

December 22, 2017

Ninth Circuit Adopts Primary Beneficiary Test to Determine Whether Vocational Students Are “Employees” Under the Fair Labor Standards Act

In a case of first impression in the Ninth Circuit, *Benjamin v. B&H Education*, No. 15-17147 (9th Cir. December 19, 2017), the Ninth Circuit Court of Appeals adopted the “primary beneficiary test” to determine whether vocational students should be regarded as employees under the Fair Labor Standards Act (FLSA). Applying this test, the Court concluded that cosmetology students engaged in hands-on training were not employees under the FLSA (or Nevada or California state law) because the students were the primary beneficiaries of their labors.

The plaintiffs—cosmetology students at schools operated by the defendant in California and Nevada—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 ruling on the parties’ cross motions for summary judgment, the district court held that the plaintiffs were not employees under the FLSA because they were the primary beneficiaries of the hands-on training program and because they failed to show that the defendant subordinated the educational function of the cosmetology program to its own profit making purposes. The plaintiffs appealed.

On appeal, the Ninth Circuit affirmed the district court’s decision that the students were not employees under the FLSA. In reaching this conclusion, the Court adopted the “primary beneficiary test” for determining whether vocational students (as well as interns) should receive compensation under the FLSA. Under this test, set forth by the Second Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015), *amended and superseded by* 811 F.3d 528 (2d Cir. 2016), courts weigh several non-exhaustive factors that focus on whether students receive and/or expect to receive education and training, rather than compensation, in exchange for their work.

In adopting the primary beneficiary test, the Ninth Circuit specifically rejected the Department of Labor's (DOL) test for determining whether an unpaid intern is an employee. See Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet #71: *Internship Programs Under the Fair Labor Standards Act* (Apr. 2010). The Court agreed with other courts that have found the test "too rigid." Rather than the DOL's test, the Ninth Circuit concluded that primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and provides courts flexibility in examining the totality of the circumstances of each case.

HOW SHOULD EMPLOYERS WITH INTERNS PROCEED?

In light of this decision, employers with interns and vocational schools that include hands-on training should ensure that there is no expectation of compensation. The internship or training program should be tied to the intern's or student's formal education program and fulfill his or her academic or training requirements. Finally, the intern's or student's work should complement, rather than displace, the work of paid employees.