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UPDATE: Fox Appeals in Second Circuit for Guidance on Unpaid Interns

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In June of 2013 in the *Glatt v. Fox Searchlight Pictures*, the United States District Court for the Southern District of New York held that Fox Searchlight Pictures, Inc. ("Searchlight") violated the Federal Labor and Standards Act ("FLSA") and New York Labor Laws ("NYLL") when the company failed to pay two interns who were assigned to perform employee tasks and job responsibilities. To review our blog article on that case, please click here.[1]

On October 1, Fox Entertainment Group ("Fox") was back to appeal the decision and request that the Second Circuit define the proper legal standard for determining the status of unpaid interns and how this legal standard should be applied when interpreting the United States Department of Labor, Fact Sheet #71[2] ("Fact Sheet") as it pertains to employment status wage claims under FLSA and the FLSA collective.

To better understand Fox's claim, it is necessary to analyze the evolution of the legal framework for classifying employee or non-employee status.

The Evolution of the Internship Decisions

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

In this 1947 United States Supreme Court case, the Court was faced with the following question: whether railroad "trainees" in a weeklong training program were considered "employees" under FLSA and therefore entitled to wages?

The Supreme Court held that the employee-trainee dynamic did not result in the railroad incurring an "immediate advantage" from the trainees' performance. Therefore, FLSA did not require the railroad to pay the trainees.

In particular, the Supreme Court reasoned that the railroad trainees were not considered employees under the FLSA because the hiring of "trainees" did not alter the number of employees that worked for the railroad, the railroad employees performed most of the work that needed to be completed despite the trainees being present, and the employees supervised any work performed by the "trainees."

Over the past several years, the *Walling* decision has been the pivotal case in deciding whether "interns" fall under the employee category or trainee category in making wage determinations.

Xuedan Wang v. Hearst Corp., No. 12-CV-793, 2012 U.S. Dist. LEXIS 97043 (S.D.N.Y. 2013)

More recently, this past May, Judge Harold Baer, United States District for the Southern District Court of New York, dismissed an intern FLSA collective wage after applying the "*Walling* bones" to the six factor Fact Sheet.[3]

Notably, Judge Baer interpreted *Walling* as requiring an analysis under the totality of the circumstances through a "balancing of the benefits" test. In applying this "primary benefit" framework, Judge Baer found that four out of the six factors on the Fact Sheet could be established for either party. Therefore, the District Court held that the Hearst interns were not employees and consequently were not entitled to FLSA wages.

Glatt v. Fox Searchlight Pictures, No. 11 Civ. 6784, 2013 WL 2495140 (S.D.N.Y. 2013)

Not even a month after the *Wang* decision was released, the Southern District of New York rendered a decision in another FLSA internship wage claim in *Glatt v. Fox Searchlight Pictures*. There, Judge Pauley of the Southern District of New York held that two former Fox interns were entitled to wages under FLSA because their internship responsibilities on various film productions were the equivalent to that of an employee.

Although Judge Pauley also applied a totality of the circumstances test to the Fact Sheet, his analysis is distinguishable from Judge Baer's analysis because Judge Pauley rejected Judge Baer's application of the "balancing of the benefits" framework. Instead, Judge Pauley strictly looked at the facts of the case and weighed the totality of the circumstances as it applied factually to each factor on the Fact Sheet and then decided whether most of the Fact Sheet factors were satisfied.

Under this analysis, Judge Pauley found that the interns were able to satisfy five out of the six factors and therefore were considered employees entitled to FLSA wages.

As evidenced by the split within the Southern District, it will be interesting to see how the Second Circuit will tackle the question as to the appropriate legal standard for determining the existence of a FLSA employer-employee relationship as it applies to unpaid internships. To read more about this topic, stay tuned to this blog for future updates.

If you or your company would like more information on employment law, contact James G. Ryan at jryan@cullenanddykman.com or via his direct line at 516-357-3750.

A special thanks to Melissa Cefalu, a law clerk at Cullen and Dykman, for help with this post.

[1] http://employment.cdllpblogs.com/2013/07/free-interns-the-era/

[2] U.S. Dep't of Labor Fact Sheet # 71: Internship Programs UnderThe Fair Labor Standards Act," *available* at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf ("DOL Fact Sheet #71")

I If all six of the following factors are satisfied, an employment relationship does not exist:

(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.