

**DATE:** June 27, 2018

**TO:** All Clients

**FROM:** Kane Kessler, P.C.  
Labor and Employment Law Department

**RE:** Unpaid Internships

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As the summer approaches, many employers may be in the midst of structuring their summer internship program or already sending out internship offers. With that in mind, we would like to apprise employers of developments of the law in this area.

The law distinguishes between an intern, who can be unpaid, and employees, who are subject to federal and state minimum wage and overtime rules. Therefore, whether an individual is an intern or an employee has important implications for employers when structuring their internship program.

### **Whether Interns Are Employees Under Federal Law**

In July 2015, the United States Court of Appeals for the Second Circuit, the federal court that oversees New York, Connecticut and Vermont (the “Second Circuit”), decided in Glatt v. Fox Searchlight Pictures, Inc. to significantly change how courts in its jurisdiction will distinguish between interns and employees under the United States Fair Labor Standards Act (“FLSA”). As a result, we emphasized in our July 9, 2015 memo to clients the importance of reviewing the structure of their internship programs.

In January 2018, the United States Department of Labor (“DOL”) abandoned its own long standing method for determining when an intern is entitled to minimum wages and overtime pay as an employee under the FLSA and adopted essentially the same test as in Glatt, known as the “primary beneficiary” test. The purpose of the primary beneficiary test is to allow courts to analyze the “economic reality” of the intern-employer relationship and determine who, either the employer or the intern, is the primary beneficiary of the working arrangement. If the employer is determined to be the primary beneficiary, then the intern will be deemed an employee under the FLSA and the employer must comply with the minimum wage and overtime rules.

Under the primary beneficiary test, Second Circuit courts and the DOL will consider the following seven factors, none of which are dispositive, in determining whether an individual is an intern not subject to minimum wage and overtime rules:

- Whether the intern clearly understands that no compensation is due; a promise of compensation suggests that the intern is an employee, and vice versa;
- Whether the internship provides training that would be given in an educational or clinical environment;
- Whether the internship is tied to the intern's formal education program by integrated coursework and the receipt of academic credit;
- Whether the internship accommodates the intern's academic calendar;
- Whether the internship's duration is limited;
- Whether the intern's work complements but does not replace the work of paid employees; and
- Whether the intern understands that he/she is not entitled to a job at the conclusion of the internship.

### **Whether Interns Are Employees Under New York Law**

For those employers with employees and/or interns in New York, the New York State Department of Labor ("NYSDOL") has not yet adopted the primary beneficiary test and continues to use its own eleven-factor test. Therefore, employers with a presence in New York should be mindful to comply with the NYSDOL's test when establishing or running its internship programs. The factors are as follows:

- The training, even though it includes actual operation of the employer's facilities, is similar to training provided in an educational program. For example:
  - The internship program builds on a classroom or academic experience - NOT the employer's operations.
  - A college, university, secondary school, specialist, technical, vocational or trade school oversees the program and awards educational credit.
  - The internship teaches skills that are useful in other jobs (not skills specific to one employer's operation).
  - The intern does not perform the routine work of the business on a regular basis, and the business does not depend upon the work of the intern.

- The intern is not engaged in the operations of the employer and does not perform productive work (such as filing, other clerical work or helping customers).
- The intern gains a new skill, advanced knowledge or better work habits.
- The training is for the benefit of the intern. Any benefit to the employer must be merely incidental. If the academic institution gives credit for the internship, it is considered some evidence of the beneficial nature of the program.
- The intern does not displace regular employees, and works under close supervision.
- The activities of interns do not provide an immediate advantage to the employer. The essence of a traineeship is that an employer provides a benefit to the trainees by developing their work skills or knowledge.
- The interns are not entitled to a job at the conclusion of the training period. Interns who are placed with the employer for a trial period, with the expectation that afterwards they will be hired as permanent employees, will generally be considered employees.
- The interns are notified, in writing, that they will not receive any wages and are not considered employees for minimum wage purposes.
- Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.
- The interns do not receive employee benefits.
- Skills offered through the training must be transferable to any employer in the field and not specific to the for-profit employer offering the training.
- The screening process for the internship program is not the same as for employment and only uses criteria relevant for admission to an independent educational program.
- Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment.

### **Tips for Employers**

Any employer that wants to institute an unpaid internship program should structure it in a way that makes the interns, rather than the business, the primary beneficiary of the intern-employer relationship. The following are tips employers may think about when reviewing their internship programs:

- Provide the intern with a written offer letter setting forth that the internship is unpaid and that a paid job is not guaranteed at the conclusion of the internship.
- Ensure that the program provides work or training that would help prepare the interns for a job in the field.
- Consider assigning interns to experienced employees who would act as mentors that the interns can shadow and learn from during the work day.
- Schedule presentations and demonstrations in which experienced employees from various departments of the business speak to the interns about their job duties.
- Create an internship program in which the interns can receive school/academic credit. If credit is not available, request that the intern receive written confirmation from his/her school that the internship is approved by the school as educationally relevant.
- Set firm start and end dates for the internship program that, where possible, correspond or match the interns' academic schedule or calendar.
- Ensure that the interns' work merely compliments and does not replace the work of paid employees.

Most importantly, employers must remember that some states continue to have more rigorous tests for determining intern or employee statuses under their own wage and hour laws. Employers must ensure that they comply with the strictest standard in each jurisdiction in which they have interns and employees.

We are available to assist you in revising your handbook or policies, conducting training, or answering any questions that you may have. Please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael Lydakis, Jennifer Schmalz, Jaclyn Ruocco or Joseph Tangredi.

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*This memo is provided for informational purposes only.  
It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.*