

# One Minute Memo®



## Second Circuit Teaches Unpaid Interns a Lesson

By Robert S. Whitman and Adam J. Smiley

In a closely watched case affecting the viability of unpaid internship programs at for-profit employers, the Second Circuit held that the “primary beneficiary” test should be used to decide whether interns should be deemed employees or trainees. The court also held that this test requires highly individualized inquiries -- a conclusion that may deal a blow to plaintiffs’ abilities to obtain class or collective certification in these cases.

The plaintiffs in *Glatt v. Fox Searchlight Pictures, Inc.* served as unpaid interns for the film production company, including on the movie *Black Swan*. In a 2013 decision, Judge William Pauley of the Southern District of New York granted summary judgment to two of the interns, holding that they should have been treated as employees entitled to compensation, and held that a third intern could pursue his related claims as a class and collective action under the FLSA and New York Labor Law.

The Second Circuit vacated those rulings. On the question of employee status, the court declined to defer to the Department of Labor’s 6-factor test, holding that it is “too rigid” since it was based on a 68-year old Supreme Court decision involving railroad trainees and was not entitled to special deference. The court also declined to adopt the interns’ proposed test, under which employee status would exist whenever the employer receives an “immediate advantage from the interns’ work.”

Instead, the Second Circuit held that the primary beneficiary test provides a more appropriate framework by focusing on “what the intern receives in exchange for his work” and providing “the flexibility to examine the economic reality as it exists between the intern and the employer.”

Rather than using a rigid set of factors to evaluate the internship, the court fashioned a flexible, non-exhaustive set of considerations:

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.

The court specifically noted that courts may consider relevant evidence beyond the specified factors in appropriate cases. Further, these considerations require a "weighing and balancing [of] all the circumstances," no 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."

At the heart of the decision is the notion that a legitimate internship program must "integrate classroom learning with practical skill development in a real world setting," and that focusing on the academic aspect of an internship program is critical and better reflects the modern workplace. The court also appeared to recognize that for any meaningful internship experience, the intern must do some "work." With this understanding, the court said that interns may perform work so long as it "complements" rather than "displaces" the work of the company's regular employees.

On the question of class and collective certification, the court held that "the question of an intern's employment status is a highly individualized inquiry" given the nature of the primary beneficiary test. Even under the FLSA's more lenient standard, it said, the interns were not "similarly situated" to each other because of the "individualized aspects of [their] experience," especially given the nationwide scope of the proposed collective action.

Through a summary order, the Second Circuit also upheld a Southern District of New York decision that denied class certification in *Wang v. Hearst Corp.*, a tandem internship case. Putting a finer point on the certification issue than in *Glatt*, the court held:

As we have framed the relevant inquiry, courts must analyze how the internship was tied to the intern's formal education, the extent of the intern's training, and whether the intern continued to work beyond the period of beneficial learning. Irrespective of the type of evidence used to answer them, these questions are individual in nature and will require individual analysis. . . . Therefore, because of variation in the proposed class and the need for individual analysis of each intern's situation, common questions do not predominate over individual ones.

### **So what does this all mean?**

*First*, the DOL's 6-factor test, at least in the Second Circuit, is no longer valid. As the court said, "[B]ecause the DOL test attempts to fit [the Supreme Court's railroad decision's] particular facts to all workplaces, and because the test is too rigid for our precedent to withstand, we do not find it persuasive, and we will not defer to it."

*Second*, the decision makes clear that interns may perform some "work" so long as the work does not displace an employee. While no bright line exists, interns may likely be assigned projects that help current employees do their work more effectively. However, the amount of work should be weighed in the context of the entire intern program to ensure that the scale still tips toward the intern being the primary beneficiary of the program.

*Third*, the educational component of the internship is a critical factor. Companies' programs should emphasize training and educational opportunities, such as speaker series, mock projects, information sessions, open door policies to ask questions about the industry, and attendance at industry conferences or events. The greater the educational component of the program, the more likely that the interns will be the primary beneficiaries.

*Fourth*, the recent wave of internship cases may have crested and crashed, based not only on the Second Circuit's decision on the merits, but as much or more because class and collective certification has become more difficult. Plaintiffs' lawyers may now decide to forego cases where the inherent individual inquires necessary to evaluate interns' experiences mean that certification will be difficult or impossible.

Stay tuned for more developments as we see how courts in the Second Circuit implement this decision and how it affects lawsuits currently filed, as well as the frequency of new lawsuits.

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