



THE THRESHOLD - REMUNERATION TEST AFTER SAACHI

With the prevalence of interns and unpaid volunteers in the workforce, what happens if an individual suffers discrimination while in their role as intern or volunteer? Can interns and volunteers take advantage of traditional employment law torts to vindicate their rights?

The Common Law Agency Doctrine

It is axiomatic that an employment relationship must exist before an individual can suffer employment discrimination. The Supreme Court has stated that when determining whether an employment relationship exists, courts should presume that Congress had in mind "the conventional master-servant relationship as understood by the common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

To determine whether someone is an employee under an agency theory, the Tenth Circuit considers the totality of the circumstances surrounding the working relationship of the parties. *Zinn v. McKune*, 143 F.3d 1353, 1357 (10th Cir. 1998). The Tenth Circuit's analysis focuses on whether, and to what extent, the employer has the right to control the means and manner of the worker's performance and looks to the following factors:

(1) the kind of occupation at issue, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the employer or the employee furnishes the equipment used and the place of work; (4) the length of time the individual has worked; (5) the method of payment, whether by time or by job; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the

work is an integral part of the business of the employer; (9) whether the worker accumulates retirement benefits; (10) whether the employer pays social security taxes; and (11) the intention of the parties.

Id. But this test only determines whether there is an employment relationship when the individual is paid. If an individual does not receive payment due to their status as an intern or volunteer, then a different test applies.

The Threshold-Remuneration Test

Although courts typically use the threshold-remuneration test to determine whether someone is an individual contractor or an employee, the Tenth Circuit has joined the Second, Fourth, Fifth, Eighth, and Eleventh Circuits in adopting a threshold-remuneration test for cases where the putative employee is not paid for his or her work. *McGuinness v. Univ. of New Mexico Sch. of Med.*, 170 F.3d 974, 979 (10th Cir. 1998).

Under this test, courts analyze the volunteer or intern's showing of remuneration *before* analyzing whether an employment relationship exists under the common-law agency doctrine. *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 435 (5th Cir. 2013). Remuneration may consist of either direct compensation, such as salary or wages, or significant indirect benefits that are not merely incidental to the volunteer activity. *Id.* If a plaintiff fails to demonstrate adequate remuneration, he or she is not considered an employee. *See, e.g., McGuinness*, 170 F.3d at 979 (finding medical student was not an employee under the ADA because he did not receive any remuneration).

In *Johnston v. Ellicott Fire Protection District*, a federal trial court recognized the Tenth Circuit's adoption of the threshold-remuneration test but was unwilling to conclude



that the benefits¹ plaintiffs received were insufficient as a matter of law. 2016 WL 7188524 at *16 (D. Colo. 2016). In denying defendant's motion to dismiss, the court found that plaintiffs had listed sufficient benefits in their complaint to make it plausible they received "indirect but significant remuneration." *Id.* (citing *Haavistola v. Comm. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 222 (4th Cir. 1993)).

Although the Tenth Circuit has adopted the threshold-remuneration test, and at least one Colorado District Court has applied it, the Tenth Circuit had not provided any additional clarification as to what remuneration is necessary to meet the indirect benefit threshold . . . until now.

Saachi v. IHC Health Services, Inc.

In a recently delivered opinion, the Tenth Circuit clarified what showing an intern or volunteer must make to survive the court's application of the threshold-remuneration test. *Saachi v. IHC Health Services, Inc.*, 918 F.3d 1155 (10th Cir. 2019).

In *Saachi*, the plaintiff worked as an unpaid intern at a local hospital. Although the internship was to continue until December, the hospital terminated her internship in early November. *Id.* at 1156. Plaintiff filed suit alleging various forms of discrimination under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. *Id.* Although plaintiff received no direct payment for her internship, there were, according to her, other significant benefits. *Id.* Plaintiff argued, that in an internship setting, access to professional certification and/or a path to employment can constitute indirect job-related benefits sufficient to satisfy the threshold-remuneration test. *Id.* Importantly, plaintiff needed to complete an internship to be certified in her chosen profession;

thus, the internship was a pathway to employment. *Id.* The court applied the threshold-remuneration test and held that plaintiff's internship failed to satisfy that test as a matter of law. *Id.* at 1159. First, the claimed benefits were not provided by the hospital and did not resemble traditional employment benefits like a pension or insurance. *Id.* Second, the claimed benefits were too tenuous because they would only accrue if subsequent events also occurred independent of the internship. *Id.* The court recognized that even if plaintiff had completed her internship, she would still have had to sit for a professional exam, pass the exam, apply for an open position, and be selected for that position. *Id.* Plaintiff's internship thus provided insufficient remuneration even though her internship was required for her to advance in her chosen field.

Although more clarification would be helpful, the *Saachi* court has, for the first time, determined what types of benefits will be considered too indirect or attenuated to be considered remuneration as a matter of law. If the benefits do not flow directly from the internship provider or if the alleged benefits do not inevitably result from the internship, courts in the Tenth Circuit are likely to find that the benefits are too tenuous to be considered remuneration.

This ruling provides an additional basis for employers to defend themselves against allegations of discrimination by unpaid interns and volunteers; and forecloses another avenue for unemployed plaintiffs to claim that they are covered by federal employment statutes.

If you have any questions about this update, please contact Aaron Thompson, thompsona@hallevans.com.



¹ Those benefits included: (1) workers' compensation; (2) funeral benefits; (3) death benefits; (4) reimbursement of pre-approved expenses; (5) off-site travel and training costs, as approved; (6) tuition credits under state programs; (7) death gratuity eligibility under state and federal laws; (8) the ability to purchase vehicle tires under a state procurement contract; (9) personal protective equipment; (10) radios for point-to-point communication; (11) pagers for dispatch; (12) uniform shirts and outerwear; and (13) consideration for part-time or full-time employment.