

Labor and Employment Alert

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2nd Circuit Vacates Plaintiffs' Partial Summary Judgment and Class Certification in Intern Cases

Last week, in two closely watched cases, the U.S. Court of Appeals for the 2nd Circuit vacated a 2013 district court decision that:

- found individuals working on the film *Black Swan* to be improperly classified as unpaid interns instead of “employees” under federal and New York law, and
- certified the case for class and collective action treatment. *Glatt v. Fox Searchlight Pictures*, No. 13-4478 (2nd Cir. July 2, 2015). In a related case, the 2nd Circuit also vacated a district court decision denying the plaintiff’s summary judgment motion on the employee status question, but affirmed the order denying class certification. *Wang v. The Hearst Corp.*, No. 13-4480 (2nd Cir. July 2, 2015).

In doing so, the appeals court answered a question of first impression in the 2nd Circuit, specifically, under what circumstances would an unpaid intern be deemed an “employee” and thus entitled to compensation.

In *Fox*, the district court ruled that the plaintiffs—whose primary duties included answering phones, making copies, filing, drafting cover letters and running errands—did not meet the criteria to be unpaid interns under a six-factor test articulated by the U.S. Department of Labor (DOL).

On defendant’s appeal, the *Fox* plaintiffs urged the court to adopt a test whereby interns would be deemed employees whenever their work provided an “immediate advantage” to the purported employer (one of the DOL’s six criteria). The DOL, as *amici*, urged the court to adopt a test whereby every one of its factors must be met for someone not to be an employee, instead of balancing them as the district court did.

The 2nd Circuit rejected both approaches as too inflexible and instead agreed with the defendants that the proper standard is whether the intern or the purported employer is the “primary beneficiary” of the relationship. The court then set forth the following non-exhaustive considerations to aid courts in applying this standard:

- 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.

- 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.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- 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.
- 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 made clear that the primary beneficiary standard requires a weighing of all the circumstances and that “[n]o one factor is dispositive and every factor need not point in the same direction for [a] court to conclude that the intern is not an employee entitled to minimum wage.” The court also made clear that the standard focuses on the educational aspects of the internship as “[t]he purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting”

Because the *Fox* district court limited its review to the DOL's six factors, the appeals court vacated the decision and remanded the case for further proceedings consistent with the newly articulated standard. The appeals court expressed no opinion on the outcome of such further proceedings.

The appeals court also vacated the class and collective action decisions because the cited common evidence—that Fox had a policy of replacing paid employees with unpaid interns—was insufficient to answer the question of whether each individual was an employee under the primary beneficiary test. Notably, the court went on to hold that the test comprises a “highly individualized inquiry” but expressly stopped short of ruling that class or collective action treatment could never be proper.

In light of the newly articulated standard, the 2nd Circuit also vacated the denial of the plaintiff's summary judgment motion in *Hearst* and remanded the case for further proceedings, but affirmed the order denying class certification. The district court had concluded that no uniform policy existed regarding the interns' duties, training and supervision, and that their experiences differed across the multiple magazines that Hearst operated, so common questions did not predominate. The appeals court found these conclusions to be consistent with its holding in *Fox* that the primary beneficiary test is a highly individualized inquiry, but again stopped short of ruling that class treatment could never be proper under this standard.

While *Fox* and *Hearst* are generally a win for employers, employers should carefully consider whether their unpaid internship or trainee programs comply with the new primary beneficiary test. Many similar

cases have been filed in New York and California in the past two years, and the stakes in these cases are high. They are being brought as class actions, seeking unpaid wages on behalf of a potentially large number of individuals who worked as unpaid interns, as well as various statutory penalties. To learn more about the background of these cases, please [read](#) our June 2015 article in the Daily Journal.

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