

ALERT - THE NINTH CIRCUIT REJECTS THE DEPARTMENT OF LABOR GUIDELINES FOR DETERMINING WHETHER UNPAID INTERNS AT FOR PROFIT COMPANIES ARE “EMPLOYEES”

Recent years have seen an increase in lawsuits filed by unpaid interns seeking to be deemed “employees.” In 2010, the U.S. Department of Labor Wage and Hour Division (“DOL”) issued a Fact Sheet that set forth a six-part test applicable to this issue. The sheet stated that individuals would be deemed “employees” unless all six factors were met. The factors required, *inter alia*, that the employer receive no economic benefit from the intern’s activities, the intern not displace regular employees, the internship be “similar” to the educational environment, and the intern did not expect to be paid.

Several other Circuits rejected the six-part test as “too rigid.” Last month, the Ninth Circuit definitively refused to apply the six-part test, opting instead to base the determination on whether the employer or the individual is the “primary beneficiary” of the relationship. The case is *Benjamin v. B&H Education, Inc.*, 2017 U.S. App. LEXIS 25672 (2017 WL 6460087) (9th Cir. December 19, 2017).

The plaintiffs in *Benjamin* were students enrolled in cosmetology and hair design programs operated by defendant under the name Marinello Schools of Beauty. Marinello operates cosmetology and beauty salons in which discounted services are offered to the public and performed by students. The students receive academic credit and instruction, but no compensation. The plaintiffs filed a putative class action, alleging that the services they performed for customers made the plaintiffs “employees” and therefore entitled to minimum wage and overtime payments, premium wages for missed meal and rest periods, and civil

penalties for violation of California and Nevada wage and hour laws. The District Court granted summary judgment to defendant, holding that the plaintiffs were the primary beneficiaries of the educational program and had not shown that Marinello subordinated the educational purpose of the salons for its own profit making purposes. Plaintiffs appealed.

The Ninth Circuit began its analysis by citing to Supreme Court cases holding that the test of whether an individual is an “employee” involves “economic reality” and does not turn on “isolated factors.” The Court next noted that while it had not previously addressed situations involving interns, it had used the “economic reality” test in situations involving prison inmates (not employees) and homeless individuals in rehabilitation programs (not employees). The Court noted that its sister courts in the Second, Sixth, and Eleventh Circuits had declined to use the DOL six-part test in favor of evaluating the totality of the circumstances in each case and determining whether the employer or the student was the primary beneficiary of the relationship. The Court concluded that these holdings represented applications of the “economic reality” test, and agreed that this test was more appropriate than the DOL factors in deciding whether interns were actually employees.

Turning to the facts of the case before it, the Court found most significant the facts that the plaintiffs received hands-on training and academic credit; did not participate in the program any longer than was necessary to complete the hours required for licensing; did not routinely displace paid employees; and had no expectation of employment

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with Marinello upon graduation. Based upon these factors, the Court upheld the trial court's ruling and confirmed that the plaintiffs were not "employees."

EMPLOYER TAKEAWAY

Many employers in California (particularly in sports, technology, and entertainment industries) regularly offer unpaid internships as opportunities that may lead to paid positions in the future. The basis for the Court's holding in *Benjamin* may not support the legal treatment of these interns as "not employees." On the one hand, the individual's lack of expectation of compensation is a factor, as is the designation of the position as "trainee." On the other hand, if the position is not part of a recognized educational program (i.e., the intern does not receive educational credit); does not have a defined start and end point; displaces a regular employee; and involves services for which clients are charged, courts may well disregard the "intern" designation and hold that the individuals are in fact "employees" and entitled to compensation under the Fair Labor Standards Act and/or the California Labor Code. We suggest that employers who regularly use unpaid interns review the arrangement with legal counsel in order to avoid potential wage and hour law liability.

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