

Unpaid Interns As Employees

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For many, unpaid internships constitute a harsh reality. However, they may not always be legal.

The spotlight is currently on two cases from the Southern District of New York that are now awaiting appeal in the Second Circuit that will clarify when unpaid interns are considered employees under the Federal Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"): *Glatt v. Fox Searchlight Pictures*, 293 FRD 516 (S.D.N.Y. 2013) and *Wang v. The Hearst Corporation*, 2013 WL 3326650 (S.D.N.Y. June 27, 2013).

Specifically, the Second Circuit will determine whether the unpaid interns are considered "trainees," and therefore, exempt from the reach of the FLSA and the NYLL. The United States Supreme Court established the "trainee" exception to the FLSA in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947). Then, in 2010, the U.S. Department of Labor released Fact Sheet # 71 ("Fact Sheet"), which elaborates on whether interns at for-profit businesses fall within the Walling "trainee" exception to the FLSA. The Fact Sheet enumerates six criteria for determining whether an internship may be unpaid: 1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; 2) the internship experience is for the benefit of the intern; 3) the intern does not displace regular employees, but works under close supervision of existing staff; 4) 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; 5) the intern is not necessarily entitled to a job at the conclusion of the internship; and 6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. According to the Fact Sheet, the "trainee" exclusion from the definition of employment is "necessarily quite narrow because the FLSA's definition of 'employ' is very broad."

Glatt and *Hearst* both consider the weight of the Fact Sheet, in light of *Walling*, in making divergent determinations on similar facts. In *Glatt*, Plaintiffs Eric Glatt and Alexander Footman were unpaid interns who worked on production of the film *Black Swan* in New York. After production ended, Glatt took a second unpaid internship relating to *Black Swan*'s post-production. During their internships, the plaintiffs' duties included, obtaining documents for personnel files, picking up paychecks for coworkers, tracking and reconciling purchase orders and invoices, organizing filing cabinets, making photocopies, assembling office furniture, taking out trash, taking lunch orders, and answering phones, among others.

The plaintiffs urged the court to analyze the question under the Fact Sheet criteria. Defendants urged the court to analyze the question under a "primary benefit test," which considers whether the internship's benefits to the intern outweigh the benefits to the engaging entity.

The district court rejected the use of the "primary benefit test," recognizing that the district court opined that an employer could never know in advance whether it would be required to pay its interns because "the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot."

The court found that, unlike the “primary beneficiary” test, “[b]ecause [the Fact Sheet criteria] were promulgated by the agency charged with administering the FLSA and are a reasonable application of it, they are entitled to deference.”

In *Glatt*, the court strictly applied the six criteria outlined in the Fact Sheet:

1. Training Similar to an Educational Environment

The district court focused on whether training or useful knowledge was offered, not necessarily whether an intern actually benefited from that knowledge. The district court found that the internship did not satisfy this first factor. The plaintiffs’ learning how to watermark scripts, learning how to operate a photocopier, or learning how to operate a coffee machine did not suffice. Moreover, the court found that “it is not enough that [Plaintiffs] ‘learning what the function of a production office was through experience.’”

2. Whether the Internship Experience is for the Benefit of the Intern

The district court found that the “incidental” benefits of working in the office such as resume listings, job references, and an understanding of how a production office works did not sufficiently benefit the intern. The district court found that even under the “primary benefit” test, the Defendants were the benefitted most from the relationship because they received free benefits that would have otherwise required paid employees.

3. Whether the Plaintiffs Displaced Regular Employees

The district court listed the numerous menial tasks the interns were required to complete, including basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, assembling office furniture, arranging travel plans, taking out trash, taking lunch orders, and answering phones. The district court found that if the interns had not performed these tasks for free, a paid employee would have been needed.

4. Whether Searchlight Obtained an Immediate Advantage From Plaintiffs’ Work

The district court focused on whether the interns performed tasks that would have required paid employees – that is, whether the work was “essential.” The district court considered whether the interns impeded the work of regular employees. The fact that the interns did not impede the work of regular employees speaks to the fact that the immediate benefit of their labor attached to their employer, rather than to themselves.

5. Whether Plaintiffs Were Entitled to a Job at the End of Their Internships

The district court found that the interns were not entitled to jobs at the end of their internships or thought they would be. These facts militate against the program being “preparatory” – that is, of practical use to the interns.

6. Whether Searchlight and the Plaintiffs Understood They Were Not Entitled to Wages

The district court found that Glatt and Footman understood they would not be paid. Normally, this finding would militate in favor of finding that interns are “trainees” under Walling. However, the court all but disregarded the import of this factor since “the FLSA does not allow employees to waive their entitlement to wages.”

As a result, the court noted that the facts here are a “far cry from Walling, where trainees impeded the regular business of the employer, worked only in their own interest, and provided no advantage to the employer.”

In Hearst, the unpaid interns worked for a variety of magazines owned by the Hearst Corporation. As in Glatt, the interns performed menial responsibilities including, research, cataloguing samples, and organizing files holding casting calls. The interns were hired pursuant to a company-wide directive at Hearst to hire interns in order to reduce costs. Several of the interns, who worked at Cosmopolitan, attended four, one hour sessions of what was called “Cosmo-U,” where editors discussed their career path. Additionally, some of the duties performed by the interns would have ordinarily been performed by paid employees.

The interns in Hearst argued that the correct analysis for determining if they were employees was whether their work provided an “immediate advantage” to Defendant. Defendants argued for a “balancing of the benefits test,” which would look to the totality of the circumstances to evaluate the “economic reality” of the relationship. Defendant went on to argue that the Fact Sheet should not be applied as a “rigid checklist.”

The district court found that Walling looked to the totality of the circumstances of the training program, rather than the “immediate advantage” test to determine whether the plaintiffs were employees. Instead, the district court found that the “prevailing view is the totality of the circumstances test.”

The district court ultimately held that to the extent that interns and Defendant advanced different theories regarding how the employer-employee relationship should be evaluated, an issue of fact existed. The district court also found that even applying the Fact Sheet criteria, there existed an issue of fact regarding the first, second, third, and fourth factors; specifically, Hearst had succeeded in showing that there was some educational training, provided to the interns, some supervision, and some impediment to Hearst’s operations by hiring interns. Accordingly, the district court denied the interns’ motion for summary judgment.

The decision in Glatt adheres much more closely to the Fact Sheet criteria, while Hearst only considers the Fact Sheet to be part of the framework for evaluating the totality of the circumstances. The Second Circuit, therefore, will decide how much weight to give the Fact Sheet criteria and will ultimately decide the fate of thousands of unpaid interns in the New York City area alone.

Are you an unpaid intern who performs predominately menial tasks? If so, you may have legal recourse. Please contact our firm if you have any questions concerning your unpaid internship.

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