What's Up With Glatt?!:
The FLSA's Primary Beneficiary Standard in Hindsight

William Murphy
St. John's University

Sejal Singh
St. John's University

This paper examines internship compensation cases under the FLSA decided after Glatt v. Fox Searchlight. In Glatt, a 2015 case, the United States Court of Appeals for the Second Circuit was thought to have fundamentally changed the nature of unpaid internships when it ruled that Department of Labor guidelines for determining what, if anything, an intern should be paid shall be replaced by an inquiry focused on which party, the employee or the intern, benefits more from the relationship. Analysis concludes that the new "primary beneficiary" standard adopted by the Second Circuit resulted in generally favorable outcomes for employers in these cases and failed to adequately protect interns due to far looser consideration by courts of factors significantly similar to the Department of Labor's original guidelines as well as a disproportionate emphasis on the existence of some inherent educational component. The resulting, detrimental effects on internship applications, participation, and outcomes are additionally explored.

Keywords: Air Labor Standards Act, internship compensation, academic internships, primary beneficiary

INTRODUCTION

Despite much recent commotion centered on individual states and private businesses raising their respective minimum wages as high as $15 per hour either instantaneously or gradually, the fact remains that federal law, as codified within the Fair Labor Standards Act (hereinafter "FLSA"), still requires only that workers be compensated a minimum wage of $7.25 per hour of labor. Setting the perpetual and well-documented tension between a stagnant federal minimum wage and the persistent increase in cost of living aside, whether specific types of laborers qualify under the FLSA as "employees" and, thus, are entitled to any wage at all is an often overlooked aspect of both employment law and business management. Falling into this unique category of laborers are interns. In its 2018 position statement, the National Association of Colleges and Employers defined an internship as follows:

> An internship is a form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting. Internships give students the opportunity to gain valuable applied experience and make connections in professional fields they are considering for career paths; and give employers the opportunity to guide and evaluate talent.

When properly designed, unpaid internship programs can greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates. All too frequently with regard to internships, however, the lines between laboring and learning are blurred begging the inquiry of whether an intern is actually functioning as an employee, and therefore, should be compensated. To resolve this potential uncertainty, the United States Department of Labor (hereinafter "DOL") provided guidance in 2010 by releasing *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*. Per the 2010 *Fact Sheet #71*, interns would be considered employees requiring compensation under the FSLA unless all of the following six factors were satisfied:

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.

If just one of the six factors were absent, an intern must be paid for their labor. Weighted in favor of interns by virtue of its all or nothing approach, *Fact Sheet #71* protected from employers' exploitation of free labor without providing an appreciable benefit in education or experience. The six factors effectively governed this issue until 2015 when the United States Court of Appeals for the Second Circuit decided *Glatt v. Fox Searchlight Pictures, Inc*. In *Glatt*, the Court created a new "primary beneficiary" standard for determining whether an intern, based upon the nature of their work experience, functioned instead as an employee falling within the minimum wage requirement of the FLSA. By adopting this more flexible and holistic analysis predicated on mere considerations nearly identical to *Fact Sheet #71*'s original six factors with a new, additional, major emphasis on academic and educational connections, subsequent court applications and interpretations demonstrate a distinct advantage for employers to the detriment of interns. As a result, aspiring young professionals are either failing to realize the full benefit of an internship or foregoing the opportunity altogether for a variety of well-documented and valid reasons.

GLATT V. FOX SEARCHLIGHT PICTURES, INC.

Glatt primarily involved three interns serving in various roles throughout production of the Academy Award nominated film *Black Swan* that premiered in 2010. In 2012, the three sued *Black Swan*'s production company, Fox Searchlight Pictures, seeking unpaid minimum wages and overtime. After pre-trial litigation, motion practice, and an appeal, the central question eventually raised before the Second Circuit Court asked under what circumstances an unpaid intern must be deemed an "employee" under the FLSA and, therefore, compensated for their work. In deciding the issue, the Court rejected the DOL's *Fact Sheet #71* approach and instead opted for applying a new "primary beneficiary" standard. Under this standard, "an employment relationship is not created when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation" and the "totality of the circumstances" is considered. In so considering, courts were directed to weigh a set of seven "non-exhaustive" factors eerily reminiscent to *Fact Sheet #71*'s six factors with an added focus on academic connections. However, unlike the compulsive application requirement under *Fact Sheet #71*, no one factor here is dispositive and every factor need not point in the same direction for a court to conclude that the intern is not an employee entitled to the minimum wage. The seven non-exhaustive factors advised for consideration under the primary beneficiary standard are:

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.

The Court provided three reasons for adopting the primary beneficiary approach in lieu of reaffirming *Fact Sheet #71*. First, it allegedly focused on what the intern receives in exchange for their work. Second, it purportedly accorded courts the flexibility to examine the economic reality as it exists between the intern and the employer. Lastly, it intended to acknowledge that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment. Shortly after issuance of the Second Circuit's opinion, the parties in *Glatt* settled the dispute out-of-court under circumstances many film industry pundits predicted would prove favorable for interns in Hollywood, and beyond, moving forward (Patten, 2016).

JUDICIAL INTERPRETATIONS OF GLATT

Subsequent applications of *Glatt* by courts clearly demonstrate that its primary beneficiary standard is anything but favorable for the interns it sought to protect from exploitation. Specifically, an over-reliance on the educational component of internships, inescapably intertwined in their definition and very existence, poses a seemingly insurmountable handicap for any unpaid intern rightfully seeking just compensation for their labor even where no academic credit or direct academic connection is involved.

Wang v. Hearst Corp., 877 F.3d 69 (2d Cir. 2017)

On December 8, 2017, the Second Circuit issued an opinion in *Wang v. Hearst Corp*. The plaintiffs in *Wang* were college-age interns who participated in Hearst's fashion-related internship programs. The interns performed a range of tasks at various magazines and, each admitted that they gained knowledge and skills related to their professional pursuits, primarily in the journalism or fashion industries. While each internship was slightly different, all were unpaid and lasted only one semester or one summer. The interns were not promised compensation or future employment, and all interns were required to receive prior approval for academic credit from a college or university. However, the plaintiffs argued that they should have been paid because many of the tasks they performed were menial, did not advance their degrees and displaced the work of paid employees The plaintiffs also claimed that they did not receive enough training and guidance.

In 2012, the interns sued for minimum wage under FLSA and New York Labor Law ("NYLL") in the Southern District of New York. After the district court denied the interns' motion for partial summary judgment with respect to their "employee" status, the Second Circuit vacated that denial and sent the case back to the district court for reconsideration in light of its decision in *Glatt*. In August of 2016, the district court concluded that the Hearst plaintiffs were not employees entitled to compensation and granted the Hearst Corporation's motion for summary judgment. On appeal, the Second Circuit agreed with the district court and affirmed the dismissal of the plaintiffs' claims. In its opinion, the Second Circuit applied the seven-factor "primary beneficiary" test and agreed that based on the totality of circumstances of the plaintiffs' internships, most of the factors favored Hearst.

The Second Circuit began its analysis with the first (no expectation of compensation) and seventh (no entitlement to paid employment) factors, which favored the employer because the interns were aware that their internships were unpaid. Moving to the second factor (educational training), the court acknowledged that the internships did not provide the same level of training as classroom instruction but concluded that those issues were offset by the practical benefits of the internships, including the benefits of practicing a skill in a professional environment. The Second Circuit agreed with the lower court that the duration of the internships were not excessive and concluded that the fifth factor (limited duration) favored Hearst.

The court further found that the third factor (academic integration) favored Hearst for all interns, except for one whose major was unrelated to fashion or writing. Here, the court looked to the undisputed evidence that some of the interns used their internships to satisfy a graduation requirement, receive class credit, write a paper or gain professional experience prior to starting a graduate program. While not all of the interns ultimately received academic credit, requiring preapproval shifted this factor in Hearst's favor for most of the plaintiffs. The court also concluded that the fourth factor (academic calendar) favored Hearst for the majority of the interns, because most of the internships corresponded to summer breaks, and there was no evidence of any interference between the internships and academic schedules.

Finally, the Second Circuit agreed with the district court that the sixth factor (displacement) favored the interns, since they performed some work such as data entry and delivery duties that could have been completed by paid employees. However, the court did not view this factor as dispositive, and held that while the Glatt factors were mixed, the district court had enough undisputed evidence to support its conclusion that Hearst's internships passed muster under the primary beneficiary test as a matter of law.

Vaughn v. Phoenix House New York Inc., 957.F.3d 141 (2d Cir. 2020)

In 2014, Mark Vaughn sued a residential drug and alcohol treatment facility, Phoenix House New York, alleging he was not properly compensated for his work under the FLSA and the NYLL. Vaughn entered the residential drug and alcohol treatment facility in July 2009 as part of his criminal sentence in lieu of incarceration and faced jail time if he failed to follow through with court ordered treatment. The plaintiff completed the inpatient phase of the program and then began an outpatient phase. After the plaintiff violated a condition of the agreement, he was reassigned to the inpatient program. Upon the reassignment, he attended a 30-day orientation period but then refused to complete work duties the program required of him. When he was told that he would be removed from the program and sent to jail for noncompliance, the plaintiff began performing his work duties for several months. The plaintiff claimed that during his stays at the rehabilitation facility, he was required to work eight hours a day, six days a week. He filed suit against the rehabilitation facility, including claims under the FLSA. The case made it to the Second Circuit on appeal, where the case was remanded to the district court for determination as to whether the plaintiff qualified as an employee under the FLSA. The district court determined that Vaughn was not an employee and he appealed.

Applying *Glatt*, the Second Circuit upheld the district court's finding that the first (no expectation of compensation), fifth (limited duration), and seventh (no entitlement to paid employment) factors weighed "strongly" against a finding that Vaughn was an employee; the sixth (displacement) factor weighed in Vaughn's favor; and the second (educational training), third (academic integration), and fourth (academic calendar) factors provided only "mixed guidance." Because no single factor was dispositive and noting Vaughn received food, shelter, training, and an opportunity to stay away from drugs, the Second Circuit concluded that the plaintiff was not an employee of Phoenix House and thus could not state a claim under the FLSA.

Velarde v. GW GJ, Inc., 914 F.3d 779 (2d Cir. 2019)

In April 2011, the plaintiff, Patrick Velarde enrolled in The Salon Professional Academy of Buffalo, a for-profit cosmetology training school. He was required to complete a course of study for cosmetology license applicants approved by the state of New York. The curriculum required him to complete 1,000 hours of coursework and pass a written and practical licensure exam. The academy's course included eight weeks of classroom study and 22 weeks working in its salon under the supervision of licensed

practitioners. Velarde and the other academy students also were required to perform janitorial and clerical work at the salon. The academy charged discounted prices to customers for salon services, depending on the students' skills, and also charged students for "tuition, books, kits, and other fees."

In 2014, Velarde sued the Academy for unpaid wages in violation of the FLSA and the NYLL in the United States District Court for the Western District of New York. The district court granted judgment on the pleadings to the Academy under the test established in *Glatt. They found* that Velarde was not an "employee" entitled to compensation under the FLSA and NYLL statutes because he was the "primary beneficiary" of his relationship with the Academy.

On appeal, the Second Circuit found the *Glatt* test applicable, and then considered the primary beneficiary test's seven, non-exhaustive factors in light of the totality of the circumstances. The Second Circuit relied on the following key facts in holding that Velarde was the "primary" beneficiary of his relationship with the Academy: that the state required 1,000 hours of course work to qualify for the licensing examination, and the Academy required that Velarde complete exactly—and not more than—the required number of hours; that Velarde performed services at the student salon under the supervision of Academy's instructors, particularly in the absence of any claim that their supervision was insufficient or their instruction unrelated to the training; that the Academy's enrollment agreement indicated enrollees' responsibility for paying the Academy for coursework which included both classroom and practical components; and the absence of any allegation that Velarde displaced paid employees at the Academy, notwithstanding that the Academy derived a financial benefit from Velarde's labor. Concluding Velarde was the "primary" beneficiary vis-à-vis the Academy, the Second Circuit held he was not an "employee" entitled to compensation under FLSA and NYLL.

Sandler v. Benden, 715 Fed.Appx. 40 (2d Cir. 2017)

In this case, the plaintiff was a student at Long Island University in the Master of Social Work program. As part of the program, she was placed in an unpaid internship at a nursing and rehabilitation center. According to her complaint, the plaintiff was dissatisfied with the internship because she performed "secretarial tasks" and "grunt work," including filing, typing, photocopying, fetching food, wheeling patients and the like. In all, she claimed that she did not receive any "educational value" from her internship. She wrote a memo to the nursing center about her displeasure with the internship and having to perform "grunt work." She was then dismissed from the nursing center and expelled from her university.

The plaintiff sued the nursing center, claiming that she was actually an employee, not an intern, and should have been paid for the "grunt work" that she had performed under the FLSA and the NYLL. The trial court dismissed her claims, and the plaintiff appealed the dismissal of her NYLL claim to the Second Circuit. The Second Circuit applied the "primary beneficiary test," and found that all but one of the factors weighed in favor of the finding that the student was an intern.

First, the court held that there was no expectation of compensation for her work, and in any case, the university required that students complete an unpaid internship. Second, the student received educational training during her internship. She was assigned one individual client and received one group assignment. She also participated in a "field work class," and her internship responsibilities included writing updates regarding her experiences as a social work intern. Third, the plaintiff would have received academic credit towards her degree, if she had satisfactorily completed the internship. Fourth, the duration of the plaintiff's internship coincided with and was limited to the university's academic calendar. Fifth, the plaintiff only worked 16-17 hours per week. Sixth, she was never promised a paid position. Finally, with respect to the last factor, the plaintiff argued that the work that she was required to perform replaced that of a secretary or assistant and failed to provide significant educational benefits to her. However, the Second Circuit found that this factor was "a wash" because the fact that an employer "merely passes drudge work on to interns" is not dispositive, and employers are permitted to receive some immediate advantage from unpaid interns. Thus, based on the totality of the circumstances, the court concluded that the defendant met the test for unpaid internships.

Benjamin v. B&H Education, Inc., 877 F.3d 1139 (9th Cir. 2017)

In a case of first impression, the Ninth Circuit adopted the "primary beneficiary test" established by the Second Circuit in *Glatt*, to determine whether cosmetology students should be regarded as employees under the FLSA. Applying this test, the Court concluded that the students engaged in hands-on training and were not employees under the FLSA (or Nevada or California state law) because the students were the primary beneficiaries of their labors.

The plaintiffs were students at schools operated by the defendant in California and Nevada. They filed a class action lawsuit, alleging that they spent much of their time performing unsupervised work in the defendant's training salons, including providing services for paying customers. As such, the plaintiffs claimed that they were employees within the meaning of the FLSA and entitled to compensation.

In applying the factors set forth in *Glatt*, the Ninth Circuit found that each of the seven enumerated factors supported a determination that the plaintiffs were the "primary beneficiaries" of their time spent in the clinical settings required for licensure by the respective states and therefore were not employees despite the fact that the school derived some income from individuals receiving the salon services. Those factors included an acknowledgment by the students that they would not be paid for their clinical services; they received hands-on training and academic credit for their efforts; their clinical work was coordinated with their academic schedules; the clinical work satisfied the practical hours required prior to taking state licensing exams and ended once a sufficient number of such hours was achieved; they did not displace paid employees of the school; and they had no expectation of employment with the school after graduation. In addition, the court held that the students were not employees with respect to claims under California or Nevada law and were the primary beneficiaries of their labors.

CONCLUSION

Resulting from courts' employer-friendly interpretations of *Glatt* fairly characterized by an overreliance on the general and inherent educational nature of internships at their core, many students find themselves relegated to seeking predominantly unpaid internships accompanied by countless disadvantages. Among the disadvantages researched and reported by the National Association of Colleges and Employers is that, increasingly, unpaid internships are a luxury that only economically advantaged students can afford while lower chances of leading to a job than paid ones and providing less professional development (Crain, 2016). Essentially, unpaid internships demonstrably lack in the purported benefits of an internship when contrasted with their paid counterparts. Moreover, many unpaid internships post-*Glatt* are found to still be highly exploitative and, even more alarmingly, in many jurisdictions, unpaid interns, as distinguished from paid interns or employees, have no protection against harassment or discrimination under state or local law.

Unsurprisingly, a 2018 University of Wisconsin-Madison study charted a significant decline in participation among college students (Hora et. al, 2018). In the study, 64% of students stated that they had hoped to take an internship but could not. Of those unable to participate, 60% indicated they could not because they had to continue to work at their full or part-time job to make money in order to finance their education among other life expenses and 33% also indicated they could not because of a lack of pay. 19% indicated they could not because transportation presented an obstacle representing an additional economic-based burden. Most interestingly, 56% indicated they could not because of a demanding course load. Put plainly, the alleged value of internships heavily prioritized by courts conducting a primary beneficiary analysis ironically functions to prevent students from taking part in them. The global COVID-19 Pandemic served only to further compound this troubling, pre-existing trend.

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