

## Second Circuit Sides With Employers in Two Cases Involving Unpaid Interns

In two recent cases decided on July 2, the Second Circuit Court of Appeals held that in many instances, unpaid interns may not necessarily be employees covered by the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). In both cases ([Glatt v. Fox Searchlight Pictures](#) and [Wang v. The Hearst Corporation](#)), plaintiffs who had obtained internships at major media companies argued that they were entitled to wage payments under the FLSA and NYLL; in addition, they sought to bring their claims as class and/or collective actions, which would drive up the costs of litigation and significantly increase the potential liability. The Second Circuit adopted a standard that will likely make it more difficult for unpaid interns to establish employment status, and will likely make it more difficult for unpaid interns to litigate their FLSA and NYLL claims in a class or collective action.

The *Glatt* and *Wang* decisions articulated two principles of great importance to employers considering internship programs. First and foremost, the Second Circuit rejected a rigid six-point test promulgated by the United States Department of Labor to determine whether interns should be considered employees, and instead adopted a more nuanced test of employment status that examines whether the employer or the intern is the “primary beneficiary” of the relationship. Second, the Court noted that because the circumstances of the internships at issue in the two cases were fact-specific, there is a high burden which plaintiffs must meet to show the requisite commonality to support a class or collective action.

While these cases were pending in the Second Circuit, the college and university community was concerned that an important resource for experiential learning might be foreclosed if employers decided to discontinue their unpaid internship programs because of a concern about FLSA or NYLL liability. Because of the potential impact on higher education, the American Council on Education (together with six other national consortia of colleges and universities) asked Bond attorneys [Shelley Sanders Kehl](#) and [E. Katherine Hajjar](#) to file an *amicus* brief arguing that the Court should consider the educational value of internships. These arguments were adopted by the Court and featured prominently in its *Glatt* decision.

The Court proposed the following seven (non-exhaustive) factors to be considered in determining who is the “primary beneficiary” in an internship placement, but also recognized that additional factors may be relevant:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation;
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; and
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.

The Court explained that these considerations require “weighing and balancing all of the circumstances” and that a single factor will not be dispositive for a court to find that an intern is entitled to minimum wage. The Court went on to observe that its decision reflects the “modern internship,” and the importance of internships in an intern’s formal education. While the Court recognized that some internships may not pass muster under the primary beneficiary test, it established a protocol for designing internship opportunities that will qualify.

This is good news both for interns and for employers, who will likely find it less risky to offer unpaid internships, providing real world experience to complement the formal education of today’s young adults.

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