July 10, 2015

Second Circuit Applies Highly Fact-Specific Primary Beneficiary Test to Determine Whether an Unpaid Intern Is an Employee under the FLSA

In *Glatt* v. *Fox Searchlight Pictures, Inc.*, Nos. 13–4478-cv, 13–4481-cv (2d Cir. July 2, 2015), a closely-watched case involving unpaid interns, the Second Circuit recently issued an important opinion addressing the standard for determining when an unpaid intern is entitled to compensation as an employee under the Federal Labor Standards Act ("FLSA"), which was an issue of first impression before the Court.[1] Slip Op. 11. In the decision, Judge Walker, writing for a unanimous court, announced that the proper test to be applied is "whether the intern or the employer is the primary beneficiary of the relationship." *Id.* at 13. The Second Circuit made clear that the new test "is a highly individualized inquiry." *Id.* at 19. And in light of this new standard, the Second Circuit overturned the district court's two orders—one granting class certification under Rule 23 and the other granting conditional certification of a collective action under the FLSA.

The decision in *Glatt* indicates that plaintiffs will now face an uphill battle in both obtaining class certification and obtaining conditional certification for FLSA collective actions.

Background

The FLSA requires employers to pay all "employees" a specified minimum wage and overtime pay. 29 U.S.C. §§ 206-07. The New York Labor Law ("NYLL") has similar requirements. *See* N.Y. Labor Law § 652. As the Second Circuit in *Glatt* pointed out, neither statute, however, provides much guidance on who is an "employee" under either statute. The FLSA defines "employee" as an "individual employed by an employer." 29 U.S.C. § 203(e)(1). And the NYLL defines "employee" as "any individual employed, suffered or permitted to work by an employer." 12 N.Y.C.R.R. § 142-2.14(a).

In 2010, the U.S. Department of Labor ("DOL") published formal guidance enumerating six factors, all of which have to be present to establish that an intern is not an employee under the FLSA. The factors mirrored older DOL guidance regarding trainees that stemmed from a 1947 Supreme Court decision recognizing that unpaid railroad brakemen trainees should not be treated as employees under the FLSA. *See Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947).

[1] The Court's opinion is limited to internships at for-profit employers.

Before the Second Circuit's opinion in *Glatt*, New York courts generally looked to a totality of circumstances test that incorporated, with varying degrees of deference, the six factors enumerated by the DOL to determine when an intern should be considered an employee under the FLSA and NYLL. *See, e.g., Wang* v. *Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013) (applying a totality of circumstances test that looked to the DOL factors).

The district court in *Glatt* v. *Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013), used such an approach by balancing the DOL factors to find that an employment relationship existed between Fox and two of the plaintiffs, Eric Glatt and Alexander Footman, two interns who assisted in the production of the Fox Searchlight-distributed film *Black Swan*. *Glatt*, Nos. 13–4478-cv, 13–4481-cv, slip op. at 4-6, 11. The district court also granted a third plaintiff's, Eden Antalik's, motions to certify a class of "[a]ll individuals who had unpaid internships between September 28, 2005 and September 1, 2010" with certain divisions of Fox Entertainment Group ("FEG"), *id.* at 17, and to conditionally certify a nationwide FLSA collective of all individuals who had unpaid internships between January 18, 2010 and September 1, 2010 with those same divisions of FEG, *id.* at 21-22.

An appeal to the Second Circuit by defendants followed.

Second Circuit Opinion

The Second Circuit announced that the proper test to determine when an intern is an employee under the FLSA is a "primary beneficiary" test, consisting of two main features: (1) "what the intern receives in exchange for his work," and (2) the flexibility accorded to courts "to examine the economic reality as it exists between the intern and the employer." *Id.* at 13-14 (citing *Barfield* v. *N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008)). The Court explained that although the primary beneficiary test requires "courts to weigh a diverse set of benefits to the intern against an equally diverse set of benefits received by the employer," certain discrete facts are more relevant than others. *Id.* at 14. The Court went on to provide the following non-exhaustive list of seven considerations that courts should consider when determining whether an intern has an employment relationship:

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.

Id. at 14-15. Notably, five of the seven factors concern the intern's education and academics.

In its decision, the Second Circuit expressly rejected the DOL's six factor test, which the DOL defended in *Glatt* as *amici curiae* in support of the plaintiffs. The Court believed that the primary beneficiary test more appropriately addresses "the central feature of the modern internship," namely "the relationship between the internship and the intern's formal education," as compared to the DOL's factors, which the Court pointed out are derived from a 68-year old Supreme Court case. *Id.* at 16.

Since the district court limited its inquiry to balancing the DOL's six factors, the Second Circuit vacated the district court's order granting partial summary judgment to plaintiffs Glatt and Footman on their employment status and remanded the case for further proceedings consistent with its opinion. *Id.* at 16-17.

The Court went on to analyze whether the district court's separate grants of class certification under Rule 23 and collective action conditional certification under the FLSA were proper. Specifically, the court reviewed whether "questions of law or fact common to class members predominate over any questions affecting only individual members," as required for Rule 23(b)(3) class certification. *See* Fed. R. Civ. P. Rule 23(b)(3). The district court had concluded that the predominance requirement was met because evidence "tending to show that interns were recruited to help with busy periods, that they displaced paid employees, and that Fox employees overseeing internships did not believe they complied with the law" answered common questions of liability that predominated over individual calculations of damages. *Glatt*, Nos. 13–4478-cv, 13–4481-cv, slip op. at 17-18. The Second Circuit disagreed and held that plaintiff Antalik failed to meet the predominance requirement because she failed to provide evidence showing that "every Fox intern was likely to prevail on her claim that she was an FLSA employee under the primary beneficiary test, the most important issue in each case." *Id.* at 19-20.

In short, the Second Circuit's holding means that the predominance requirement can only be met if plaintiffs identify evidence that shows that all interns in a class are employees under the FLSA under the primary beneficiary test, evidence that plaintiff Antalik lacked. As a result, the Second Circuit vacated the district court's order certifying plaintiff Antalik's New York class. *Id.* at 20. For substantially the same reasons, because of the individual nature of the primary beneficiary test, the Second Circuit also vacated the district court's order conditionally certifying Antalik's proposed nationwide collective action and remanded the case for further proceedings. *Id.* at 23.

On the same day that *Glatt* was issued, the Second Circuit issued a summary order in another closely-watched unpaid intern suit, *Wang* v. *Hearst Corp.*, No. 13-4480-cv (2d Cir. July 2, 2015), vacating the district court's denial of the plaintiffs' motion for summary judgment on the issue of their employment status, because the district court did not consider all the factors outlined in *Glatt*. Slip Op. at 4-5. The Court also affirmed the district court's denial of class certification, finding that common questions do not predominate over individual ones, because "of variation in the proposed class and the need for individual analysis of each intern's situation." *Id.* at 6.

Analysis

Glatt and *Wang* are significant developments in employment law and significant victories for employers.

First, the *Glatt* and *Wang* decisions strongly suggest that it will be nearly impossible for plaintiffs to certify either a putative class or conditional FLSA collective of interns seeking to be recognized as employees. The Second Circuit noted in its decisions that the Court could not "foreclose the possibility that a renewed motion for class certification" or "conditional collective certification might succeed on remand under the revised standard." *See Glatt*, Nos. 13–4478-cv, 13–4481-cv, slip op. at 20 n. 5, 23 n. 7; *see also Wang*, No. 13-4480-cv, slip op. at 7 n. 2. However, any such possibility in *Glatt*, *Wang*, or, indeed, any other unpaid intern suit, is remote in light of the *Glatt* Court's repeated statements that "the most important issue" in unpaid intern suits is whether the intern is the primary beneficiary of the internship, an analysis in which "courts must consider individual aspects of the intern's experience," and which inherently is a "highly individualized inquiry." *Glatt*, Nos. 13–4478-cv, 13–4481-cv, slip op. at 19, 22; *see also Wang*, No. 13-4480-cv, slip op. at 6-7 (citing *Glatt*). Plaintiffs will have difficulty identifying generalized proof that can answer what the Court has stated repeatedly is a fact-specific, individualized inquiry.

Second, the Second Circuit's recent rulings provide clear guidance on the standard that will be applied in New York courts for determining the employment status of unpaid interns. The primary beneficiary test, in essence, establishes that the more an internship benefits an intern, especially educationally and academically, the less likely the intern is an employee under the FLSA.

In evaluating whether their internship programs are exposed to liability under the FLSA for unpaid internship claims, employers should weigh and balance all circumstances and particularly consider the non-exhaustive factors outlined in *Glatt* enumerated above.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Allan J. Arffa 212-373-3203 aarffa@paulweiss.com	Robert A. Atkins 212-373-3183 ratkins@paulweiss.com	Jay Cohen 212-373-3163 jaycohen@paulweiss.com
Eric Alan Stone 212-373-3326 estone@paulweiss.com	Daniel J. Toal 212-373-3869 dtoal@paulweiss.com	Liza M. Velazquez 212-373-3096 lvelazquez@paulweiss.com

Counsel Maria Helen Keane and Associate Lin Ting Li contributed to this client alert.