



## Court Adopts "Primary Benefit" Unpaid-Intern Analysis

Insights

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We have been following developments in *Glatt v. Fox Searchlight Pictures* since former unpaid interns filed the lawsuit in 2011 seeking (among other things) back-wages under the federal Fair Labor Standards Act. In June 2013, the lower federal court ruled that at least two of the unpaid interns should have been deemed "employees" for purposes of the FLSA's requirements.

The 2nd Circuit U.S. Court of Appeals (with jurisdiction over Connecticut, New York, and Vermont) has vacated that decision and has remanded the case for further proceedings. In so doing, the 2nd Circuit:

- Fashioned a set of considerations for use in determining whether interns at for-profit entities are or are not FLSA employees who must be paid consistently with that law's requirements; and
- Declined to defer to the U.S. Labor Department's arguments and views.

### Who Receives The Primary Benefit?

The Circuit said that "the proper question is whether the intern or the employer is the primary beneficiary of the relationship." The answer, it continued, involves weighing and balancing all of the relevant circumstances, including (but not limited to) the extent to which:

- The intern and the employer clearly understand that there is no expectation of compensation;
- The internship provides training that would be similar to that given in an educational environment (including clinical and other hands-on training provided at educational institutions);
- The internship is tied to the intern's formal education program by integrated coursework or academic credit conferred;
- The internship accommodates the intern's academic commitments by corresponding to the academic calendar;
- The internship's duration is limited to the period during which the internship provides beneficial learning to the intern;
- The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
- The intern and the employer understand that there is no entitlement to a paid job at the internship's conclusion.

According to the court, "[n]o 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" under the FLSA.

### **Government's Positions Rejected**

USDOL had submitted a friend-of-the-court brief in which it opposed evaluating the issue as being one of primary or relative benefit. USDOL also urged the adoption of its longstanding test (most recently repeated in its "Fact Sheet #71") calling for treating an intern as an FLSA employee unless each of six factors is met.

The court did not feel that USDOL's position was based upon any special competence or role. The court's view also was that USDOL's test is outdated, inflexible, and less-well-suited to "the role of internships in today's economy" than the court's approach.

### **The Bottom Line**

This decision represents the views of only one federal appellate court, so it is too soon to know whether the approach it embraced will become the consensus.

Moreover, businesses should not take the ruling to mean that every unpaid intern is a non-employee under the FLSA, even where an internship has some connection to an educational institution or to an academic pursuit. Instead, it is still important to:

- Evaluate thoroughly whether to permit unpaid internships *at all* under the business's particular circumstances;
- Design any such internships carefully so as to be able to demonstrate their non-employment nature;
- 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.