the modern internship – the relationship between the internship and the intern's formal education. The Court of Appeals noted that the purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting. By focusing on the educational aspects of the internship, the appellate court's approach "better reflects the role of internships in today's economy than the DOL factors..."

The Court of Appeals also reversed the district court's granting of the plaintiffs' motion to certify a class of unpaid interns, holding that the plaintiffs failed to show that "questions of law or fact common to class members predominate over any questions affecting only individual members..." given that the question of an intern's employment status is a highly individualized inquiry. The common evidence provided by the plaintiffs "did not help answer whether a given internship was tied to an education program, whether and what type of training the intern received, whether the intern continued to work beyond the primary period of learning, or the many other questions that are relevant to each class member's case." The appellate court for similar reasons also vacated the lower court's conditional certification of the plaintiffs' FLSA collective action.

WANG v. THE HEARST CORP.

The companion case of *Wang v. The Hearst Corp.* dealt with plaintiffs who worked as unpaid interns at various magazines. The Court of Appeals similarly vacated the district court's denial of the employer's motion for partial summary judgment on the employee issue, and remanded the case for application of the above-listed seven factors in deciding whether the plaintiffs' established that they were in fact FLSA employees. The appellate court also affirmed the lower court's denial of class certification given that common questions did not predominate over individual ones.

Nevertheless, the California Labor Commissioner determined that the driver in question was an employee of Uber. The deputy commissioner focused on the fact that drivers are integral to Uber's business: "Without drivers such as Plaintiff, [Uber's] business would not exist." The deputy commissioner also highlighted the control Uber exercised over the transaction, both in registering drivers and in negotiating fees with passengers. The deputy commissioner also found that the driver exercised no "managerial" skill over her operations, despite fact that she had complete autonomy over the hours and areas she choose to drive, and further found that other than her ownership of her car, she had no "investment in the business."





On June 16, 2015, Uber appealed the Labor Commissioner's decision to the San Francisco County Superior Court. However, this decision serves as an important reminder of the potential risks faced by companies that use independent contractors to provide services. Given the legal climate in California, companies that do not have properly drafted independent contractor agreements or that cannot establish an independent contractor relationship exists consistent with applicable legal precedents risk potentially significant liability under California law. Accordingly, as misclassification litigation becomes more common, companies should confirm that their independent contractor agreements comply with new developments in the law and assess whether an employment relationship might be a viable alternative.

ASK MSK

Q: Will employers that use unpaid interns now see fewer class action suits?

A: The Court of Appeals rulings may discourage the plaintiffs' bar from bringing class action wage and hour claims on behalf of interns since obtaining class certification should be more difficult. However, these rulings do not signal the end of interns' litigation. The decisions in both cases expressly did not foreclose the possibility that renewed efforts for class certification could succeed under the appellate court's seven factors. Moreover, the decision is only binding on federal district courts in the Second Circuit, which covers New York, Connecticut and Vermont. Other Circuits, such as the more plaintiff friendly Ninth Circuit, which has jurisdiction in California and other western states, may disagree with the Second Circuit and apply the more stringent DOL test. Employers also should be aware of possible conflicts between the Second Circuit's approach and the requirements of state law, especially in California and other states that have more protective labor legislation, as an individual could qualify as an intern under federal law but not under the applicable state law.

Q: Is it "safe" to re-implement or continue the use of unpaid interns?

A: In the Second Circuit, and to the extent that these Court of Appeals decisions are followed in other Circuits, they make the use of unpaid internships more viable. However, employers should ensure that their internship programs, at a minimum, meet the seven factors listed above in determining whether an unpaid intern is actually an employee. Employers especially should ensure that their internships provide interns with an educational experience, and that the internships integrate classroom learning with practical skill development. An internship program not connected to a course of classroom study is still unlikely to be upheld. Further, outside of the Second Circuit, it would still be prudent to consider the more stringent DOL test, which is also applied under some state laws, such as in California.

Q: How does the DOL Test compare to the test used by the Second Circuit?

A: The DOL Test requires that all of the following factors be met in order for an employment relationship to not exist:



1. The internship is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The test outlined by the Second Circuit does not require that all of its factors be met, but instead uses its seven factors as a non-exhaustive set of considerations to determine whether the employer or the intern is the primary beneficiary. The Second Circuit test provides a trial court with flexibility to examine the economic reality between the employer and intern and does not preclude the employer from deriving some benefit or advantage from the use of interns, as long as the intern is the primary beneficiary of the relationship.

