

Employment Practices Liability

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NY District Court Decision Provides New Guidance on the Second Circuit's Intern-Employee Test

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Executive Summary: A recent Southern District of New York opinion brings clarity to the Second Circuit's new intern-employee "primary beneficiary" test. The court in *Wang v. Hearst Corporation* (Aug. 24, 2016), held that unpaid interns working at magazines owned by a media company were not "employees" for purposes of the Fair Labor Standards Act and granted summary judgment in favor of the media company.

Formulating an Intern Program in Light of the New Second Circuit Intern-Employee Test

With a new college school year already in session, many organizations are now contemplating whether and to what extent to offer unpaid student internships for spring and summer in 2017.

One of the biggest concerns for organizations confronting this issue is how to provide a program that benefits both the business and the intern, without triggering the minimum wage requirements of the Fair Labor Standards Act (FLSA) or applicable state labor laws.

Last year, in *Glatt v. Fox Searchlight Pictures, Inc.*, as an issue of first impression, the Second Circuit announced that, when determining whether an unpaid intern qualifies as an "employee" under the FLSA, courts should decide who is the primary beneficiary of the relationship — the intern or the employer? See 811 F.3d 528 (2d Cir. 2015) (amended Jan. 25, 2016).

In doing so, the Second Circuit set forth a seven-factor, non-exhaustive balancing test. Among other things, the "primary beneficiary" test includes the following factors:

- "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 "Training/Educational Environment factor"); and
- "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 "Academic Integration factor").

The parties in *Glatt* ultimately agreed to settle the case prior to the district court's application of the newly announced "primary beneficiary" test. Nevertheless, a recent decision out of the Southern District of New York provides some guidance as to how New York federal courts may interpret some of the more nuanced *Glatt* factors.

The Training/Educational Environment Factor

In *Wang v. Hearst Corporation*, a district court granted summary judgment in favor of Hearst Corporation and found that six individuals serving as unpaid interns for its magazines in various capacities were not employees. In reaching this conclusion, the district court

rejected the idea that the Training/Educational Environment factor meant that an intern's training must resemble traditional classes and coursework. Instead, the court focused on the "practical skills" learned by the interns and inquired whether the interns "gained the intangible value of exposure to the practical realities of jobs in their respective fields." Moreover, the opinion suggests that even where an intern does not master new skills during his or her internship and engages in some "rote" tasks, this factor will still favor an employer where the intern "engaged in the practical work of [the company] and learned about an industry in the process."

The Academic/Integration Factor

While the *Glatt* "primary beneficiary" test requires courts to consider an internship's connection to the intern's formal education program, the Second Circuit offered no clear guidance on how strong that connection needed to be.

In *Wang*, the court concluded that the Academic/Integration factor weighed strongly in favor of Hearst as to those interns whose academic programs required them to keep journals and/or write papers on their experiences during their internship. However, the *Wang* court also found that factor to be in Hearst's favor, albeit less strongly, where an intern received academic credit at a community college, but did not receive credit from the college where she was pursuing her actual degree.

Notably, the *Wang* court also concluded this factor was in favor of Hearst as to two interns who never ultimately received academic credit for their internships. The *Wang* court emphasized that, where Hearst was provided documentation to suggest the interns would receive credit, Hearst was not obligated to follow-up and confirm that academic credit was actually received.

Bottom Line:

The *Wang* decision reinforces the flexible nature of the *Glatt* "primary beneficiary" test and provides new guidance as to certain factors of that test. In particular, that court's broad view of the Training/Educational Environment factor should give employers with internship programs that do not provide formal classes or coursework more comfort. In addition, the *Wang* court suggests that an employer is not required to confirm whether an intern did, in fact, receive academic credit for the internship.

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