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UNPAID INTERNS

The use of unpaid interns has been the subject of recent judicial scrutiny, causing informed employers to reconsider their internship programs. Restrictions placed on unpaid internships by courts and the Department of Labor ("DOL") warrant careful consideration.

Two statutes, New York's Labor Law ("NYLL") and the federal Fair Labor Standards Act ("FLSA"), govern whether an intern must be paid. These laws require payment of minimum wage and overtime pay for all covered employees. While not all employees are covered by these statutes, several courts have determined that some interns are covered and must be paid unless specific criteria are met.

In *Glatt v. Fox Searchlight Pictures*, 293 F.R.D.516 (S.D.N.Y. 2013), a federal court sitting in New York considered whether unpaid interns who worked on the production of the film *Black Swan* were covered by the protections of the FLSA and NYLL. The interns performed the same work as low-level paid employees at Fox: they arranged travel plans, answered phones, took out trash, etc. They argued that they were "employees" under the statutes and thus entitled to receive minimum wage and overtime pay for their work. The defendant employer argued that the interns fell under the "trainee" exception and therefore were not covered by the wage laws. In considering whether the *Black Swan* interns could legally be unpaid, the court applied the following six-factor test articulated by the United States Department of Labor:

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.

The *Glatt* court stated that the DOL test, having been promulgated by the agency charged with administering the FLSA, is entitled to deference. According to the court, no single factor is controlling or takes precedence over the others. Rather, all of the circumstances should be considered. The court ruled

that the *Black Swan* internships were not designed to be uniquely educational, and the internships did not meet the DOL test. An "employee" relationship existed, and the interns were entitled to the minimum wage and overtime protections of the FLSA and NYLL.

In a similar case, *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013), a different federal judge sitting on the same New York court denied partial summary judgment on the issue of whether Hearst Corporation's interns were employees under the FLSA. The *Wang* court also considered the DOL's six factors, but found issues of material fact in dispute which prevented a definitive judgment in favor of the interns.

In November 2013, the U.S. Court of Appeals for the Second Circuit directed that the wage issues presented in *Glatt* and *Wang* be heard in tandem. The upcoming decision is expected to define the circumstances in which interns must be paid and will clarify employers' responsibilities and potential liabilities to interns. [1]

[1] In an unrelated development, New York City Mayor Bill de Blasio recently signed legislation giving unpaid interns the right to sue their employers if they are harassed or discriminated against in the workplace. The bill was prompted by a sexual harassment suit brought by an unpaid intern last year in which a federal judge held that the unpaid intern did not qualify as an employee and therefore did not have standing to sue under the New York City Human Rights Law. The new legislation clarifies that all interns, paid or unpaid, are afforded the protections provided to employees under the City's Human Rights Law.

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