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# Employment & Employee Benefits Luncheon
for Investment Managers

Wednesday, December 2, 2015

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# Employment & Employee Benefits Contacts

Schulte Roth & Zabel's employment & employee benefits practice is dramatically different from the industry norm. Unlike most other law firms, we counsel and represent clients with respect to the whole employment relationship.


**Mark E. Brossman**
Partner
+1 212.756.2050
mark.brossman@srz.com

**David M. Cohen**
Partner
+1 212.756.2141
david.cohen@srz.com

**Ian L. Levin**
Partner
+1 212.756.2529
ian.levin@srz.com

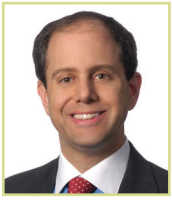
**Ronald E. Richman**
Partner
+1 212.756.2048
ronald.richman@srz.com

**Holly H. Weiss**
Partner
+1 212.756.2515
holly.weiss@srz.com

**Susan E. Bernstein**
Special Counsel
+1 212.756.2056
susan.bernstein@srz.com

**Stephen I. Brecher**
Special Counsel
+1 212.756.2331
stephen.brecher@srz.com

**Max Garfield**
Special Counsel
+1 212.756.2506
max.garfield@srz.com



**Scott A. Gold**
Special Counsel
+1 212.756.2051
scott.gold@srz.com

# Resources

Schulte Roth&Zabel

# Alert

## New York City Commission on Human Rights Issues Enforcement Guidance on Fair Chance Act and Clarifies Credit Check Law Exemption

November 11, 2015

The New York City Commission on Human Rights (the "Commission") recently released enforcement guidance on the Fair Chance Act (the "FCA"), which took effect on Oct. 27, 2015.[1] The FCA prohibits New York City employers from inquiring about a job applicant's criminal record prior to extending a conditional offer of employment. The Commission's guidance provides clarity as to how the Commission will enforce the new law. Separately, the Commission clarified how it will interpret the exemption to the Stop Credit Discrimination in Employment Act ("SCDEA") for positions involving responsibility for funds or assets worth $10,000 or more.[2]

**Job Advertisements and Pre-Offer Inquiries**

It is a violation of the FCA for an employer to "[d]eclare, print or circulate … any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction." The Commission explains that including in job advertisements or job applications phrases such as "no felonies," "background check required" or "must have clean record" violates the FCA "even if no adverse action follows."

The Commission provides clarity about what types of background checks an employer can conduct before extending a conditional offer of employment. An employer can still review an applicant's background so long as the employer does not attempt to discover an applicant's criminal history during this process.[3] An employer who inadvertently discovers an applicant's criminal history during this process will not be subject to liability, so long as the employer does not consider the information until after a conditional offer of employment has been given.

**Inquiries Following a Conditional Offer of Employment**

The FCA permits criminal background checks following a "conditional offer of employment," which the Commission defines as "[a]n offer of employment that can only be revoked based on: (1) the results of a criminal background check; (2) the results of a medical exam in situations in which such exams are

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[1] The enforcement guidance, "Legal Enforcement Guidance on the Fair Chance Act," is available on the New York City Commission on Human Rights' website at www.nyc.gov/html/cchr/html/coverage/fair-chance-legalguidance.shtml.

[2] For a complete overview of the Commission's guidance on the Stop Credit Discrimination in Employment Act, see our *Alert*, "New York City Commission on Human Rights Issues Enforcement Guidance on Credit History Law," *available at* www.srz.com/New_York_City_Commission_on_Human_Rights_Issues_Enforcement_Guidance_on_Credit_History_Law.

[3] The Commission defines "criminal history" as a "previous record of criminal convictions or non-convictions or a currently pending criminal case."

permitted by the Americans with Disabilities Act; or (3) other information the employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material to job performance." The Commission's definition of "conditional offer of employment" could be interpreted to mean that an employer must complete all other pre-employment screening procedures (e.g., reference checks, drug screening) before making an offer conditioned on a criminal background check.

If an employer's inquiry reveals a criminal conviction,[4] the employer must perform the required analysis under Article 23-A of the New York State Correction Law ("Article 23-A") prior to revoking a conditional offer of employment. Article 23-A prohibits an employer from denying employment based on a criminal conviction unless the employer can show a "direct relationship between one or more of the criminal offenses" and the "employment sought or held by the individual" or if employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public" and sets forth eight factors that an employer must consider in making this determination.[5]

If, after evaluating the applicant under Article 23-A, the employer wishes to revoke the offer, an employer must follow what the Commission has termed the "Fair Chance Process":

- The employer must disclose to the applicant "a written copy of any inquiry it conducted into the applicant's criminal history."
- The employer must provide the applicant a written copy of the employer's Article 23-A analysis. The Commission has issued a form that employers can use to document this analysis.[6]
- After providing the applicant with the above, the employer must give the applicant at least three business days from receipt to respond before revoking the conditional offer of employment.

**Exemptions**

The FCA contains limited exemptions that permit employers to conduct pre-offer criminal background checks on certain employees. The Commission explains that employers "have the burden of showing that an exemption applies." According to the Commission, the exemptions "are to be construed narrowly."

The FCA does not apply to actions employers take pursuant to "state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history." The Commission has interpreted this provision to mean that employers are exempt from the FCA's requirements in instances in which the law places "mandatory barriers" to employment for applicants

[4] The Commission reminds employers that they "must never inquire about or act on non-conviction information."

[5] The eight factors are: "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought or held by the person; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense or offenses; (f) the seriousness of the offense or offenses; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."

[6] The form is available on the Commission's website at www.nyc.gov/html/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf. Employers may adapt the Commission's form to their "preferred format" but may not change the "material substance" of the form.

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with certain convictions. Employers will not be exempt from the FCA if the law permits the employer discretion as to whether to deny an applicant employment due to certain criminal convictions.

According to the Commission, the FCA *does not* apply when employers are complying with "industry-specific rules and regulations promulgated by a self-regulatory organization." For asset managers,[7] this exemption may not be as useful as it appears at first blush. It is unlikely that asset managers will be deemed to be exempt from the FCA because the Investment Advisers Act and the Commodity Exchange Act registration regimes generally do not impose per se registration disqualifications for individuals with criminal convictions.[8]

The Commission has set out certain procedures that an employer must follow when the employer believes an exemption applies. The Commission instructs employers to inform applicants of the exemption and to create an exemption log, which should be maintained for a period of five years from the date an exemption is used.

Employers may be required to share their exemption logs with the Commission, and promptly doing so may "help avoid a Commission-initiated investigation into employment practices."

New York City employers should carefully review the Commission's enforcement guidance and make adjustments to hiring processes as necessary to ensure that they are in compliance with all of the FCA's requirements.

**Update on the SCDEA**

Separately, the Commission updated the FAQs[9] on its website to clarify the exemption from the SCDEA for positions involving responsibility for funds or assets worth $10,000 or more. The SCDEA prohibits New York City employers from requesting or using the credit history of applicants and employees when making employment decisions.

- Positions with signatory authority over third-party funds of $10,000 or more are exempt from the SCDEA.
- Positions that are required to "verify that a transaction of more than $10,000 is settled" are exempt from the SCDEA, even if such positions do not have "signatory" authority over the funds.
- Employees who receive corporate credit cards that are paid directly by the employer and can be used for amounts above $10,000 without any preliminary or subsequent approval are exempt from the SCDEA. Given that most employers require employees with corporate credit cards to submit receipts to verify transactions, it is likely that few positions will be considered exempt on the basis of the employee in such position having a corporate credit card.

[7] Note that the analysis for broker-dealers may differ from that for investment advisers.

[8] Of course, the regulators can and do impose civil and administrative industry bars and there are regulations, such as the so-called "Bad Actor Rule" — i.e., SEC Rule 506(d), which can have significant adverse effects on asset managers employing officers with criminal convictions — but these kinds of situations generally are not within the FCA's "industry-specific rules" exemption (although they may be within Article 23-A).

[9] The FAQs are available on the Commission's website at www.nyc.gov/html/cchr/html/coverage/credit-history-faqs.shtml.

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*Authored by Mark E. Brossman (+1 212.756.2050 | mark.brossman@srz.com), Ronald E. Richman (+1 212.756.2048 | ronald.richman@srz.com), Holly H. Weiss (+1 212.756.2515 | holly.weiss@srz.com), Scott A. Gold (+1 212.756.2051 | scott.gold@srz.com) and Adam B. Gartner (+1 212.756.2708 | adam.gartner@srz.com).*

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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# Alert

## Second Circuit Rules That Internal Whistleblowers Are Protected Under Dodd-Frank

September 18, 2015

On Sept. 10, 2015 the U.S. Court of Appeals for the Second Circuit held, in a 2-1 decision, that the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") protects employees who report violations of securities laws only internally. The court's decision in *Berman v. Neo@Ogilvy LLC*[1] conflicts with the U.S. Court of Appeals for the Fifth Circuit's decision in *Asadi v. G.E. Energy (USA), L.L.C.*,[2] in which that court held that employees are protected from retaliation under Dodd-Frank only if they report securities law violations to the Securities and Exchange Commission ("SEC"). The scope of Dodd-Frank's anti-retaliation provision is, therefore, poised for review by the U.S. Supreme Court.

In *Berman,* Daniel Berman served as finance director of Neo@Ogilvy LLC ("Neo") and was responsible for Neo's financial reporting and compliance with accounting standards. After his employment was terminated by Neo in April 2013, Berman sued Neo and its parent, WPP Group USA Inc., alleging that his employment was terminated as a result of his whistleblowing activity — specifically, his internal report of alleged accounting fraud. The district court granted Neo's and WPP's motions to dismiss the complaint, holding that the anti-retaliation provision of Dodd-Frank only protects employees who report securities law violations to the SEC.

The Second Circuit reversed the district court's decision. In the majority opinion, Judge Newman concluded that there was tension between the definition of whistleblower in Subsection 21F(a)(6) of the Securities Exchange Act of 1934 (the "Exchange Act") (which defines a "whistleblower" as an individual who reports violations to the SEC) and the anti-retaliation provision set forth in Subsection 21F(h)(1)(A) of the Exchange Act (which prohibits retaliation for, *inter alia*, internal reporting). While the Fifth Circuit in *Asadi* held that employees who do not report violations to the SEC do not fall within the statute's definition of "whistleblower," the Second Circuit held that there was sufficient ambiguity in the statute for the court to give *Chevron* deference to the reasonable interpretation of the agency responsible for administering the statute — the SEC.

After the passage of Dodd-Frank, the SEC implemented Exchange Rule 21F-2, taking the position that employees who report violations in a manner described in Section 21F(h)(1)(A) of the Exchange Act — which includes reporting violations internally — are protected regardless of whether the employee

[1] No. 14-4626 (2d Cir. Sept. 10, 2015).

[2] 720 F.3d 620 (5th Cir. 2013).

satisfies the requirements to qualify for an award under Dodd-Frank's bounty program.[3] After oral argument in *Berman,* the SEC issued a release that reinforced its position that employees who report violations only internally are entitled to the same anti-retaliation protection as employees who report violations to the SEC.[4] The Second Circuit deferred to the SEC's interpretation.

The decision is likely to result in an increase in whistleblower retaliation claims under Dodd-Frank. Now, in the Second Circuit at least, employees who believe they have been retaliated against for having reported violations only internally will more likely choose to sue their employers under Dodd-Frank, rather than initiating a claim under the Sarbanes-Oxley Act ("SOX"). Dodd-Frank provides a direct route to federal court, while SOX claimants must first file and exhaust administrative claims with the Department of Labor. In addition, Dodd-Frank has a much longer statute of limitations period and double back pay is available. Accordingly, employers should ensure that they: (1) promptly investigate internal reports of securities law violations and take appropriate action to remedy matters reported (including by taking steps to avoid retaliating against a whistleblower); and (2) vet and document the legitimate bases for adverse employment actions against whistleblowers, to be in a better position to defend against retaliation claims under Dodd-Frank should they arise.

*Authored by Holly H. Weiss (+1 212.756.2515 | holly.weiss@srz.com) and Jessica Augarten (+1 212.756.2230 | jessica.augarten@srz.com).*

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[3] 17 C.F.R. § 240.21F-2(b)(1)(iii).

[4] Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-75592, 2015 WL 4624264 (F.R.) (Aug. 4, 2015).

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EXPERT ANALYSIS

# Recent Labor Department Actions Target Independent Contractor Misclassification, Overtime

**By Mark E. Brossman, Esq., Ronald E. Richman, Esq., Holly H. Weiss, Esq., Scott A. Gold, Esq., and Joseph Gallagher, Esq.**
***Schulte Roth & Zabel***

On July 15 the Department of Labor issued Administrator's Interpretation No. 2015-1 to address misclassification of independent contractors under the wage-and-hour requirements of the Fair Labor Standards Act. Also, on June 30, the DOL issued a proposed regulation amending the exemption tests for "white collar" employees under the FLSA.

These actions highlight the need for employers to re-examine their classifications of individuals as contractors or as exempt from overtime pay requirements.

## MISCLASSIFICATION OF WORKERS

The July 15 interpretation stresses that the definition of employee is very broad under the FLSA and that most workers should be classified as employees rather than independent contractors. The interpretation asserts that worker misclassification is occurring frequently and that employees are therefore not receiving "important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation."[1]

The interpretation emphasizes that the FLSA's definition of employ — which is "to suffer or permit to work" — and the "economic realities" test developed by courts in evaluating FLSA claims provide a "broader scope of employment than the common law control test."[2]

The interpretation analyzes each of the following six factors of the "economic realities" test (see box).

The interpretation highlights the importance of the first factor, and it appears to deemphasize the sixth. It states, "whether the worker's work is an integral part of the employer's business should always be analyzed in misclassification cases."[3] In addition, it stresses that the "control" factor "should be analyzed in light of the ultimate determination of whether the worker is economically dependent on the employer or truly an independent businessperson."[4]

The DOL appears to suggest that the "control" factor — which is typically key to the common law test — should not be the focus of a court's analysis, stating that it "should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor."[5]

The interpretation concludes by stating, "most workers are employees under the FLSA's broad definitions" and the "factors should be used as guides to answer that ultimate question of economic dependence."[6]

In contrast to the interpretation, the 2nd U.S. Circuit Court of Appeals recently affirmed a lower court ruling that used the "economic realities" test to strike down an FLSA class-action suit brought by a group of umpires for the U.S. Open tennis tournament.[7] Contrary to the interpretation, the 2nd

*The Department of Labor's administrative interpretation and proposed regulation highlight the need for employers to re-examine their classifications of individuals as contractors or as exempt from overtime pay requirements.*

### The 'economic realities' test

- Is the work performed is an integral part of the employer's business?
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
- Is the worker retained on a permanent or indefinite basis?
- Is the worker's investment relatively minor as compared with the employer's investment?
- Does the worker exercise business skills, judgment and initiative in the work performed?
- Does the worker have control over meaningful aspects of the work performed?

Circuit focused primarily on the "control" factor in making its decision, stating that "the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results."[7]

The DOL began issuing administrator interpretations in March 2010. Thereafter, there was uncertainty as to what weight the interpretations would carry and what level of deference they would be afforded by courts.

The U.S. Supreme Court recently ruled that because administrator interpretations do not require agencies to undertake notice and comment procedures, they are not to be afforded the same deference as regulations.

"When courts give 'controlling weight' to an administrative interpretation of a regulation — instead of to the best interpretation of it — they effectively give the interpretation — and not the regulation — the force and effect of law," the high court said.[8] Courts, therefore, are not required to give the same level of deference to DOL interpretations as they do to DOL regulations.

## PROPOSED FLSA SALARY REQUIREMENT

The FLSA generally requires employers to pay the minimum wage to employees and overtime pay for each hour they work in excess of 40 hours. However, among the FLSA's exemptions is one for employees who are paid on a salary basis and earn a certain minimum amount per week.

To be exempt, these employees must also meet a "duties test" that determines whether they fall under one of the "white collar" exemptions — which include, among others, executive, administrative and professional employees.[9]

The DOL's June 30 proposed regulation sets forth an increase in the salary requirement from $455 per week to $970 per week. Although the DOL did not propose amending the "duties test," it did request comments on the test. This may result in amendments as well.

The DOL proposed that the salary level be increased to an amount equal to the 40th percentile of earnings for full-time salaried workers. The current salary threshold is $23,660 per year. The DOL estimates that the new threshold, if approved, would be $50,440 in 2016.

The agency also proposed establishing a mechanism for automatically updating salary levels annually. The current threshold was set in 2004, and it has not changed. The DOL further proposed an increase to the minimum salary required to qualify for the "highly compensated employee" exemption from $100,000 in total annual compensation (including non-discretionary bonuses) to the 90th percentile of earnings for full-time salaried employees ($122,148 per year).

Although the proposed regulation requested comments on the duties test, the DOL suggested that the salary level proposal may negate the need for any changes to the test.

The department said it "believes that the salary level increase proposed ... , coupled with automatic updates to maintain the effectiveness of the salary level test, will address most of the concerns relating to the application" of the "white collar" exemption.[10]


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The public comment period for the proposed amendments ended Sept. 4. It is unlikely that the rule will be finalized this year. Employers, however, should take the opportunity to review the classifications being used for current employees.

## NOTES

[1] U.S. Dep't of Labor, Administrator's Interpretation No. 2015-1, at 1 (July 15, 2015), *available at* http://1.usa.gov/1Gnc8fZ.

[2] *Id.* The common law test is used by the Internal Revenue Service and in other circumstances where "employee" is not defined.

[3] *Id.* at 6.

[4] *Id.* at 13.

[5] *Id.* at 14.

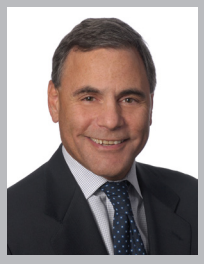
[6] *Id.* at 15.

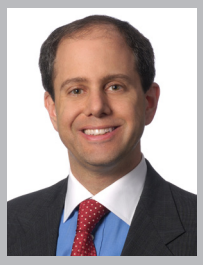
[7] *Meyer v. U.S. Tennis Ass'n,* 607 Fed. Appx. 121, at *1 (2d Cir. 2015) (internal citation marks omitted).

[8] *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2015).

[9] For a more detailed analysis of the professional exemptions, see Mark E. Brossman, Ronald E. Richman, Holly H. Weiss & Scott A. Gold, "The New Overtime Regulations," at http://bit.ly/1ESKj5x.

[10] The DOL's proposed regulations are available at http://1.usa.gov/1GM8xti.




(From L-R) **Mark E. Brossman** is a partner and co-head of the Employment & Employee Benefits group at **Schulte Roth & Zabel** in New York, where he concentrates his practice on all aspects of ERISA, employment discrimination, labor relations, education law and related litigation. **Ronald E. Richman** is a partner and co-head of the firm's Employment & Employee Benefits group. His practice concentrates on the litigation of employee benefit and employment cases in federal and state courts and the representation of employers and employee benefit plans before the Department of Labor, Internal Revenue Service and Pension Benefit Guaranty Corp. **Holly H. Weiss** is a partner in the firm's Employment & Employee Benefits group, where she focuses her practice on the representation of employers in all aspects of employment law and employee relations. She also serves as co-head of the firm's cybersecurity group. She litigates disputes involving restrictive covenants, ERISA claims, executive compensation, employment agreements, statutory employment discrimination claims, and common law tort and contract claims. **Scott A. Gold** is a special counsel at the firm, and **Joseph Gallagher** is an associate.

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Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Now We Know How NYC's Credit Check Ban Will Be Interpreted

*Law360, New York (September 4, 2015, 2:43 PM ET)* -- On Sept. 2, the New York City Commission on Human Rights released enforcement guidance on the Stop Credit Discrimination in Employment Act, which took effect on Sept. 3.[1] The SCDEA prohibits New York City employers from requesting or using the credit history of applicants and employees when making employment decisions. The commission's enforcement guidance makes clear that the commission plans on interpreting the SCDEA's restrictions broadly and its exemptions narrowly.

In the guidance, the commission explains that "consumer credit history is rarely relevant to employment decisions, and consumer reports should not be requested for individuals seeking most positions in New York City." According to the commission, an employer will be in violation of the SCDEA for: "(1) requesting consumer credit history from job applicants or potential or current employees, either orally or in writing"; *or* "(2) requesting or obtaining consumer credit history from job applicants or potential or current employees from a consumer reporting agency"; *or* "(3) using consumer credit history in an employment decision or when considering an employment action." Accordingly, simply requesting consumer credit history will be considered a violation of the SCDEA, even if the employer does not use the information it receives or the employer's use of the information it receives does not result in adverse employment action.

As we detailed in our prior *Alert*,[2] the SCDEA includes exemptions for certain positions, including positions with control of funds or assets worth $10,000 or more, nonclerical positions with regular access to trade secrets, positions with control over digital security systems and positions for which credit checks are required by law or self-regulatory organization. The commission's guidance provides insight as to how the commission plans on interpreting these exemptions:

- The exemption for positions involving responsibility for funds or assets worth $10,000 or more "only" applies to "executive-level positions with financial control over a company, including, but not limited to, Chief Financial Officers and Chief Operations Officers." This exemption "does not include all staff in a finance department."

- Financial Industry Regulatory Authority members are exempt from the SCDEA only when making decisions about people who are required to register with FINRA. FINRA members must comply with the SCDEA when making employment decisions about individuals who are not required to register with FINRA.

- Trade secrets "do not include information such as recipes, formulas, customer lists, processes, and other information regularly collected in the course of business or regularly used by entry-level and nonsalaried employees and supervisors or managers of such employees."

- The exemption for positions with control over digital security systems includes "positions at the executive level, including, but not limited to, Chief Technology Officer or a senior information technology executive who controls access to all parts of a company's computer system." This exemption "does not include any person who may access a computer system or network available to employees, nor does it include all staff in an information technology department."

The commission explains that employers "have the burden of showing that an exemption applies." According to the commission, the exemptions "are to be construed narrowly."

The commission outlines steps that an employer should take if it believes a position is exempt. Employers should "inform applicants or employees of the claimed exemption." The commission does not, however, require that applicants or employees be so informed in any particular manner. Additionally, the commission suggests in the guidance that employers keep an "exemption log" detailing instances when exemptions are used to perform credit checks. The commission instructs that the exemption log should be maintained for a period of five years from the date an exemption is used and should include the following information:

1. the claimed exemption;
2. why the claimed exemption covered the exempted position;
3. the name and contact information of all applicants or employees considered for the exempted position;
4. the job duties of the exempted position;
5. the qualifications necessary to perform the exempted position;
6. a copy of the applicant's or employee's credit history that was obtained pursuant to the claimed exemption;
7. how the credit history was obtained; and
8. how the credit history led to the employment action.

Employers may be required to share their exemption logs with the commission "upon request," and "promptly" doing so may "help avoid a Commission-initiated investigation into employment practices."

As with other violations of the New York City Human Rights Law, employers found in violation of the SCDEA may be liable for compensatory damages (including front pay and back pay), punitive damages and attorneys' fees and costs, as well as a civil penalty of up to $250,000 for violations that "are the result of willful, wanton or malicious conduct."

New York City employers should carefully review the commission's enforcement guidance before requesting credit history of applicants or employees. Additionally, any decision to apply one of the SCDEA's exemptions should be made on a case-by-case basis, after carefully reviewing the SCDEA and the commission's accompanying enforcement guidance.

—By Mark E. Brossman, Ronald E. Richman, Holly H. Weiss, Scott A. Gold and Adam B. Gartner, Schulte Roth & Zabel LLP

*Mark Brossman, Ronald Richman and Holly Weiss are partners, Scott Gold is special counsel and Adam Gartner is an associate in Schulte Roth & Zabel's New York office.*

*Brossman has served as an instructor at Columbia University Teacher's College and as a lecturer in the*

*Cornell University School of Industrial and Labor Relations. Richman is a former adjunct professor in New York University School of Continuing Education's certified employee benefits specialist program.*

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[1] The enforcement guidance and other materials issued by the commission are available on the commission's website.

[2] "New York City to Restrict Employers' Use of Credit History in Employment Decisions."( available at www.srz.com/New_York_City_to_Restrict_Employers_Use_of_Credit_History_in_Employment_Decisions)

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EXPERT ANALYSIS

# 2nd Circuit Adopts New 'Primary Beneficiary' Test for Determining If Unpaid Interns are Employees

**By Mark E. Brossman, Esq., Ronald E. Richman, Esq., Holly H. Weiss, Esq., and Scott A. Gold, Esq.**
***Schulte Roth & Zabel***

A recent wave of multimillion-dollar lawsuits brought against employers by unpaid interns demanding compensation for their work has resulted in settlements but no definitive word from the federal courts on when interns should be considered employees. Despite the volume of litigation in this area, the factors that federal district courts have considered to determine whether an intern must be paid have varied, leaving the issue unsettled — until July, when the 2nd U.S. Court of Appeals ruled on the issue.

On July 2, the 2nd Circuit in *Glatt v. Fox Searchlight Pictures,* 791 F.3d 376, held that a new test — the "primary beneficiary" test — should be used to determine whether an intern must be considered an employee and thus paid.

In 2014, NBCUniversal settled a class action brought by about 9,000 unpaid interns for $6.4 million. Other companies such as Viacom, Condé Nast, Warner Music Group and Lionsgate have similarly settled class-action lawsuits for amounts ranging from $1 million to $7.2 million.[1]

In reaction to the increasing number of lawsuits and multimillion-dollar settlements, companies have been terminating their unpaid internship programs or paying interns at least minimum wage.[2] Students have been left with fewer and more competitive internship options.

In *Glatt* three unpaid interns filed complaints against Fox Searchlight Pictures and Fox Entertainment Group, claiming they were entitled to compensation as employees under the Fair Labor Standards Act, 29 U.S.C. § 201, and the New York Labor Law.

Specifically, the plaintiffs alleged that the defendants had violated these laws by failing to pay them as employees during their internships, as required by minimum-wage and overtime provisions of the statutes. One plaintiff sought to certify a nationwide class.

## DETERMINING EMPLOYMENT STATUS

In its decision, the 2nd Circuit rejected the U.S. Department of Labor's fact-sheet guidelines on unpaid interns working in the for-profit private sector. The DOL's fact sheet, issued in 2010, set forth a rigorous, intern-friendly test. The guidelines provided that there is no employment relationship only if all of the following six requirements are met:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
- The internship experience is for the benefit of the intern.
- The intern does not displace regular employees, but works under close supervision of existing staff.

*In reaction to the increasing number of lawsuits and multimillion-dollar settlements, companies have been terminating their unpaid internship programs or paying interns at least minimum wage.*

- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In 2010 the New York State Department of Labor adopted the DOL's six-factor test and added five additional factors.[3] The NYDOL provides, just like the DOL in its guidelines, that an employment relationship does not exist only if all the criteria are met.

In *Glatt* the District Court used a version of the DOL's six-factor test. The lower court balanced the factors and found that four weighed in favor of finding that the interns were employees and the other two against, and ultimately it concluded that the interns were employees.

On appeal, neither party argued that the court should apply the DOL's guidelines.

The plaintiffs argued that when an employer receives an "immediate advantage" from an intern's work, the intern should be considered an employee. The defendants urged the court to adopt a "primary beneficiary" test in which the benefits to the intern are weighed against the value provided by the intern to the employer. The DOL filed an *amicus* brief urging the court to abide by the six-factor test.

The appellate court agreed with the defendants and adopted the primary-beneficiary test. The court wrote: "The primary beneficiary test has two salient features. First, it focuses on what the intern receives in exchange for his work. ... [S]econd, it also accords courts flexibility to examine the economic reality as it exists between the intern and the employer."

The 2nd Circuit articulated a list of non-exhaustive factors for courts to consider when determining whether the intern or the employer is the primary beneficiary of the relationship (see box).

The appeals court stated that no one factor is dispositive and that not every factor needs to point in the same direction to find that an intern is not an employee. The court emphasized that this decision reflects "a central feature of the modern internship — the relationship between the internship and the intern's formal education."

## The 'primary beneficiary' test

The 2nd Circuit's "primary beneficiary" test includes these factors:

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation — any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
- The extent to which the internship provides training that would be similar to that which would be given in an education environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the duration of the internship is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.


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This approach allows courts to look to the totality of the circumstances, weighing and balancing all of the considerations at play in each unique case.

## CLASS-ACTION CERTIFICATION

In addition, the court held that determinations under the primary-beneficiary test are "highly individualized inquir[ies]," meaning common, generalized proof required for certification of class actions would probably not be capable of answering the questions the court articulates in the test. Therefore, the court vacated the district court's orders certifying the plaintiffs' proposed class and the conditional certification of a nationwide collective action.

## CONCLUSION

The primary-beneficiary test adopted by the 2nd Circuit emphasizes the educational aspects of internships and provides greater clarity to employers as to when unpaid internship programs are permitted.

The appeals court's decision is welcome relief for employers within the 2nd Circuit, including New York and Connecticut employers, that have traditionally offered opportunities to students via internship programs.

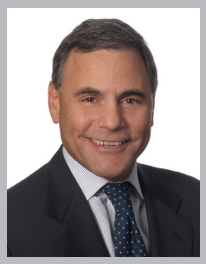
The court's rejection of any class or collective action in this case is a win for employers. Although the new standard does not explicitly preclude class actions by interns, the individualized nature of the test makes it unlikely that an employer will face lawsuits by large groups of current and former unpaid interns, such as those that led to the *Glatt* decision and the Viacom, NBCUniversal and other recent multimillion-dollar settlements.

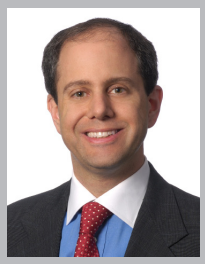
## NOTES

[1] Many of the major lawsuits concerning unpaid interns have been in the media industry, probably because large numbers of unpaid internships tend to be much more prevalent in "high-prestige creative fields like music, media, and fashion." Neil Howe, *The Unhappy Rise of The Millennial Intern,* FORBES, Apr. 22, 2014. Unpaid interns, however, are used across all industries. Employers are bound by federal and state labor laws and the case law construing these laws.

[2] *See* Rachel Feintzeig & Melissa Korn, *Colleges, Employers Rethink Internship Policies,* WALL ST. J., Apr. 22, 2014; Melissa Schorr, *The Revolt of the Unpaid Intern,* BOSTON GLOBE, Jan. 12, 2014.

[3] NYDOL Opinion RO-09-0189 (Dec. 21, 2010).



*(Pictured L-R)* **Mark E. Brossman** is a partner and co-head of the Employment & Employee Benefits Group at **Schulte Roth & Zabel** in New York, where he concentrates his practice on all aspects of ERISA, employment discrimination, labor relations, education law and related litigation. **Ronald E. Richman** is a partner and co-head of the firm's Employment & Employee Benefits Group. His practice concentrates on the litigation of employee benefit and employment cases in federal and state courts and the representation of employers and employee benefit plans before the Labor Department, Internal Revenue Service and Pension Benefit Guaranty Corp. **Holly H. Weiss** is a partner in the firm's Employment & Employee Benefits Group, where she focuses her practice on the representation of employers in all aspects of employment law and employee relations. She also serves as co-head of the cybersecurity group. Holly litigates disputes involving restrictive covenants, ERISA claims, executive compensation, employment agreements, statutory employment discrimination claims and common-law tort and contract claims. **Scott A. Gold** is a special counsel at the firm. The firm thanks summer associate Carly Halpin for her contributions on this commentary.

*In a "primary beneficiary test," the benefits to the intern are weighed against the value provided by the intern to the employer.*

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# Alert

## New York City to Ban Employer Pre-Offer Inquiries About Applicant Criminal Records

July 2, 2015

On June 10, 2015, by a 45-5 margin, the New York City Council passed a "ban the box" law prohibiting employers from asking about a job applicant's criminal record prior to extending a conditional offer of employment. New York City Mayor Bill de Blasio signed the bill on June 29, 2015, and the new law will go into effect on Oct. 27, 2015.

The bill amends the New York City Human Rights Law ("NYCHRL"), expanding its protections for job applicants and employees with criminal convictions and arrest records.

The new law will prohibit employers from making "any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment" until after the employer has extended a conditional offer of employment to the applicant. These limitations are broadly defined. "Any inquiry" is defined as any "question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purposes of obtaining an applicant's criminal background information." "[A]ny statement" is defined as "a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check." The new law will also bar employers from creating a job advertisement which expresses "directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction."

An employer will not be permitted to inquire about an applicant's arrest or conviction record until after extending a conditional offer of employment; however, the law includes specific procedures the employer must follow prior to taking any adverse action based on the inquiry. Specifically:

- The employer must provide a written copy of the inquiry to the applicant in a manner to be determined by the New York City Human Rights Commission ("NYCHRC").
- If the inquiry reveals a criminal conviction, the employer must perform an analysis of the applicant under Article 23-A of the New York State Correction Law ("Article 23-A"). If the employer then decides to revoke the offer of employment, the employer must provide a written copy of the analysis to the applicant. Article 23-A requires that an employer must show a "direct relationship between one or more of the criminal offenses" and the "employment sought or held by the individual" before taking adverse action against an individual due to a criminal conviction. Article 23-A lays out eight factors an employer must consider in making a

determination about a "direct relationship," including the "specific duties and responsibilities necessarily related to the … employment sought or held by the person."[1] The written analysis, which will be given to the applicant in a manner determined by the NYCHRC, will include "supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such applicant."

- Before taking any adverse action, the employer must give the applicant a reasonable time to respond to the inquiry and analysis, which shall be no less than three business days. During this time, the employer must hold the position open for the applicant.

The prohibition on inquiring about criminal history does not apply if a law or a self-regulatory organization (as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (e.g., FINRA)) bars employment based on criminal history or requires an employer to conduct a criminal background check for employment purposes.

The new law also expands the protections under the NYCHRL for employees with criminal convictions or arrest records. The NYCHRL will now provide that it is "an unlawful discriminatory practice" for an employer to deny employment to any person or take adverse action against any employee because of a criminal conviction when the denial or adverse action is in violation of Article 23-A. It also will be an unlawful discriminatory practice for any "person" to make any inquiry or act adversely because of any arrest or criminal accusation of an individual which is not currently pending against that individual or has been resolved in favor of the individual. Because the new law amends the NYCHRL, employers that violate the law may be liable for compensatory and punitive damages, as well as attorney's fees and costs.

The new law represents a significant change in the process employers in New York City must undertake when conducting criminal history background checks. Employers need to consider city, state and federal laws when taking adverse employment actions based on an arrest or a criminal conviction. Most importantly, employers must not inquire about convictions until after a conditional job offer and must make sure to perform the required Article 23-A analysis before revoking a conditional job offer based on a criminal conviction. In light of New York City's recent ban on the use of credit information in making employment decisions,[2] New York City employers should review their hiring processes and modify them to ensure they are compliant with these new laws.

*Authored by Mark E. Brossman (+1 212.756.2050 | mark.brossman@srz.com), Ronald E. Richman (+1 212.756.2048 | ronald.richman@srz.com), Holly H. Weiss (+1 212.756.2515 | holly.weiss@srz.com), Scott A. Gold (+1 212.756.2051 | scott.gold@srz.com) and Adam B. Gartner (+1 212.756.2708 | adam.gartner@srz.com).*

[1] The eight factors are: "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought or held by the person; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense or offenses; (f) the seriousness of the offense or offenses; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."

[2] See our April 30, 2015 *Alert*, "New York City to Restrict Employers' Use of Credit History in Employment Decisions," *available at* www.srz.com/New_York_City_to_Restrict_Employers_Use_of_Credit_History_in_Employment_Decisions.

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