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TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

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

RE: Unpaid Internships

In the October 2013 issue of the Firm's Newsletter, we wrote about the risks of unpaid internships and discussed in detail the case of Glatt v. Fox Searchlight Pictures, Inc. In the Fox case, the United States District Court for the Southern District of New York (the "District Court") had held that several unpaid interns should have been classified as employees entitled to at least minimum wage because their internships did not meet the six (6) factors set forth by the United States Department of Labor ("DOL"), all of which had to be met for an internship to be unpaid. DOL had, in turn, derived those factors from Walling v. Portland Terminal Co., a case decided by the United States Supreme Court in 1947, which held that certain brakemen-trainees were not employees during their training. In addition, the District Court in Fox had granted class certification under New York law and collective certification under federal law, thus allowing potentially hundreds of similarly situated unpaid interns over a six (6) year period to join the lawsuit.

On July 2, 2015, the Court of Appeals for the Second Circuit (the "Second Circuit") vacated the District Court decision in Fox and remanded it back to the District Court for further proceedings. In vacating the District Court decision, the Second Circuit rejected DOL's rigid six (6)-part test and replaced it with what it called the primary beneficiary test. As explained by the Second Circuit, the primary beneficiary test focuses on what the intern receives in exchange for his/her work and also affords the courts the flexibility to examine the economic reality as it exists between the intern and the employer. Rather than be hide-bound by six (6) factors derived from a 1947 case, the Second Circuit held that courts should examine the totality of the circumstances to determine who – as between the intern and the employer – is the primary (but not necessarily the only) beneficiary of the arrangement.

The Second Circuit set forth "a non-exhaustive set of considerations" to be included in the examination of the totality of the circumstances. Many of these considerations are also found in the rejected six (6)-factor DOL test, but now they are only considerations, not rigid requirements. Some of these non-exhaustive considerations are:

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

Although many of these considerations mirror the six (6)-factor DOL test, the Second Circuit instructed:

> Applying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to minimum wage. In addition, the factors we specify are non-exhaustive – courts may consider relevant evidence beyond the specific factors in appropriate cases….
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> The approach we adopt today … reflects a central feature of the modern internship – the relationship between the internship and the intern's formal education. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting ….

The Second Circuit went on to reason that because the new test they adopted requires an examination of an intern's employment status on a highly individualized basis, plaintiffs could not establish the "commonality" element of a class action and vacated the District Court's certification of both the class and collective action, sending that issue back to the District Court to reconsider in light of the new primary beneficiary test.

Although the Second Circuit's new primary beneficiary test is more flexible that the old DOL test, it is clear that many of the same factors will be considered by the courts when determining whether the internship is primarily for the benefit of the intern. At a minimum, internships should still (1) be tied to and coordinated with educational programs; (2) complement but not displace paid workers; (3) be of limited duration; and (4) not guarantee a permanent job at the conclusion. Finally, the intern and the employer must make it clear that the internship is unpaid.

Fortunately for employers, the totality of circumstances analysis will make it more difficult for plaintiffs to certify internship lawsuits as class or collective actions, thus limiting both the number of lawsuits brought and the number of potential plaintiffs.

The District Court will be examining this case again based on the instructions from the Second Circuit to utilize the primary beneficiary test. It is entirely possible that in applying the new test, the District Court will again reach the same conclusion – that the plaintiffs were, indeed, employees who were entitled to compensation and that class certification was appropriate. We will follow the proceedings and report when further decisions are issued.

If you have any questions about internships, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert L. Sacks, Lois M. Traub, Alexander Soric or Michael Lydakis.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman