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Judge's Ruling on Unpaid Internships Makes the Training Staple a Risky Proposition for Employers

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In 2011, two unpaid interns for Fox Searchlight Pictures, Inc. brought a putative class action under the Fair Labor Standards Act ("FLSA") and state labor laws alleging that their relationship with the company was that of employee-employer, and not trainee-trainer. See *Glatt, et al. v. Fox Searchlight Pictures, Inc., et ano. Case No. 11 Civ. 6784* (United States District Court for the Southern District of New York).

Both interns worked on major motion pictures, including *Black Swan* and *500 Days of Summer*. Their internship duties largely consisted of obtaining documents for personnel files, picking up paychecks for coworkers, tracking and reconciling purchase orders and invoices and, of course, making copies. Importantly, Fox Searchlight admitted that if the interns were not performing these tasks for free, a paid employee would have been needed. Indeed, when one of the interns went from working five days a week to three days a week, the *Black Swan* crew "hired" another part-time intern to cover the remaining two days. Ultimately the court ruled that the two unpaid interns were actually employees under the FLSA and state labor laws.

While the intern tasks described above may seem familiar, and in fact play out in offices throughout the United States, employers need to be aware of the expansive approach the FLSA takes to defining an employee for purposes of determining who is entitled to wages. As the court in *Glatt* noted, the FLSA defines the term "employ" broadly as including to "suffer or permit to work." Under that definition, internships in the for-profit sector[1] will most often be viewed as employment, unless the internship satisfies the "trainee" test.

To be certain that the employer is bringing on an intern, and not an employee entitled to minimum wage, the following six factors must be met:

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.

[1] A different set of rules apply to non-profit entities.

Practically speaking, this means that gone are the days when an employer could bring on an unpaid intern for making copies, grabbing coffee or doing the office busywork that other employees are reluctant to do. Instead, under *Glatt*, unpaid internships should be structured in such a way as to be an educational experience for the intern, rather than an exercise in what it is like to work in a particular industry. This could include having the intern work on hypothetical tasks related to the industry in which he or she is interested, as opposed to working on actual tasks that would benefit the employer.

The court's ruling in *Glatt* appears to already have motivated other unpaid interns to bring suit under the FLSA. Soon after the court's decision was handed down, unpaid interns working for the blog giant Gawker brought a similar suit alleging that the company violated minimum wage laws.

Unpaid internships can often be a valuable experience to participants and provide an opportunity for employers to get a feel for whether an individual would be an asset to the company. However, employers should be aware that if the unpaid intern is performing tasks that ultimately are a benefit to the company, the intern likely is an "employee" and entitled to at least minimum wage.

If you have any questions about wage and hour issues please contact Jonathan Rector or a member of Crowe & Dunlevy's Labor & Employment practice group.

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