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*If you have any questions
about this Advisory,
please contact:*

MARY GAMBARDILLA
203-363-7662
mgambardella@wiggin.com

LAWRENCE PEIKES
203-363-7609
lpeikes@wiggin.com

*Other Labor, Employment
and Benefits Department
Members:*

KAREN CLUTE

NAJIA KHALID

PETER LEFEBER

JOHN ZANDY

CAROLINE PARK

CHRISTINE WACHTER

DOL ADOPTS LESS STRINGENT INTERNSHIP TEST UNDER FLSA

On January 5, 2018, the U.S. Department of Labor (DOL) announced that it had adopted the “primary beneficiary standard” used by many courts for purposes of assessing whether interns qualify as employees under the Fair Labor Standards Act (FLSA) so as to be entitled to compensation. In so doing, the DOL rejected a six-factor test adopted in 2010 that essentially required for-profit employers to compensate interns unless the following criteria were met:

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.

Many employers found this test unduly demanding to the point of discouraging the use of interns. This in turn prompted prospective interns to complain about shrinking opportunities to obtain internships providing post-graduate, entry level experience needed to break into their chosen fields.

A number of courts declined to adopt the DOL’s six-factor test, the most notable example being the Second Circuit’s decision in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016), rejecting the DOL’s 2010 guidance as “too rigid.” Instead, the court found that the proper inquiry should focus on “whether the intern or the employer is the primary beneficiary of the relationship” as illuminated by the following non-exhaustive factors:

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

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- 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.

Perceived as far more practical than the approach previously taken by the DOL, the "primary beneficiary" test allows greater flexibility to examine the economic reality as it exists between the parties in recognition of the fact that the intern-employer relationship, unlike a traditional employer-employee relationship, is entered into with the expectation of vocational benefits not necessarily gained in other forms of employment. The *Glatt* court emphasized that in applying the "primary beneficiary" test, no one factor should be considered dispositive and all facts and circumstances are to be weighed in the balance to determine the nature of the relationship.

Since the *Glatt* decision, three other federal appellate courts have followed suit and also rejected the DOL's 2010 test in favor of a "primary beneficiary" analysis. The Second Circuit recently had

occasion to apply the *Glatt* standard in *Wang v. Hearst Corp.*, 877 F.3d 69 (2d Cir. 2017), and affirmed the trial court's finding that several college students who interned at Hearst over the summer were not "employees" under the FLSA. Although certain *Glatt* factors favored the interns, the Court concluded that the totality of the circumstances did not where the record showed there was no expectation of payment or entitlement to a job, the internships provided some level of vocational training and were arranged to fit the academic calendar, and academic credit was a prerequisite.

In a short statement issued on January 5, 2018, less than a month after the Second Circuit released its decision in *Wang*, the DOL acknowledged the judicial trend and announced that it would conform to these appellate court rulings by applying the "primary beneficiary" test going forward. This statement was accompanied by the release of DOL's updated test adopting the factors laid out in *Glatt* and confirming that, consistent with the Second Circuit's guidance, no one factor would be determinative but rather all of the relevant facts and circumstances are to be considered.

As with some other, recent rollbacks of prior administrative agency positions, the DOL's policy shift on the intern v. employee issue is a welcome one, allowing employers greater flexibility in structuring internships. However, employers should remain mindful of the type of arrangements that triggered scrutiny in the first place, i.e., those in which unpaid interns were primarily used as employee substitutes without the real benefit of vocational training. Under any test, these "interns" are properly classified as employees and entitled to compensation.