



USDOL Brief Elaborates Upon "Intern" Views

Insights

7.19.14

We wrote some time ago about a lower federal court's determination in *Glatt v. Fox Searchlight Pictures* that at least two unpaid interns were "employees" for federal Fair Labor Standards Act purposes.

This ruling is now being reviewed by the 2nd Circuit U.S. Court of Appeals (with jurisdiction over Connecticut, New York, and Vermont). The U.S. Labor Department has submitted a friend-of-the-court brief (link to copy below) in which it supports the lower court's decision. USDOL's filing provides some interesting insight into its views about when an intern is an "employee" for purposes of the FLSA's requirements.

All-Or-Nothing Six-Part Test

USDOL's analysis begins by reasserting its longstanding position that, unless each of six criteria is met, an intern is an FLSA "employee". The factors are (with a little paraphrasing) that:

- The internship is similar to training given in an educational establishment or in a vocational school, even if the intern's activities include actual operation of the employer's facilities;
- The internship is for the intern's benefit;
- The intern does not displace regular employees but instead works under their close supervision;
- The employer derives no immediate advantage from the intern's activities, and its operations might occasionally actually be impeded;
- The intern is not necessarily entitled to a job at the internship's end; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The brief summarizes USDOL's views by saying that an internship is "less likely" to be FLSA employment, and will "usually" satisfy the six criteria, if it has "been set up for the specific purpose of providing targeted educational training to the intern rather than being a general introduction to the workplace or a particular industry; benefits the intern because of the educational nature of the internship rather than providing the employer with free entry-level labor; provides close supervision and therefore does not displace regular employees; and does not include compensation or promise of a job"

Other Noteworthy Statements

Among USDOL's elaborations on these themes are that:

- It is "critical" for a non-employee internship to have an educational component that extends throughout the internship's entirety and that "imparts substantial education content that is transferable beyond the confines of the particular workplace . . ."
- The internship must provide "more than the general skills and exposure that any new employee would receive in [the] first few months on the job", and the "intern's benefit" factor cannot be met if the employer's business is dependent upon the intern's work.
- A consideration favoring "employee" status is that an organization would have either hired additional employees or required existing employees to work more hours absent having the intern.
- It would also favor "employee" status if an intern receives the same level of supervision as the rest of the workforce.
- "Minimal productive work" done by an intern might be "offset by the burden assumed by the employer in providing the training and supervision."
- An internship "should not be used as a trial period for permanent employment" and should be for a "fixed, rather than an open-ended, period of time."
- USDOL rejects an analysis that is based upon to whose "primary" or "relative" benefit the internship runs, and it is especially disdainful of "intangible" benefits.

As it has been suggesting since releasing "Fact Sheet # 71" in April 2010, USDOL says in a footnote that "[d]ifferent rules apply to individuals who . . . perform unpaid internships . . . for non-profit charitable organizations." However, once again the agency provides no specifics as to exactly how the "rules" are "different" in this context. And as we have said, interns for non-profit organizations are free to assert FLSA claims in court, notwithstanding what USDOL thinks.

The Bottom Line

Of course, whether and to what extent the 2nd Circuit embraces USDOL's take on these matters remains to be seen. Even so, any employer permitting unpaid internships should assume that USDOL would apply these principles in investigating an intern's status. Management might therefore be wise to establish and maintain such internships with an eye to what the agency has argued.

[Glatt v. Fox Searchlight USDOL Amicus Brief.pdf \(207.40 kb\)](#)