SANDBERG PHOENIX

EMPLOYER LAW BLOG

Pay Me! Should Interns be Paid? A New Test

AUTHOR: SANDBERG PHOENIX

By Courtney Cox and Zachary Rich

Cox, C Image not found or type unknown Plaintiffs were unpaid interns on the Fox Searchlight distributed film Black Swan. The U.S. District Court for the Southern District of New York found the Black Swan interns were employees under the Fair Labor Standards Act and New York Labor Law. The court applied a version of the U.S. Labor Department's six factor test, which was derived from the 68 year-old Supreme Court decision Walling v. Portland Terminal Co., 330 U.S. 148 (1947), to determine whether the interns fell within an exception for unpaid trainees. The six factor test is whether:

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.

The district court balanced the six factors and found that the two interns were improperly classified as unpaid interns.

On appeal, the issue before the Second Circuit was “when is an unpaid intern entitled to compensation as an employee under the [Fair Labor Standards Act] (FLSA)?” Instead of using the Department of Labor’s six factor test, the court applied the primary beneficiary test to determine whether the employer or intern was the primary beneficiary of the relationship. The primary beneficiary test (1) focuses on what the intern receives in exchange for their work and (2) it allows for flexibility in the court’s examination of the economic reality between the intern and employer. The court articulated a list of non-exhaustive factors to aid in the determination of whether a worker is an employee for FLSA purposes. The factors include:

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.

Under this test, the intern is not an employee if they are the primary beneficiary of the internship.

This flexible approach balances all the circumstances, so that no one factor is dispositive. The court found that the primary beneficiary approach reflects the purpose of the internship, the relationship between the intern’s formal education and the internship. An internship is to integrate formal classroom education with real-world practical skill development. The primary beneficiary test better demonstrates the purpose of the modern internship in today’s economy rather than the Labor Department’s six factor test.

It is advisable that employers:

A. Be cautious because the Department of Labor will likely continue to take an aggressive approach against employers in such circumstances.

B. Note that this is a Second Circuit ruling and is only persuasive to federal courts in Illinois and Missouri.

Glatt v. Fox Searchlight Pictures, Inc., 2nd Cir., No. 13-4478-cv 7/2/2015.