Unpaid Internship Programs Come Under Greater Scrutiny

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Employers with unpaid internship programs may need to reevaluate their policies after an unprecedented ruling from a federal court in New York this past summer. In *Glatt v. Fox Searchlight Pictures, Inc.*, the court held that unpaid interns who worked on the production of the movie *Black Swan* were employees who must be paid minimum wage and overtime compensation under the Fair Labor Standards Act (FLSA).

Under the FLSA, "employees" must be paid minimum wage and overtime for the services they provide to for-profit private sector employers. Since 1947, however, the so-called "trainee" exception has exempted interns who receive training for their own educational benefit and where the internship's benefits to the intern outweigh the benefits to the engaging entity.

In *Glatt*, the court concluded that the interns should have been classified as employees under the FLSA. The interns performed menial labor, such as filing documents, photocopying, running errands and other general clerical work that would have otherwise been done by a paid employee. Under the circumstances, the interns functioned as employees and provided an immediate advantage to the employer by replacing paid workers. Because they did not receive training or skills comparable to those conferred in an educational or vocational setting, and the benefits of résumé listings and job references were incidental, the interns did not fall under the "trainee" exception to the FLSA. The receipt of academic credit had no bearing on the validity of the program.

This case followed a crackdown on the use of unpaid interns, initiated by the U.S. Department of Labor in 2010. As set forth in the DOL's Fact Sheet #71, an unpaid internship is exempt from minimum wage and overtime requirements only where all of the following criteria are met:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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; on occasion its operations may actually be impeded.
- The intern is not necessarily entitled to a job at the conclusion of the internship.
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

While the result in the *Glatt* case was unusual, it leaves a wake of uncertainty for employers and highlights a split among the U.S. Courts of Appeal over the proper test for deciding whether interns with for-profit companies are covered under the FLSA. Governmental entities and not-for-profit organizations are exempt from a duty to pay interns. Employers with unpaid internship programs may wish to consult with an attorney to ensure that their interns are exempt. Employers should ensure that their internship programs are similar to an education environment, that they are not hiring interns to replace paid employees, that the internship is of a fixed and limited duration, and that there is no guarantee of subsequent employment.

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