2nd Circuit Amends Unpaid-Internship Opinion

Insights
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Readers will recall that, last July, the 2nd Circuit U.S. Court of Appeals (with jurisdiction over Connecticut, New York, and Vermont) adopted a "primary benefit" framework for determining whether a for-profit entity's unpaid intern is or is not an "employee" for purposes of the federal Fair Labor Standards Act.

As we reported then, the court concluded in *Glatt v. Fox Searchlight Pictures* that "the proper question is whether the intern or the employer is the primary beneficiary of the relationship." The court also articulated seven, non-exclusive factors to use in deciding whether such an intern must be paid consistently with the FLSA's requirements.

The Circuit has now released an amended opinion that, while substantially similar to the earlier one, contains some interesting changes.

Unique "Internship" Expectation
In embracing the primary-benefit approach originally, the court pointed to two "salient features" favoring such an evaluation:

- The focus is "on what the intern receives in exchange for his work"; and
- Courts will have "the flexibility to examine the economic reality as it exists between the intern and the employer."

The amended opinion adds a *third* consideration: The framework "acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship[,] because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job)."

Not All Training Is An "Internship"
However, the court also said explicitly that its approach "is confined to internships and does not apply to training programs in other contexts."

The amended opinion joins this statement with the court's earlier observation that "a central feature" of the modern internship is "the relationship between the internship and the intern's formal education", such that "[t]he purpose of a bona-fide internship is to integrate classroom learning with

practical skill development in a real-world setting". The court noted there that all of the *Glatt* interns "were enrolled in or had recently completed a formal course of post-secondary education."

The Bottom Line

The new *Glatt* opinion still does not mean that every unpaid intern is a non-employee under the FLSA, even if the internship is connected to an educational program or to another formal academic pursuit. On the other hand, *Glatt* also implies that, in the *absence* of such a connection, other factors supporting an intern's non-employee status had better be clear, strong, and convincing.

The Circuit's amended discussion (i) provides additional guideposts to consider in establishing and maintaining these internships, and (ii) might increase the chances that other federal appellate courts will take a similar course (as the 11th Circuit has already done). But in the end, a business that considers providing unpaid (or minimally-paid) internships should nevertheless:

- Evaluate thoroughly whether to permit unpaid internships *at all* under the business's own, particular circumstances;
- Design such internships carefully so as to be able to demonstrate their non-employment nature (including by taking the more-recent *Glatt* discussion into account);
- Administer the internships consistently with that design at all times; and
- Keep in mind that states and other jurisdictions can take their *own* positions regarding an intern's status under *their* particular wage-hour laws.