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FLSA Litigation

In recent years, the amount of Fair Labor Standards Act litigation involving the question of whether unpaid interns working for private employers should be considered employees and entitled to minimum wage has risen significantly. While the U.S. Department of Labor's Fact Sheet #71 provides official guidance to employers regarding the use of unpaid interns, several federal circuit courts of appeal, including, most prominently, the Second Circuit in ***Glatt v. Fox Searchlight***, have rejected the DOL's listed factors, which are generally seen as making it next to impossible for private employers to have unpaid interns work for them. As such, several tests have been issued by several circuit courts, making a hearing before the U.S. Supreme Court on the issue more likely. Bloomberg BNA explored how recent federal court decisions have changed the landscape for the use of unpaid interns and how likely the Supreme Court is to get involved in deciding the issue.

U.S. Supreme Court May Ultimately Have the Final Word on the Future of Unpaid Internships in the Private Sector

By William D. Welkowitz

For many young professionals, participating in internships, whether paid or unpaid, is seen as a common rite of passage and a necessary first step in moving up the proverbial ladder of their eventual professional goals.

While the stereotypical image of an intern from previous generations was generally one of the person who got the regular employees coffee and performed a range of menial tasks around the office, the image of an intern today is significantly different. In many ways, today's unpaid intern is seen as identical in many respects to entry-level employees, particularly in the type of work that they are asked to perform and the level of work that they are expected to perform at. The biggest difference tends to be that while the entry-level employee gets paid for the work he or she does, the unpaid intern doesn't.

As a result, the number of class and collective action lawsuits involving unpaid interns in the private sector has significantly increased over the last several years. The argument in these cases is that they are performing the work expected of regular employees, and therefore they should be paid as such – at least the minimum wage according to the Fair Labor Standards Act.

DOL Guidance on Internship Programs

Such lawsuits were bolstered by the fact that the U.S. Department of Labor's Wage and Hour Division's closest guidance on the subject generally favored treating unpaid interns as employees. According to the DOL's Fact Sheet #71 (April 2010), the six most important factors in determining whether someone is an ''employee'' or a ''trainee'' for FLSA purposes are:

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;

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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.[1]

The DOL's test was derived from the U.S. Supreme Court's decision in ***Walling v. Portland Terminal Co.***[2] Until recently, this was the most authoritative legal source available in determining whether unpaid interns should be considered employees entitled to the minimum wage.

However, the Second Circuit Court of Appeals threw the viability of the DOL Fact Sheet into serious jeopardy when it issued its decision in ***Glatt v. Fox Searchlight***[3] this past July. While other circuits have previously adopted tests that are different from the DOL Fact Sheet, the ***Glatt*** case was the first time a federal appeals court had directly addressed the status of unpaid interns.

The Second Circuit's Test for Unpaid Interns

In ***Glatt***, the Second Circuit considered the case of former interns who had worked for Fox Searchlight Pictures on the film *Black Swan*.

In granting class and conditional collective action certifications to the plaintiffs, the U.S. District Court for the Southern District of New York had previously ruled that the interns were ''employees'' rather than ''interns'' or ''trainees'' for FLSA and New York state law classification purposes. While the court relied on the DOL Fact Sheet for guidance, it did not expressly hold that all six factors had to be satisfied in order for someone to be classified as an ''intern.''

On appeal, a panel of judges in the Second Circuit rejected the DOL's six factor test as well as the plaintiffs' claim that they were employees. Instead, they adopted a ''primary beneficiary'' test to determine whether someone should be considered an employee or not. This test, according to the panel, is based on the premise that ''the proper question is whether the intern or the employer is the primary beneficiary of the relationship.''[4]

To help with the application of this test, the Second Circuit listed seven non-exclusive factors to consider in determining whether the ''intern'' or the employer is the primary beneficiary of the internship:

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.[4]

Internships Expected to be Closely Connected to Academics

Attorneys contacted by BBNA expect this decision, and the outlined test in particular, to make it easier for private employers to be able to use unpaid interns. Rachel Bien, a partner with the employee-side litigation form Outten & Golden, LLP in New York City, says that this test will make it more difficult for unpaid interns to bring their claims as a class because (according to the Second Circuit) determining whether an intern is an employee is a highly individualized question.

Ryan Hancock, who is of counsel and represents employees at Willig, Williams & Davidson in Philadelphia, concurs with this assessment, saying that the decision ''will give employers under the jurisdiction of the Second Circuit the confidence to use unpaid interns, connected with an educational program, without fear of liability.''

Bien, who is also one of the lead attorneys representing the ***Glatt*** plaintiffs, added that in terms of the merits, the factors the Second Circuit adopted will make it difficult for employers to maintain unpaid internship programs if the programs aren't closely tied to an academic curriculum and do not offer substantial educational benefits. ''Programs that primarily have interns do regular work alongside paid employees without a significant educational component will likely primarily benefit the employer, which points toward an employment relationship,'' Bien explained.

David Warner, a partner at Centre Law & Consulting, LLC in Tysons Corner, Va., believes that the Second Circuit was correct in identifying the question of whether the intern or the employer was the primary beneficiary of the internship as the proper central in-

[1] DOL Wage and Hour Division Fact Sheet #71.

[2] 330 U.S. 148, 67 S. Ct. 639 (1947).

[3] 791 F.3d 376, 24 WH Cases2d 1665, 2015 BL 212500 (2d Cir. 2015).

[4] *Id.* at 383.

[4] *Id.* at 384.

quiry of the case. ''This concept illuminates the distinction between an employee on the one hand and a trainee/intern on the other,'' Warner said. Like Bien, Warner also points out that the analysis in ***Glatt*** is ''expressly tied to the specific facts presented by the internship and individual interns before the court.''

However, Warner also expressed concern with what he describes as an overemphasis on the educational aspect of the internship – or tying the internship to the intern's formal academic studies. ''Overemphasizing the 'classroom learning' and 'formal education' aspects of the analysis to potential real world hypotheticals may lead to some unintended results, particularly as the traditional model of post-secondary education undergoes increasing evolution,'' Warner explained.

In the short term, Warner expects that the impact will be greater ''in terms of the counseling advice that attorneys provide clients as opposed to impacting currently pending litigation, including an emphasis on tying intern programs to formal academic endeavors.''

While the ''primary beneficiary'' test is generally seen as more favorable to employers, attorneys also see it as having the potential to lead to more consistency on the issue of intern classification under the FLSA. Hancock points out that while the ''primary beneficiary'' test is subjective, it does allow an employer throughout the internship to ensure that the student intern is the primary beneficiary of the training. ''I believe adoption of the 'primary beneficiary' test would lead to less inconsistent decisions by courts and provide employers with more guidance,'' Hancock said. ''This is especially true, if courts use the DOL Fact Sheet #71 as guidance during their deliberations in addition to a 'primary benefits' inquiry.''

However, the case is not yet binding precedent in the Second Circuit, as the ***Glatt*** plaintiffs applied for a rehearing of the case in the form of a review *en banc* before the full slate of judges in the Second Circuit. Even if the full panel affirms the original decision, Warner expects there to be ''a greater willingness among courts to deviate from the DOL's six-factor test as opposed to other circuits necessarily adopting the Second Circuit's specifically enumerated seven-factor test.''

Different Tests for Different Circuits

Although the Second Circuit's Glatt decision has been the most widely publicized case surrounding the issue of unpaid interns under the FLSA, multiple federal circuit courts have come out with decisions that address how to look at the issue. While each of these tests are very similar to one another, there are important distinctions between them.

Like the Second Circuit, the Fourth and Sixth Circuits have been using the ''primary beneficiary'' test in unpaid intern cases, in which the ultimate factor is whether the worker or the employer receives the primary benefit of the relationship.[5]

In addition, both the Fifth and Eighth Circuits also use the ''primary beneficiary'' test when analyzing unpaid intern cases. However, the Fifth Circuit both cites to, and gives a great amount of deference to, the DOL Fact Sheet #71 factors, while the Eighth Circuit also cites to the fact sheet for guidance in its analysis.[6]

The Tenth Circuit, meanwhile, has adopted a ''totality of the circumstances'' test, which specifically refuses to allow one factor to be dispositive.[7]

Hancock concedes that both the ''primary benefit'' and ''totality of circumstance'' tests allow courts great flexibility in determining the employment relationship of student interns. However, ''the 'totality of circumstances' test is extremely subjective and allows courts to reach inconsistent results and does not give employers the ability to determine what factors are important to the court at the beginning of the internship,'' Hancock said.

Two months after the ***Glatt*** decision, the Eleventh Circuit also formally rejected the DOL Fact Sheet #71 factors as something that should be followed with ''rigid adherence.''[8] The Eleventh Circuit had previously adopted an ''economic realities'' test (which, among other things, looks to whether the intern's work confers an economic benefit on the employer) to determine whether an unpaid intern should be treated as an employee.[9] The problem with this test, according to Hancock, is that it provides very little guidance to the courts or employers contemplating the adoption of unpaid internship programs and is not supported by relevant Supreme Court precedent.

Whatever the test may be for any given circuit, Hancock notes that each test determines whether the intern is protected or not protected by the FLSA for minimum wage and overtime compensation. ''This circuit split creates uncertainty and prohibits and/or discourages employers from adopting legitimate unpaid internship programs to benefit student workers and allows unscrupulous employers to exploit free labor from students in which they gain any real benefit,'' Hancock explained.

Some Circuits Still in Limbo

The First, Seventh and Ninth Circuits, on the other hand, have not adopted a specific test for unpaid intern cases, though Hancock thinks that it is possible that they could end up adopting the Second Circuit's standard. ''The decision, if upheld, could influence the First, Seventh and Ninth Circuits, which have not adopted a specific test to date, to adopt the Second Circuit 'primary beneficiary' test, once the issue is ripe in their jurisdictions,'' Hancock opined.

Bien, on the other hand, does not believe that the Glatt decision will be fully adopted by other circuits. ''Other circuit courts may not agree with the Second Circuit that intern cases are unique in being particularly challenging to certify,'' Bien said. ''That aspect of the Second Circuit's decision conflicts with its own FLSA misclassification precedent and with the decisions of other circuits and is at odds with the purposes behind the FLSA.''

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[5] *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989); *Solis v. Laurelbrook Sanitarium & Sch.*, 642 F.3d 518 (6th Cir. 2011).

[6] *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982); see also *Blair v. Wills*, 420 F.3d 823 (8th Cir. 2005).

[7] *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993).

[8] *Schumann v. Collier Anesthesia*, 2015 BL 294459 (11th Cir. 2015).

[9] *Kaplan v. Code Blue Billing & Coding*, 2013 BL 16205 (11th Cir. 2013).

Warner agreed with Bien's assessment in general, but for different reasons. ''I anticipate that other courts may not necessarily agree with the circuit court's conclusion that its decision 'reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education,'' Warner opined, stating that 'the court's conclusion that the 'purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting' is unnecessarily and inappropriately restrictive.''

Warner also agrees with Hancock's analysis in that there does appear to be a significant deal of inconsistency among the circuits in analyzing the issue, with at least two circuits expressing the opinion that the DOL's six-factor test is not an appropriate, or at a minimum not the *only*, standard by which to judge whether an intern is in fact an employee entitled to minimum wage. ''The absence of a clear standard creates uncertainty, and uncertainty in the law tends to create opportunities for litigation, so I would ultimately anticipate an uptick in scrutiny and litigation over unpaid intern programs,'' Warner explained.

Hancock notes that while the tests adopted by the various circuit courts to date overlap and analyze similar factors, the courts' application of each test determines the outcome of the claim. ''Ultimately, I believe that the matter will be decided by the U.S. Supreme Court as there is a circuit court split on the issue,'' Hancock said. ''This circuit split allows interns, who often engage in the same or similar work, to be classified differently depending upon the jurisdiction in which the internship is completed or the employer is located.''

U.S. Supreme Court: Precedent and Future

The variation in the tests adopted by the different circuits, as well as the fact that one of its own decisions is at the heart of the issue, make it more likely that the U.S. Supreme Court will hear a case involving unpaid interns in the foreseeable future. However, despite the recent dramatic developments, it still may be at least a couple of years before such a case is heard before the justices.

At the center of the case is the DOL Fact Sheet #71, which the department says is derived from the U.S. Supreme Court's 1947 decision and analysis in ***Walling v. Portland Terminal Co.***[10]

Bien points out that in ***Walling***, the U.S. Supreme Court was clear that trainees who provide an immediate advantage through their labor, whether by expediting company business or displacing paid employees, must be paid for their work. ''The Second Circuit adopted a much broader approach for interns, permitting employers to obtain productive labor from interns under some circumstances for no pay,'' Bien explained. ''The Supreme Court's bright line rule is more consistent with the FLSA's remedial goals and the FLSA's expansive coverage of employees.''

Warner, on the other hand, thought that the court in ***Glatt*** accurately identified the core concept behind the Supreme Court's ***Walling*** decision – i.e., that the individual trainees in question were receiving greater benefit than that received by the putative employer that was training them. ''In some respects, the tension between ***Walling*** and ***Glatt*** simply reflects the ever present tension and friction that occurs as courts (and employers) attempt to fit a 21st century economy into a statutory scheme that is nearly 80 years old,'' Warner opined. ''If only because of the practical realities of the modern workplace, I would not expect courts analyzing intern programs to require strict adherence to the factual contours and conclusions underlying the ***Walling*** decision.''

Agency Deference at Issue

There is also the question of whether the Second Circuit decision might have been in conflict with the Supreme Court's 1984 decision in ***Chevron U.S.A., Inc. v. Natural Resources Defense Council***[11] regarding deference to an agency interpretation of a statute.

The question of ***Chevron*** deference is a two-step analysis. First, the court determines whether Congress spoke directly to the question at issue. If so, the court defers to the plain meaning of the statute. If Congress did not address the issue in question in the statute itself, then the court must determine if the agency's response to the statute is based on a ''permissible'' interpretation of the statute. If so, then the court defers to the agency interpretation.

However, Warner noted that the DOL conceded in its brief before the Second Circuit that the fact sheet *was not*, in fact, an agency interpretation of the statute itself, but was rather a distillation of the Supreme Court's legal analysis in ***Walling***. ''The DOL having conceded that ***Chevron*** deference was not appropriate, the court was free to effectively ignore the DOL's interpretation if it found it unpersuasive, which was indeed the case,'' Warner stated.

Even the employee-side litigators conceded that ***Chevron*** deference was not warranted in this case. Hancock said that the DOL fact sheet is not a regulation, and therefore should not be given ***Chevron*** deference. However, Bien argued that the DOL fact sheet was entitled to deference under the 1944 ***Skidmore v. Swift & Co.***[12] decision, which gives deference to an agency's interpretation of a statute announced in more informal agency papers, such as an opinion letter or fact sheet, and is still considered good case law today.

Despite the lack of deference given to the fact sheet, however, Hancock argues that the DOL factors are not going anywhere. ''This is especially true since the DOL fact sheet was derived from the U.S. Supreme Court's decision in ***Walling***,'' Hancock said. ''Accordingly, whether a court gives the DOL factors ***Chevron*** deference or not, the factors found in the DOL fact sheet should be used by a court interpreting the FLSA and the outcome of each should turn on the facts of each case.''

Lack of Direct Case Law Emphasizes Need for a Uniform Test on Unpaid Interns

All of the litigators agree that the U.S. Supreme Court won't immediately take up a case involving the status of unpaid interns under the FLSA, mainly because there

[10] 330 U.S. 148, 67 S. Ct. 639 (1947).

[11] 467 U.S. 837, 104 S. Ct. 2778 (1984).

[12] 323 U.S. 134, 65 S. Ct. 161 (1944).

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isn't a clear enough split among the circuits regarding the issue.

Warner opined that there is little likelihood of the Supreme Court weighing in on the issue of unpaid interns in the near term or granting *certiorari* on ***Glatt*** should it be appealed after the *en banc* hearing. ''Absent another circuit court strictly construing ***Walling*** to have enumerated the sole factors for determining whether an individual is an intern or an employee, I do not see the Supreme Court perceiving a need to entertain the issue,'' Warner said.

Bien added that there are still very few decisions involving unpaid interns and even fewer by circuit courts, which would likely impact whether the Supreme Court is willing to hear an unpaid intern case.

Despite there being various tests adopted by several different circuits, Hancock thinks that the Supreme Court will wait for the decision of at least two more circuits before taking up the issue. ''However, it is clear that the Supreme Court needs to take up the issue as courts have struggled with this issue creating various outcomes, with little consistency, depending on the jurisdiction the employer operates in,'' Hancock said. ''As unpaid internships continue to proliferate, it is important that a uniform test be adopted. The U.S. Supreme Court should adopt a uniform test which takes into consideration Congress's intent to provide broad protections to workers in the United States through the FLSA.''

The Future of Internship Programs

Particularly if the Second Circuit upholds the initial panel's decision in ***Glatt***, unpaid internships are indeed expected to continue to proliferate.

Warner believes that the move away from the rigid six-factor test clears the way for more employers to offer unpaid internship programs. ''Under the DOL standard, most unpaid intern programs foundered on [DOL Fact Sheet #71] factor 4's requirement that the 'employer that provides the training receive *no immediate advantage* from the activities of the intern.' Under ***Glatt***, the analysis moves to the *relative* benefit received by the intern in relation to the employer. This standard will be much easier for employers to meet,'' Warner explained.

However, the ***Glatt*** decision is likely to still have major caveats for unpaid intern programs in the private sector. ''I think a likely and regrettable change will be a move to more tightly tie unpaid intern programs to an individual's academic endeavors,'' Warner stated. ''While the Second Circuit did state no one factor in its analysis was dispositive and that every factor needs to point in the same direction, three of the seven factors reference 'educational environment' or academic commitments or credit.''

Bien agreed with that assessment, stating that employers will have a greater burden to design internship programs that are predominantly educational and closely aligned with an academic program. ''Employers will be required to scrutinize the particular circumstances of each intern – including the intern's academic pursuits, the benefits of the internship to the intern, and the benefits that the intern provides to the employer – to make the appropriate classification decision,'' Bien explained. ''Given these challenges, employers may be more likely to avoid the potential for liability all together by paying their interns the minimum wage and overtime.''

Hancock added that employers need to be sure of the exact extent of the applicability of the Second Circuit's decision, saying that they should determine if the decision applies to *all* unpaid internship programs, or only those that are connected to educational programs.