Cooley

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On July 2, 2015, a federal appeals court upended the test companies and courts have relied upon for nearly seventy years to determine whether or not an intern must be paid. Instead, in ***Glatt v. Fox*** the Second Circuit Court of Appeals says the question to be answered is whether it is the intern or company where the intern is working that is the primary beneficiary of the relationship.

The facts are not in dispute: three unpaid interns worked for Fox Searchlight Pictures on the movie *Black Swan*. On the set, their duties included copying documents, transporting items around the set, organizing paperwork, making travel arrangements, taking out the trash, making coffee, and running errands, one of which was to purchase a non-allergenic pillow for the movie's director. The former interns filed a class-action claim in federal court alleging that Fox had violated minimum wage labor laws and that they were therefore entitled to compensation for their work. After a 2013 trial, the federal District Court ruled in the intern's favor, citing the Department of Labor's **set of six criteria** that work performed for a for-profit employer must meet in order to be unpaid. The District Court also certified the case as a class action.

The Second Circuit decision vacated the lower court's ruling, finding that the Department of Labor's criteria was both out of date and not binding upon the court as it was based on a venerable Supreme Court case which the Department of Labor has no authority to interpret. Instead, the appeals court adopted a new *primary beneficiary* test, under which an intern is considered an employee only if the employer benefits more from the relationship than the intern.

In its opinion, the Court of Appeals set out a list of seven factors that should be considered when deciding the primary beneficiary, no one of which is necessarily dispositive:

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation, with any promise of compensation, express or implied, suggesting 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 appeals court deleted from the venerable **Department of Labor** guidance one very distinctive element: "An intern may be unpaid if the employer that provides the training derives *no* immediate advantage from the activities of the intern *and on occasion its operations may actually be impeded*." There is no "primary beneficiary" test here. And under the DOL guidance, *all* of the factors must be met. The new case changes that. The *Fox* decision also reversed the class action certification, saying that there could not be generalizable facts.

What does it mean

It is likely that when the case is heard again by the District Court the interns will—again—prevail, since it is pretty clear who primarily benefited from the work they performed. The extent to which running errands and taking out trash provides "beneficial learning" appears very small. However, the test—or rather, set of tests—create a far more complex and nuanced environment for determining whether an intern must be paid.

On the one hand, menial labor is simply not going to qualify. However, there is a flip side to this: in its decision the Court of Appeals said that an intern's educational experience must not be *so* substantive that the intern *replaces the work of a regular employee* by performing, for example, high-level tasks or analyses that would have been carried out by paid personnel. The analysis of an internship experience thus requires striking a curious balance: the question is not only whether the intern benefits but whether despite that benefit the employer benefits more by in effect replacing a skilled employee. If the answer is in the affirmative, the intern must be paid, just as he or she would if the work is too menial. The prohibition against replacing existing employees has always been a part of the rule, but the Court of Appeals has now sought to refine its application at the high end of the work experience.

However, the *Fox* decision also substantially elevates the educational component of an internship. The language of the Court in articulating this connection is worth repeating:

> The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting.

An internship that is directly tied to a student's educational program, and particularly where the student receives academic credit, will appear to squarely fit the exception, particularly, as the Court noted, if the internship coincides with a student's academic calendar. Likewise, a program in which students participate in a learning component, such as lectures and seminars that integrate the work experience with his or her formal education will likely be exempt from compensation. Employers that partner with educational institutions or with organizations that integrate internship experiences with an academic component are also likely beneficiaries of the *Fox* decision.

The *Fox* decision seems to also support internships that are undertaken even when an intern is not attending school or college. One of the criteria established by the appeals court provides that an internship may be exempt if "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." Coupling such training-oriented work with wrap-around educational experiences may allow post-graduate unpaid internships to come out of the shadows, especially if they are integrated with add-on educational programs offered by non-institutional providers.

The decision may heighten the interest of advocacy groups and public interest law firms that have in recent years begun to more aggressively take up the case of unpaid interns. While the guidelines articulated by the appeals court are more fluid than those previously relied upon, the strong focus on educational relevance is likely to enable plaintiffs, such as those in Glatt v. Fox, to make stronger cases. There are, however, two caveats. First, the appeals court has made certifying class actions in such cases more difficult. Second, the ruling is only directly applicable in the Second Circuit, which subsumes New York, Vermont, Connecticut. While the Second Circuit is considered one of the most influential federal courts, and its decisions tend to be given considerable deference when similar cases arise elsewhere, federal judges in other Circuits may still choose to follow the DOL guidance. How this plays out nationally—and whether the Department of Labor will issue new guidance consistent with the appeals court decision—remains to be seen.

A final note

While there is nothing in the Fair Labor Standards Act that expressly says so, the Department of Labor has hedged when it comes to requiring compensation for interns performing "religious, charitable or humanitarian" work for non-profit organizations. Technically the same rules apply regarding benefit to the student versus the organization, and Court of Appeals does not make any distinction. See the footnote at the very bottom of the **Department of Labor guidance**. Note also that state law may be more specific regarding application of state minimum wage requirements, and public agencies, particularly those of the federal government, are likely to have entirely different rules regarding the circumstances under which they are able to accept unpaid workers.

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