

Employment Practices Liability

January 19, 2018

DOL Scraps The Impossible Unpaid-Intern Standard

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In 2010, the Department of Labor identified a six-factor test to address whether an unpaid intern is an employee under the FLSA, which virtually made compliance impossible:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. 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;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If the employer could not establish each of these factors, the intern would constitute an employee and need to be paid the statutory minimum wage and overtime for all hours worked in excess of 40 in a workweek. Because the majority of employers tend to be able to derive some advantage from the activities of an intern, the DOL's restrictive standards made an unpaid internship program effectively impossible. This resulted in settlements and the disappearance of the unpaid internship.

In 2015, the Second Circuit, in *Glatt v. Fox Searchlight Pictures, Inc.*, rejected the DOL's six-factor test for determining whether an individual has been properly classified as an unpaid intern in favor of another test that looks to whether the intern or the employer is the primary beneficiary of the relationship. In doing so, the Second Circuit articulated a seven-factor test. Unlike the DOL's 2010 test, this seven-factor test was described as "flexible" and evaluated whether an intern was entitled to wages, based upon the totality of the circumstances. No factor was determinative. That more flexible test is as follows:

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.

Since *Glatt*, other federal circuit courts adopted a similar test focusing on whether the employer or the intern was the primary beneficiary. On January 5, 2018, the DOL abandoned its 2010 six-factor guidance in favor of the seven-factor primary beneficiary standard adopted by the Second Circuit in *Glatt*. This standard will make it easier for employers to establish unpaid internship programs.

Although easier, sufficient ambiguity still exists, continuing to make it difficult to guarantee that an internship program will withstand judicial scrutiny. Therefore, employers must be mindful of these risks when crafting internship programs. In crafting these programs, employers must ensure accommodation of academic schedules of the interns (i.e. scheduling intern work around class schedules). Employers should work with academic institutions to craft internship programs that compliment curriculum so that academic credit for their internship can be achieved by the intern for completion of the internship program. Employers should state in writing to the intern that he or she will not be paid during the internship, that the internship is for a stated duration and there is no expectation of a position after the conclusion of the internship. Finally, employers must avoid terminating, reducing hours or transferring existing employees in favor of the intern, and instead use the internship as an opportunity to provide the intern with valuable instruction as opposed to assignment of unrelated mundane tasks.

Robin Kallor is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises public sector and private sector employers on matters pertaining to the employer-employee relationship, including wage and hour issues. If you have questions about this article, you should feel free to contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please CIRMA, Carolyn Field, Communications Supervisor at cfield@ccm-ct.org.

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