PUBLICATION

Interns or Employees? The Issue Draws Nearer to Conclusion

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Three and a half years ago, litigation began in the Southern District of New York ("S.D.N.Y.") challenging the long-held assumption that interns were not "employees" under the law. These cases alleged that interns who were not paid were nevertheless entitled to minimum wage and overtime under the FLSA. Because these lawsuits enjoyed some initial success, and because unpaid internship programs were commonplace throughout the country, several copycat lawsuits were filed thereafter, establishing a significant new trend in wage & hour litigation. This tidal wave of new cases has subsided in the last three years, as most of the intervening lawsuits have been settled. But the original cases from the S.D.N.Y. are still being litigated and are currently on appeal to the Second Circuit. The lead cases have been consolidated and a decision is expected shortly. Whatever the outcome may be, that decision will likely bring clarity to the proper classification of interns. There is already a split among the Circuit Courts of Appeal, which mean the United States Supreme Court may take up this issue next term. Until then, employers should take preventative measures to avoid liability for unpaid interns.

I. The Key Litigation History

The leading case on the payment of interns is *Glatt v. Fox Searchlight Pictures*. In that case, two separate interns for the 2010 film, *Black Swan*, alleged that they – and a class of nearly 100 others – should have been paid minimum wage and overtime for their work on the movie. Importantly, the two lead plaintiffs had rather different experiences as interns—as one predominantly got coffee and lunch for Fox's production staff, and the other provided more substantive services, like accounting and the preparation of purchase orders. *Both* were ultimately certified as class representatives, and *both* were granted summary judgment by the S.D.N.Y. Class notices for recovery went out last year as a result, and Fox has appealed the propriety of class certification to the Second Circuit, where they remain today.

The other leading case from the S.D.N.Y. is *Wang v. Hearst Corporation*. Hearst is the publisher of several well-known magazines, such as *Cosmopolitan* and *Marie Claire*. The allegations by the company's interns in this case were very similar to the allegations in *Glatt*, but the result was different. Summary judgment for the plaintiffs was denied, as the court held a jury could find that the interns were not entitled to pay at all. That ruling has also been appealed to the Second Circuit, where it awaits a decision alongside the *Glatt* case.

The different outcomes in these cases are the result of different approaches taken by their presiding judges. Both decisions relied on the Department of Labor's ("DOL") six-factor test for identifying an intern, but they applied them differently. Those factors are:

- The internship is similar to training which would be given in an education environment or vocational school;
- The experience provided by the internship is for the benefit of the intern;
- The intern does not displace regular employees but works under the close supervision of existing staff;
- The employer derives no immediate advantages from the intern, and on occasion, its operations may even be impeded as a result;

- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the work the intern performs.

In *Glatt*, the district judge used these six factors as a *checklist*, whereby failure of any one of them would cause an intern to become an employee. In *Hearst*, the district judge used them as a *framework*, whereby satisfying enough of the factors would mean the intern is, in fact, an intern. You can see why the Second Circuit wants to clarify the proper approach.

Still other appellate circuits don't even follow the DOL's factors. Instead, they concentrate on one primary inquiry, stemming from a 1947 decision by the Supreme Court: *whether the internship is designed predominantly to benefit the intern or the employer?* If the internship is for the employer's benefit, the intern is an employee. If the internship is for the intern's benefit, the intern remains an intern. Both the Fourth Circuit and the Sixth Circuit follow this approach. The Fifth Circuit and the Eleventh Circuit, however, follow the DOL's factors. Again, you can see why the Supreme Court may want clarify to the approach that should apply nationwide.

II. Advice for Employers in the Meantime

In light of these conflicting cases, consider taking preventative measures until they are resolved. Some employers, like Fox Searchlight, have changed their policy altogether and begun to pay interns in keeping with the FLSA. Other employers, like Conde Nast, have done the opposite and cancelled their internship programs altogether. Both are legitimate responses to this wave of litigation, but if you want to maintain an unpaid internship program, then you should proceed with caution. You will want to take the following steps to maximize your ability to defend the nonpayment of interns:

- First, verify that your unpaid internship program complies with most, if not all, of the DOL's six factors listed above.
- Second – and at a minimum – ensure your internship program is designed to benefit the intern primarily, not your business.

Failure to take these steps will almost assure that your interns will be found to be employees, which will expose you to potentially significant liability down the road.