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CLIENT ALERT - Interns & Independent Contractors

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Second Circuit Reverses Class Certification Ruling in Fox Searchlight Unpaid Intern Case, Directing Trial Court to View Economic Benefit Factors Through New Lens

Paul Blechner
PBlechner@GreenbergGlusker.com
310.201.7456

A federal appellate court in New York handed an apparent victory to employers who utilize unpaid internships. In *Glatt v. Fox Searchlight Pictures, Inc.*, frequently referred to as the "Fox intern" case, the Second Circuit Court of Appeals reversed a 2013 district court ruling that had granted class certification to a plaintiff class of unpaid interns who had worked on the movie "The Black Swan" and other projects. The district court's ruling brought substantial publicity to unpaid internships and was followed by the filing of literally dozens of lawsuits challenging unpaid internships. In reversing the district court, the *Glatt* opinion has potentially significant consequences for companies and for those who desire internships.

Perhaps most significantly, the Second Circuit reversed the decision to allow the case to go forward as a class action. Under the court's analysis, class certification was reversed as a result of the highly individualized analysis required to determine whether unpaid interns must be paid. It remains unclear whether there are any circumstances where an unpaid intern case might proceed as a class action, but the opinion's repeated reference to the requisite individualized analysis would appear to act as a significant impediment, if not a complete bar, to class certification in most cases. If that is correct, it would follow that we should see plaintiff/employee-counsel shift their recent emphasis away from this area of the law.

The *Glatt* opinion also enunciated a new standard for determining whether an unpaid intern is an "employee" who thus must be paid. In adopting what it described as the "primary beneficiary" test, the Second Circuit expressly refused to use the list of factors that had been issued by the Department of Labor ("DOL"). Whereas the DOL's list has been read to require interns to be compensated as employees if the company received some benefit from the intern's services, "some" benefit is not automatically disqualifying under the Second Circuit's new test and, instead, the court must weigh any such benefit to the company's operations against the benefits received by the intern, i.e., to ask the question of who is the primary beneficiary of the arrangement.

While the opinion clearly swings the pendulum in a direction that is more favorable of unpaid internships, many questions remain following the issuance of the *Glatt* opinion. Preliminarily, the Second Circuit is comprised of the federal courts in New York, Connecticut, and Vermont. It remains unknown whether the opinion will be followed in other federal jurisdictions, whether it will be adopted by any of the states applying comparable state laws, and/or whether the

Department of Labor may modify its current position. Further, even in the Second Circuit, the *Glatt* opinion does not provide clear guidance as to how the respective benefits received by an intern and a company are supposed to be weighed or where the line lies between unpaid intern and employee.

There are a number of factors to consider when using unpaid interns. If you are doing so or considering such hiring in the future, please contact us to discuss these issues and the specifics of your situation.

Uber-Big Challenges for Independent Contractor Classification

Olivia Goodkin
OGoodkin@GreenbergGlusker.com
310.201.7446

Employers frequently and improperly classify workers as independent contractors rather than employees. Recently, the California Labor Commissioner ruled that an Uber driver is actually an employee, not an independent contractor. Uber argued that the drivers choose their own hours and use their own cars, but the driver claimed that she was an employee because she was screened, trained and was required to adhere to a disciplinary system.

While this particular ruling applies only to one driver, it calls into question Uber's business model. Furthermore, Uber and Lyft are defending themselves in multiple class action lawsuits challenging the status of their drivers. If the companies lose, they will need to pay the workers overtime pay among other things, including penalties for missed meal and rest periods, and failure to provide paycheck stubs. In moving forward, the companies will incur increased costs arising from payroll taxes, workers' compensation and other insurance, medical benefits, mandatory sick leave in certain jurisdictions (including California) and family medical and pregnancy leave laws. It will force a change in the business model and will require significant investments in administrative support as well.

As the cases against Uber and Lyft are unfolding, the Department of Labor (DOL) recently published an "Administrator's Interpretation" of the definition of "employee" under the federal Fair Labor Standards Act (FLSA). Under the FLSA, to "employ" a person means to "suffer or permit" a person to work. In the interpretative bulletin, which can be found here, the DOL encourages an "economic realities" test to determine if a worker is an independent contractor or employee.

The economic realities test includes these factors: (A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer. No single factor is determinative, but all are taken into account when analyzing whether a worker is an employee.

We recommend that in light of the increased focus by the DOL and state agencies on the issue of classification – in addition to continuing litigation by the workers themselves – employers take a renewed look at their workforce to ensure that they have correctly identified workers who should be on payroll.

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For more information about this new issue, or to have your agreements reviewed and updated, please contact any member of **Greenberg Glusker's Employment Law Group**: Sofia Aguilar, Nancy Bertrando, Paul Blechner, Olivia Goodkin, Wendy E. Lane, or Steven Smith, at (310) 553-3610.