The Law Governing Unpaid Internships Continues To Evolve In New York

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Unpaid interns continue to demand that for-profit businesses provide them with greater workplace protections. Employers who continue to use unpaid interns without ensuring compliance with state and federal labor regulations risk being hit with costly individual cases, as well as collective and class actions. With the number of unpaid internship programs exploding in recent years, experts estimate that at least a half a million Americans hold unpaid internships every year, with about 38% in the for-profit sector. Given New York's six year statute of limitations for wage and hour claims, the size of the potential group of plaintiffs is substantial.

New Legislation in New York

On July 22, 2014, New York Governor Andrew Cuomo signed into law an amendment to the New York State Human Rights Law that expressly prohibits discrimination, harassment, and retaliation against unpaid interns. N.Y. Exec Law §296-C. The new legislation became effective immediately and parallels a similar law passed by New York City several months earlier. New York City's Human Rights Law was amended unanimously after a Manhattan federal court ruled that a female unpaid intern was not protected by federal or city sex discrimination laws because she was not paid. (see Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527 (S.D.N.Y. 2013)). Presently, only New York, Oregon and Washington, D.C. have extended discrimination laws to unpaid interns of for-profit businesses. However, the trend is likely to continue as California and New Jersey have similar legislation pending.

Second Circuit Hears Arguments on Unpaid Internships

Increasingly, courts are being forced to determine whether federal and state wage and hour laws apply to unpaid interns working in the for-profit sector. As previously discussed in this blog [ww.wigdorlaw.com/2014/04/21/unpaid-interns-as-employees/]two district courts reached opposite results on substantially similar facts in separate class actions asserting claims under the Fair Labor Standards Act ("FLSA"). The conflicting decisions arose, in part, because each court used a different test to analyze whether interns are "employees" and therefore protected under federal laws or are "trainees" and are therefore exempt from wage and hour regulations.

The DOL 6 factor test versus the "Primary Benefit" test

In Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), the district court analyzed the question of whether unpaid interns were employees or trainees, by applying a six factor test set forth in Fact Sheet #71 by the U.S. Department of Labor ("DOL"). Criticized by employers as being too rigid, the six factor test requires that all six factors are present:

- 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;

- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- 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;
- 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 time spent in the internship.

Using the DOL six factor test, the court in Fox held that the interns were entitled to wages. In Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013), the court held that the unpaid interns were "trainees" and not entitled to compensation. The court arrived at the decision by using a totality of the circumstances approach, specifically, if the internship "primarily benefits" the intern rather than the employer, then the intern is properly deemed a trainee.

On January 30, 2015, the Second Circuit heard arguments from lawyers in both Fox and Hearst. The DOL and the interns argued in support of the six factor test. The employers advocated use of the broader balancing inquiry used in Hearst. The panel, Judges Walker, Jacobs and Wesley, indicated through their questioning that the 6 factor test was too rigid and failed to consider critical factors, including whether academic credit was received by the intern or whether the intern performed "real work." The panel also agreed with the interns, however, on the issue that no educational benefit is gained from performing menial tasks such as running errands and getting coffee.

The Second Circuit decision is likely months away but will undoubtedly provide much needed guidance on the questions raised in these cases. Regardless of the outcome, employers can expect the number of such cases to increase going forward.

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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