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## Second Circuit Develops “Primary Beneficiary” Test to Evaluate Unpaid Internships

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*On July 2, 2015, the U.S. Court of Appeals for the Second Circuit adopted a “primary beneficiary” test for evaluating whether unpaid interns are employees for purposes of the Fair Labor Standards Act (FLSA). Rejecting a six-factor test that the U.S. Department of Labor has used for over forty-five years, the Second Circuit held “the proper question is whether the intern or the employer is the primary beneficiary of the relationship.” The Second Circuit’s decision in *Glatt. v. Fox Searchlight Pictures, Inc.*, vacated a district court judgment that two interns on the movie *Black Swan* had been improperly classified as unpaid interns rather than employees. The Second Circuit also held that, under the “primary beneficiary” standard, “the question of an intern’s employment status is a highly individualized inquiry,” and therefore vacated the district court’s orders conditionally certifying a nationwide FLSA collective action and certifying a class of New York interns.*

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### Background

In 2011, Eric Glatt and Alexander Footman sued Fox Searchlight Pictures, Inc., and Fox Entertainment Group, Inc. for violations of the FLSA and New York Labor Law. Glatt and Footman alleged that they were improperly classified as interns and should have been entitled to pay for their work on the film *Black Swan*. A third unpaid intern, Eden Antalik, filed a separate class action.

In June 2013, U.S. District Court for the Southern District of New York granted partial summary judgment to Glatt and Footman, finding they were employees under the FLSA and New York Labor Law. The district

court relied on the DOL's six-factor test, under which "[i]nternships in the 'for-profit' private sector will most often be viewed as employment," unless all six of the following DOL "trainee" test criteria are met:

1. The internship, even though it includes actual operation of the facilities of the employer, 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; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship;
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Contrary to the DOL's position, however, the district court did not require that all six factors be present to establish that the intern is not an employee. Instead, the district court balanced the factors, finding the first four factors weighed in favor of finding that Glatt and Footman were employees, and the last two factors favored finding them to be trainees. As a result, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns and granted their motion for partial summary judgment.

### Primary Beneficiary Test

On interlocutory appeal, the Second Circuit identified the question of when an unpaid intern is entitled to compensation as an employee under the FLSA as an issue of first impression for the Court, and noted that the Supreme Court has provided no guidance on the issue since its 1947 decision in *Walling v. Portland Terminal Co.*, holding that trainee brakemen in a railroad course did not qualify as employees under the FLSA. Criticizing the DOL's six-factor test as too "rigid" and based too closely on the particular fact pattern in *Portland Terminal*, the Second Circuit adopted a more flexible, individualized test, with "two salient features": "First, it focuses on what the intern receives in exchange for his work.... Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer."

The Second Circuit provided a set of non-exhaustive considerations when determining the primary beneficiary in the context of unpaid internships at 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, 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 the 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 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.
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. Applying these considerations "requires weighing and balancing all of the circumstances," and no one factor is dispositive. The Court explained that not every factor needs to point in the same direction and that courts may consider relevant evidence beyond the specified factors in appropriate cases.

In vacating the district court's orders conditionally certifying a nationwide FLSA collective action and certifying a class of New York interns, the Second Circuit noted that its new test required a highly individualized inquiry. Accordingly, the Court explained that common evidence will not help to answer whether a given internship was tied to an educational 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 would be relevant to each proposed class member's case.

### Practical Implications and Unanswered Questions

The Second Circuit's decision in *Glatt* now sets a different standard for employers in New York, Connecticut, and Vermont than for employers in other Circuits, where courts and the DOL may still seek to apply the DOL's six-factor test. Cautious employers, therefore, would be well-advised to evaluate unpaid internship programs under both the DOL test and the "primary beneficiary" test and consider paying interns at least the applicable minimum wage if the position fails to satisfy either test. Employers should also consult counsel regarding any state-specific requirements, given that some states employ more strict requirements than the FLSA in determining whether an individual may be considered an intern and, thus, be exempt from state minimum wage and overtime requirements.

We generally suggest that clients take the following steps with respect to unpaid internships:

- Provide a written offer letter to the student intern, stating that (a) the internship is unpaid; and (b) that a job is not guaranteed upon completion of the training or completion of the person's schooling, and act accordingly. The DOL has warned that "even when such an agreement [that internship is unpaid and intern is not entitled to a job at the conclusion of it] exists, hiring workers who finish the training program is considered in determining whether an employment relationship exists, and frequently hiring such workers suggests that the workers are not trainees."
- When publicizing the internship, state that applicants who will receive college credit are preferred. If college credit is not available, seek to receive written documentation from the student intern's school stating that the internship is approved and/or sponsored by the school as educationally relevant.
- Create a formal internship program with scheduled start and end dates. As part of the formal program, schedule presentations in which leaders from different parts of the company speak to student interns about their job duties, implement a mentoring program, and offer generous instruction and constructive

feedback on student interns' work product. Where possible, match the duration of the internship to the academic schedule (e.g., the summer or semester-length).

- Emphasize and put into practice the training and close supervisory characteristics of the internship program. Expend company resources to provide adequate training to the intern on general practices, so the intern will be well-equipped to use his or her skills in multiple employment settings.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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