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SPECIAL FEATURE

Unpaid internships can pose hazards for employers

By Julie A. Galvin

The summer internship season may be winding down, but a recent federal court decision serves as a reminder that using unpaid interns any time of the year can be risky to for-profit employers.

In *Glatt v. Fox Searchlight Pictures, Inc.*, a New York federal District Court judge determined that two former unpaid interns for a film production company did not fall within the narrow "trainee" exception to the Fair Labor Standards Act.

As a result, the judge concluded, the interns should have been classified as employees under the FLSA and, as such, could now recover unpaid minimum wages and overtime earnings under the statute, as well as any additional amounts that might be recoverable under the New York wage-and-hour law.

While *Glatt* does not mark a change in this area of the law, the decision underscores how important it is for employers to ensure that unpaid internships comply with the FLSA and any applicable state laws.

Background

Glatt was brought by several former unpaid interns for Fox Searchlight Pictures. Two of them ("the plaintiffs") performed "back office" tasks related to production of the film "Black Swan."

Working up to 50 hours a week, the plaintiffs carried out routine administrative tasks, such as making photocopies, organizing filing cabinets, answering phones, making coffee, ordering lunch, running errands, picking up paychecks for co-workers, tracking and reconciling purchase orders and invoices, and watermarking scripts. The plaintiffs did not hold their internships in conjunction with any formal educational programs, nor did they receive any hands-on training related to actual film production.

After their internships had concluded, the plaintiffs filed suit against Fox Searchlight and its parent company under the FLSA and New York law. The plaintiffs eventually moved for summary judgment, asking the court to rule that they did not fall within the "trainee" exception and, accordingly, were entitled to the protections afforded to employees under the FLSA and state law.

Court's decision

In its decision, the court noted that the FLSA, as interpreted by the U.S. Supreme Court, excludes unpaid "trainees" who perform services for their own educational or professional benefit, rather than for the benefit of the employer. (The U.S. Department of Labor also recognizes an exception to the FLSA for individuals who volunteer their time "for religious, charitable, civic, or humanitarian purposes to non-profit organizations.")

The court analyzed several factors that the DOL has identified as relevant to the determination of whether a for-profit employer may treat an intern as an unpaid trainee. According to the DOL, a court should consider whether:

(1) The internship, even though it involves the employer's facilities and business activities, is similar to training that would be given in an educational environment;

(2) The internship experience is for the benefit of the intern (as opposed to that of the employer);

(3) The intern does not displace regular employees but works under the close supervision of existing staff;

(4) The employer derives no immediate advantage from the intern's activities, and, on occasion, its operations may actually be impeded;

(5) The intern is not necessarily entitled to a job at the conclusion of the internship; and

(6) The employer and the intern under-

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stand that the intern is not entitled to wages for time spent in the internship.

The court found that, considered as a whole, those factors weighed in favor of the plaintiffs' claim that they were required to be treated as employees.

Applying the first factor, the court noted that "[w]hile classroom training is not a prerequisite [for unpaid trainee status], internships must provide something beyond on-the-job training that employees receive."

In *Glatt*, however, the plaintiffs' purely routine work activities involved "nothing approximating the education they would receive in an academic setting or vocational school."

As to the second DOL factor, Fox Searchlight argued that the plaintiffs benefited from their work activities by gaining resume listings, job references and exposure to the workings of a production back office.

The court responded, however, that "those benefits were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them. Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor."

Thus, the court concluded, Fox Searchlight, and not the plaintiffs, primarily benefited from the plaintiffs' work.

The court also found, in relation to the third factor, that the plaintiffs' work had the effect of displacing employees of Fox Searchlight. In that regard, the court observed that while the plaintiffs' work activities were "menial," those activities were nonetheless "essential" and, by Fox Searchlight's own admission, would otherwise have been carried out by paid employees.

Along similar lines, in reference to the fourth DOL criterion, the court noted that Fox Searchlight "does not dispute that it obtained an immediate advantage from [the plaintiffs'] work." The court said the plaintiffs "performed tasks that would have required paid employees" and that "[t]here is no evidence that they ever impeded [other employees'] work at their internships."

Finally, in reference to the last two factors identified by the DOL, the court acknowledged that the plaintiffs understood that they would not be paid for their services, and that there was no evidence that the plaintiffs were entitled (or believed they were entitled) to job offers at the end of their internships. But it concluded that those factors were not sufficient to overcome the other DOL criteria supporting employee status, particularly given the strong public policy embodied in the FLSA against permitting employees to waive their entitlement to wages.

Accordingly, the court concluded that the plaintiffs were employees for purposes of the FLSA and New York law (which the court found co-extensive with the FLSA on the issue), thereby entitling them to potential damages under the minimum-wage and overtime provisions of those statutes.

Recommendations for employers

In light of *Glatt*, there are a number of steps employers should take if they are considering whether to bring unpaid interns into the workplace.

First and foremost, employers should confer with experienced employment counsel to determine whether workers sought to be classified as unpaid interns fall within the trainee exception (or any other exception) to the FLSA.

It is also vital that unpaid internships be structured in accordance with the factors noted by the DOL. For instance, unpaid internships should, to the greatest extent possible, focus on tasks of educational and career value to the interns, and not on routine administrative tasks that employees otherwise would have to perform.

Additionally, an employer should require each unpaid intern to sign an agreement confirming that no wages, compensation or benefits will be provided in connection with the internship and that the intern will not be entitled to a job offer at the conclusion of the internship.

Employers should also be aware of any applicable state-law requirements for internships. For example, in Massachusetts, a for-profit employer may need to show that an unpaid internship is part of a formal educational program. Misclassifying interns can be particularly costly for Massachusetts employers, in light of the mandatory treble damages and attorneys' fees awarded to prevailing plaintiffs under the Massachusetts Wage Act.

Finally, employers should ensure that any interns who do not both fall within an exception to the FLSA and satisfy any additional conditions that may be required by state law are paid at least the minimum wage, in addition to overtime pay when applicable. NEIH