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Employers Beware, Your Unpaid Interns May Cost You More than You Think

By Maria Tavano

Summer internship season is in full swing, and if you are an employer with an unpaid internship program, you may want to take particular note of a recent Southern District of New York decision that may have spurred a surge of wage and hour litigation by interns.

Last month, in [Glatt v. Fox Searchlight Pictures, Inc.](#), 2013 WL 2495140 (S.D.N.Y. June 11, 2013), a federal district judge for the Southern District of New York granted summary judgment in favor of two plaintiffs, holding that Fox Searchlight Pictures, Inc. ("Fox Searchlight") violated the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL") when it misclassified the plaintiffs as interns rather than employees and failed to pay them wages consistent with federal and state law. The court further held defendant Fox Searchlight was plaintiffs' joint employer using both formal and functional employer control tests. Finally, the court certified a class of former unpaid interns who worked over a five-year period for various divisions of Fox Searchlight's parent company and additionally named defendant, Fox Entertainment Group, Inc. ("FEG").

Plaintiffs' Classification as Interns versus Employees

In determining whether the interns were misclassified, and instead should have been deemed employees covered by the FLSA and the NYLL, the court relied heavily on analysis of the "trainee exception" to the FLSA, which was articulated in the 1947 United States Supreme Court decision *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), along with the U.S. Department of Labor, [Wage and Hour Division Fact Sheet](#)

[71](#) ("DOL Intern Sheet") regarding interns at for-profit businesses. In *Walling*, a case involving a railroad's week-long training program for prospective employees, the United States Supreme Court held the railroad's program was exempt from the mandates of the FLSA because the trainee, rather than the railroad, received the direct benefit of the program. In so holding, the *Walling* court determined the FLSA was not intended to penalize employers for providing for free the same kind of instruction offered at a vocational school. Thus, in light of *Walling*, the analysis for determining whether an individual may be classified as an intern, and thereby exempted from the FLSA, focuses on whether it was the intern or the employer who received the direct benefit of the intern's work.

The *Glatt* court further focused its analysis on the following six factors enumerated in the DOL Intern Sheet:

1. the internship provides training similar to an educational environment;
2. the internship experience is for the benefit of the intern;
3. the intern does not displace regular employees;
4. the employer that provides the training does not obtain an immediate advantage from the intern's work;
5. the intern is not necessarily entitled to a job at the end of the internship; and
6. the intern and employer understand the intern is not entitled to wages.

As to the sixth factor, the *Glatt* court specifically noted that the FLSA does not allow employees to opt out of wage and hour laws by voluntarily waiving their entitlement to wages. Applying these six factors, the *Glatt* court found that the interns were improperly classified as unpaid interns because they worked "as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training."

Fox Searchlight as Joint Employer

The *Glatt* court further found that Fox Searchlight was the interns' joint employer, despite Fox Searchlight's arguments to the contrary. In so ruling, the court focused its analysis on both formal and functional control tests. The court applied formal control tests and analyzed Fox Searchlights' hiring and firing power, ability to supervise or control work schedules or conditions, ability to determine the rate and method of payment, and maintenance of employment records for the interns. The court also looked to functional control tests and considered whether Fox Searchlight's premises and equipment were used for the interns' work, whether the alleged joint employers had the ability to shift production among one another, the extent to which the interns performed a discrete line-job integral to Fox Searchlight's process of production, whether responsibility could pass from one subcontractor to another

without material changes, the degree to which Fox Searchlight supervised the interns' work, and whether the interns worked exclusively or predominantly for Fox Searchlight. The balance of all these factors, in the court's opinion, led to the finding that Fox Searchlight was a joint employer.

Class Certification

Finally, the court granted class certification as to the NYLL claims and conditional certification as to the FLSA claims. The class consists of all individuals who participated in unpaid internships, not only with defendant Fox Searchlight, but also with one or more of three identified divisions of Fox Searchlight's parent company, defendant FEG, in New York between September 2005 and September 2010. In so ruling, the court found the proposed class and its claims of wage and hour violations satisfied the elements of numerosity, commonality, typicality, adequacy, predominance and superiority required by *Federal Rule of Civil Procedure 23(a)*.

Conclusion

Since the *Glatt* decision was entered on June 11, 2013, there has been a measurable increase in lawsuits by interns, most seeking class certification, alleging wage and hour violations. The media and film production industry, in particular, seems to be targeted. However, it is very likely that plaintiffs' attorneys will pursue this kind of litigation across all industries. Employers may want to take heed of the six-point test enumerated in the DOL Intern Sheet, in addition to applicable local laws, and evaluate their own internship programs to determine whether their unpaid interns are correctly classified.

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