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Proskauer Sets Precedent for Determining Intern-Employer Relationship

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February 22, 2018 (NEW YORK) – On January 5, 2018 the U.S. Department of Labor (DOL) announced it was adopting the “primary beneficiary” test for determining whether interns are employees under the Fair Labor Standards Act (FLSA) and abandoning its previously articulated six factor test used for years. The primary beneficiary test was established by Proskauer’s precedent-setting win in *Glatt v. Fox Searchlight Pictures, Inc.* Now implemented by the DOL, the primary beneficiary test analyzes the “economic reality” of the intern-employer relationship to determine which party is the primary beneficiary of the relationship.

In 2015, the Firm represented Fox Searchlight Pictures, Inc. in a high-profile wage and hour litigation brought by unpaid interns who believed they should be considered employees and thus paid for their intern experience while interning on the movie *The Black Swan* for several months in 2009 and 2010.

Since no court had yet determined the standard for evaluating the legality of unpaid internships, the case raised questions of first impression. Our lawyers argued that the court should adopt a “primary beneficiary” test, weighing the benefit to each intern against the benefit to the company, and that because this is an individualized fact intensive inquiry, no class or collective could be certified under that standard.

The Second Circuit adopted our positions in their entirety and, in the course of doing so, rejected the standards for determining “employee” status for unpaid interns under the FLSA and New York labor law that were advocated by both the plaintiffs and the Department of Labor.

Proskauer has represented more companies in class actions challenging unpaid internships than any firm in the country. Partner Elise Bloom, co-chair of the Firm's Labor & Employment Department and co-head of the Class & Collective Action Practice Group, led the team which included co-head of the Class & Collective Action Practice Group Mark Batten and partner Mark Harris, and associates Noa Baddish and Joshua Fox.

Related Professionals

- **Elise M. Bloom**
  Partner
- **Mark W. Batten**
  Partner
- **Mark D. Harris**
  Partner
- **Noa M. Baddish**
  Partner
- **Joshua S. Fox**
  Partner