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Expert Analysis

Second Circuit to Decide Challenges Over Unpaid Interns

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On March 11, 2002, in this very column, this author urged private employers to "exercise caution in accepting unpaid work because any worker who cannot qualify as a volunteer intern/trainee is an employee entitled to the protection of the wage laws." (NYLJ, March 11, 2002). Currently, there are a large number of companies facing lawsuits from current and/or former unpaid interns that should have taken that advice. In light of the decisions in *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) and *Wang v. The Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013), this article will update readers about the law regarding the use of unpaid interns under the Fair Labor Standards Act (FLSA), 29 USC 201 et seq., and New York Labor Law. 12 NYCRR 142-2.14 et seq.

For the most part, "[t]here is no permissible volunteering of services to a for-profit employer in the private sector. All work must be paid work." The Fair Labor Standards Act (E. Kearns Ed.) BNA Books (1999) p. 95. This may come as a shock to the between one and two million people who serve as unpaid interns in the United States each year. See "Thirteen Depressing Facts about Unpaid Internships in America," Business Insider, July 8, 2011 (available at http://www.businessinsider.com/intern-nation-2011-7).

Interns Are Not Employees

In 1947, the Supreme Court examined a seven- to eight-day training program for prospective railroad brakemen. The unpaid prospects worked under close supervision, did not displace regular employees who performed most of the actual work, and their presence did not "expedite" the company's business, but instead hindered it. Those who successfully completed the program were eligible for hire, those who failed were not.

The court held they were trainees, not employees, and thus not covered by the FLSA:

> Section 3(g)…defines 'employ' as including 'to suffer or permit to work.' [It] was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. The Act's purpose…was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of 'employ' and 'employee' are broad enough to accomplish this. But… they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.

Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

Forty years later, the court addressed the status of workers engaged in the commercial businesses of a non-profit religious foundation. "Associates" received no wages, but did receive free food, clothing, and shelter. Despite their testimony that they considered themselves volunteers and worked strictly for "religious and evangelical" purposes, the court held that they were employees:

> The test of employment…is one of 'economic reality.' Whereas in *Portland Terminal*, the training course lasted a little over a week, in this case the associates were entirely dependent upon the Foundation for long periods, in some cases several years. [A]ssociates must have expected to receive in-kind benefits—and expected them in exchange for their service. [T]hat the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are…wages in another form.

Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 209, 301 (1985) (citations and quotations omitted).

In *Acriche v. Grand Central Partnership, Inc.*, 997 F.Supp. 504 (S.D.N.Y. 1998), Judge (now Justice) Sonia Sotomayor rejected defendant's claim that the plaintiffs were trainees. Plaintiffs were formerly homeless people employed at sub-minimum wages by defendant's Pathways to Employment program. Adopting the U.S. Department of Labor's test, Sotomayor held that if all of the following criteria apply, the individuals are not employees within the meaning of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not displace regular employees, but work under their close observation;
4. The employer derives no immediate advantage from the activities of the trainees or students, and on occasion

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his operations may actually be impeded;

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.

Id. at 532 (citing Wage and Hour Manual (1980); *Donovan v. American Airlines*, 686 F.2d 267, 273, n.7 (5th Cir. 1982)).

Although these cases speak of trainees, the same analysis applies to student-interns:

> Where educational or training programs are designed to provide students with professional experience in the (sic) furtherance of their education and the training is academically oriented for the benefit of the students [or] where students receive college credits applicable toward graduation when they volunteer for internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting… [no] employment relationship exists.

May 8, 1996 USDOL Opinion Letter (reprinted at WHM 99:8048).

'Glatt v. Fox Searchlight'

In *Glatt*, plaintiffs served as unpaid interns on the production of defendants' films. Judge William Pauley granted plaintiffs summary judgment on their status as employees. The court looked at the U.S. Dept. of Labor Fact Sheet #71 (April 2010) (available at http://www.dol.gov/whd/regs/compliance/whdfs71.htm), which sets forth a six-part test that is basically the same as Judge Sotomayor's six-part test (which, in turn, was based on the Labor Department's 1980 Wage and Hour Manual).

Defendants had urged the court to use a primary benefit test, i.e. whether the "internship's benefits to the intern outweigh the benefits to the engaging entity," but the court found that the Labor Department six-part test was applicable, and added that no single factor is controlling. 293 F.R.D. at 532-33. The court also found that the same analysis applies under New York Labor Law. Id. at 532.

Turning to the specific elements of the six-part test, the court held as follows:

• **Training similar to educational environment**. The court held that classroom training is not required, but an intern must receive "something beyond on-the-job training that employees receive." An internship that "emphasizes the prospective employer's particular policies is nonetheless comparable…if the program teaches skills that are tangible within the industry." Moreover, whether the intern "learned" anything is not the question because "any student knows, even a classic educational environment sometimes results in surprisingly little learning." Id. at 533.

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• **Whether the experience is for the intern's benefit.** General benefits, like "resume listing, job references and an understanding of how a production office works" are "not the academic or vocational training benefits envisioned by this factor." Id. In contrast, the defendants got the benefit of the intern's unpaid work. Id. See also *Acriche*, 997 F.Supp. at 533 (although plaintiffs received a benefit from the program, "defendants gained an immediate and greater advantage…the ability to offer…services at below market rates").

• **Whether the intern displaces a regular employee.** In *Glatt*, there was (and in most cases will be) little dispute that the interns performed tasks that normally would have been performed by paid employees. 293 F.R.D. at 533. Although some of the work may have been menial, it was essential to defendants' businesses.

• **Whether the putative employer gains an immediate advantage.** Similarly, there was little dispute (as will often be the case) that defendants gained the advantage of having unpaid interns do work that otherwise would have been performed by paid employees. Moreover, the presence of the interns did not impede the defendants' business operations. Id.

• **Whether the intern is entitled to a job.** There was no evidence of any such job guarantee and the court did not discuss this factor in detail. Id. at 534.

• **Whether both parties understood there were no wages.** The court noted that this factor counts for very little because employees cannot waive their rights under the FLSA. Id.

'Wang v. The Hearst Corp.'

The plaintiffs in *Wang* served as unpaid interns at various magazines published by defendant and were eligible to receive college credit for their internships. 293 F.R.D. at 491. In contrast to Judge Pauley's decision in *Glatt* adopting the Labor Department's six-part test, Judge Harold Baer adopted a "'balancing of the benefits test' which looks to the totality of the circumstances to evaluate the 'economic reality' of the relationship." Id. at 493. According to Baer, although the Walling court held that the workers there "were not employees because the defendant railroads received no immediate advantage from the trainees, it does not logically follow that the reverse is true, i.e. that the presence of an "immediate advantage alone creates an employment relationship." Id. at 493. Baer rejected plaintiffs' argument that the court should use an "immediate advantage" test or require strict adherence to the Labor Department's six-part test. Instead, Baer found that the six-part test merely "suggests a framework for analysis of the employee-employer relationship." Id. at 494.

Applying that totality of the circumstances test to the facts before him, Baer denied plaintiffs' motion for summary judgment finding there were questions of fact, at least in part, because "Hearst has shown…there was *some* educational training, *some* benefit to individual interns, *some* supervising, and *some* impediment to Hearst's regular operations." Id. at 494 (emphasis in original).

Conclusion

The Second Circuit will soon decide what test will apply in New York for determining employee status under the FLSA because both *Glatt* and *Wang* are before the court. See *Glatt v. Fox Searchlight Pictures, Inc.*, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013) (certifying decision for immediate appeal), Second Circuit docket no. 13-2467; *Wang v. The Hearst Corp.*, 2013 WL 3326650 (S.D.N.Y. June 27, 2013) (certifying decision for immediate appeal), Second Circuit docket no. 13-2616. Given the uncertainty in the law, and indeed no matter what test the Second Circuit eventually adopts, private employers must very carefully analyze the potential use of unpaid interns, and only if the circumstances fall squarely on the "intern" side of the equation should they permit the use of unpaid interns.