

PUBLICATION

Throw the DOL "Intern Fact Sheet" Away: Second Circuit Rejects DOL's Unpaid Intern Six-Factor and Adopts New "Primary Beneficiary" Standard.

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The Department of Labor's ("DOL") six-factor test has long been the incontrovertible standard for determining whether employers are required to pay an intern under the Fair Labor Standards Act. That may no longer be the case after the Second Court of Appeals' decision earlier this month in *Glatt v. Fox Searchlight Pictures, Inc.*, Nos. 13-4478-cv, 13-4481-cv (2d Cir. July 2, 2015). In *Glatt*, three graduate students alleged the film company violated the FLSA by not paying them minimum wage or overtime when it allowed them to work as unpaid interns.

Applying the DOL's six-factor test for unpaid trainees, the district court determined the graduate students were improperly classified as unpaid interns and thus were entitled to compensation for their hours worked. On appeal, the Second Circuit noted the DOL's six-part test was merely a recitation of factors that the United States Supreme Court's considered in 1947 case (*Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)), addressing whether railroad brakemen trainees should be treated as employees under the FLSA. Because the six-factor test was the DOL's interpretation of a judicial decision as opposed to statutory terms or its own regulations, the Second Circuit determined the DOL's view was not entitled to any deference. The Second Circuit rejected the DOL's six-part test. Instead, it adopted a primary beneficiary test that focuses on the benefits the intern receives for his or her work and the economic realities that exist between the intern and the employer. The Second Circuit set forth a non-exhaustive list of factors to be considered including:

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.
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 Second Circuit emphasized that no one factor is dispositive and every factor need not be present for a court to determine an employment relationship existed.

What is the take away for employers from the *Glatt* decision? Continue exercising caution when classifying workers as unpaid interns. The *Glatt* decision is binding only in the Second Circuit. Other appellate courts may follow the Second Circuit, but a circuit split could easily arise. Moreover, the factors set forth by the Second

Circuit, albeit more flexible, are similar to the DOL's six-part test. In the final analysis, if the employer reaps all of the benefits from the unpaid internship while the intern receives little or nothing, a court is likely to determine the intern is entitled to compensation.