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EMPLOYMENT LAW

Expert Analysis

Rising Litigation Over Unpaid Interns

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With the ongoing difficulty recent graduates have obtaining jobs in an oversaturated market, unpaid internships continue to provide a valuable opportunity to break into a desired profession or line of work. Unpaid internships allow job seekers to develop practical skills, real world experience and valuable contacts to help them in their future job searches.[1]

In view of the recent rise in litigation related to whether interns must be paid at least a minimum wage to comply with the wage-hour laws, employers are beginning to reconsider their commitment to internship programs.

Defining Employment

The Fair Labor Standards Act (FLSA) defines the term "employ" as to "suffer or permit to work"[2] and "employee" as "any individual employed by an employer."[3] The FLSA lists some exceptions to the definition of "employee," including certain people employed by public agencies, individuals employed by a member of their family working in agriculture and volunteers for public agencies.[4]

The U.S. Department of Labor takes the position that, under the FLSA, students are not allowed to volunteer their services for employers, whether they are for-profit or non-profit entities, unless certain criteria are met. The Labor Department has issued a "Fact Sheet" detailing a six-factor test for determining whether an internship is a training program, and therefore exempt under the FLSA.[5] The department derived the six-factor test from the Supreme Court's 1947 decision in *Walling v. Portland Terminal*.[6] These factors are:

1. 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;

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.

Although this is not the place to discuss *Portland Terminal*, it is not clear from the court's decision that all six factors were necessary to allowing an unpaid training program in that case. Nor is it clear that all of these factors are relevant, or relevant to the same degree, to an unpaid internship program.

Conflicting Approaches

In *Wang v. Hearst Corp.*,[7] Judge Harold Baer for the U.S. District Court for the Southern District of New York, explained that while the Labor Department fact sheet should be given appropriate deference, the Supreme Court in *Portland Cement* actually looked to the "totality of the circumstances" in deciding whether unpaid interns were employees under the FLSA. In the court's view, because the defendant "has shown with respect to each [p]laintiff that there was some educational training, some benefit to individual interns, some supervision, and some impediment to Hearst's regular operations"[8] there was a material factual dispute precluding summary judgment for the plaintiffs.

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By contrast, in *Glatt v. Fox Searchlight Pictures*,[9] Judge William Pauley for the Southern District held that the plaintiffs, former unpaid interns of the defendant, were employees entitled to compensation under the FLSA. The court in *Glatt* did not discuss the decision in *Hearst*.[10] Instead, plaintiffs were considered to be employees because they "worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received…are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer. They received nothing approximating the education they would receive in an academic setting or vocational school."[11] Both Baer and Pauley have certified their cases for interlocutory appeal under 28 U.S.C. §1292(b), but the

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Second Circuit has not yet decided whether it will certify the appeals.

Other jurisdictions have focused on whether the "primary benefit" of the internship or training program inured to the student/volunteer rather than the putative employer. As the U.S. Court of Appeals for the Sixth Circuit reasoned in *Solis v. Laurelbrook Sanitarium and School*,[12] the Labor Department's six-factor test offered a "poor method for determining employee status in a training or educational setting."[13] The appeals court agreed that the trial court had properly denied the Labor Department injunctive relief because the "primary benefit" of the program redounded to the students.

Other Employment Laws

There is reason to believe that unpaid interns who are treated as employees for FLSA purposes may be lawfully treated as unpaid volunteers under other employment statutes. *Wang v. Phoenix Satellite Television US*[14] is an important recent decision by Judge Castel for the Southern District of New York. Lihuan Wang, a 22-year-old masters degree student at Syracuse University, worked as an unpaid intern at Phoenix Satellite Television US Inc. Wang reported daily to Zhengzhu Liu, the bureau chief for Phoenix's D.C. and New York offices. After her internship ended and she was denied a position at Phoenix after she completed her degree, Wang brought an employment discrimination claim under the New York State (NYSHRL) and the New York City (NYCHRL) Human Rights Laws against Liu and Phoenix, alleging that Liu subjected her to a hostile work environment, quid pro quo sexual harassment and retaliation.[15]

Phoenix moved to dismiss Wang's hostile work environment claim on the ground that she was an unpaid intern and therefore was not an employee covered by the NYCHRL or the NYSHRL. The court ruled that the plaintiff's claim failed under the NYSHRL because "it is axiomatic in this Circuit that [the fact of] compensation is a threshold issue in determining the existence of an employment relationship under both Title VII of the Civil Rights Act of 1964,[16] and the NYSHRL."[17]

Regarding the claim under the NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005) (Restoration Act), the court first explained that while the statute prohibited the employer from discriminating against "any person" in compensation or other terms and conditions of employment "the plain terms of §8-107(1)(a) make clear that the provision's coverage only extends to employees, for an 'employer' logically cannot discriminate against a person in the 'conditions or privileges of employment' if no employment relationship exists."[18] Therefore, the plaintiff could not recover on her sexual harassment claim because she was not an employee, but an unpaid volunteer. The court in Phoenix relied on the Second Circuit's decision in *O'Connor v. Davis*,[19] which held that an unpaid student could not sue under Title VII because the student was not an employee under the statue.

Pro-Bono Matters

Patricia Smith, the solicitor for the U.S. Department of Labor, has recently clarified whether the FLSA requires payment of at least the federal minimum wage to unpaid interns working for a for-profit exclusively on pro bono matters. On Sept. 12, 2013, Smith wrote a letter to Laurel Bellows, the immediate past president of the American Bar Association, seemingly enhancing the ability of private law firms to engage unpaid interns on unbilled work. The letter stated that "[u]nder certain circumstances, law school students who perform unpaid internships with for profit law firms for the student's own educational benefit may not be considered employees entitled to wages under the FLSA."

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With respect to the Labor Department six–factor-test, the solicitor explained, where a law student works only on pro-bono matters "that do not involve potential fee-generating activities, and does not participate in the law firm's billable work or free up staff resources for billable work that would otherwise be utilized for pro bono work, the firm will not derive any immediate advantage from the student's activities, although it may derive intangible, long term benefits such as general reputational benefits associated with pro bono activities." The intern's experience with the law firm was deemed equivalent to "the educational experience the intern would receive in a law school clinical program."

Conversely, the solicitor noted, the FLSA would require compensation where the intern "works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm's licensed attorneys, or displaces regular employees." Notably, "law graduates may not volunteer for private law firms without pay in the same manner." The solicitor distinguished law graduates by asserting that "the analysis would be different for law school graduates than for law students as the former have completed their legal education. Additionally, law schools would not have the same ability to act as intermediaries between graduates and the law firms that they do with current students and would not be able to monitor the internship's compliance with these principles."

Implications

The law on unpaid interns remains in flux. Internships provide important opportunities, whether or not a minimum wage is paid. Employers may wish to reassess their programs in view of the developments outlined in this article.

1. Samuel Estreicher, "Unpaid Internships Under Legal Scrutiny," NYLJ, Jan. 4, 2013, p.4 (with Allan S. Bloom).
2. 29 U.S.C. §203(g).
3. 29 U.S.C. §203(e)(1).
4. 29 U.S.C. §203(e)(2-4).
5. U.S. Department of Labor, Wage and Hour Division, "Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act" (April 2010), http://www.dol.gov/whd/regs/compliance/whdfs71.htm.
6. *Walling v. Portland Terminal*, 330 U.S. 148 (1947).
7. *Wang v. Hearst*, 2013 U.S. Dist. LEXIS 65869 (S.D.N.Y. May 8, 2013).
8. Id. at *15-16.
9. *Glatt v. Fox Searchlight Pictures*, 2013 U.S. Dist. LEXIS 139594 (S.D.N.Y. Sept. 17, 2013).
10. Id.
11. Id. at 40-41.
12. *Solis v. Laurelbrook Sanitarium & Sch.*, 642 F.3d 518 (6th Cir. Tenn. 2011).
13. Id.
14. *Wang v. Phoenix Satellite TV US*, 2013 U.S. Dist. LEXIS 143627 (S.D.N.Y. Oct. 3, 2013).
15. Id.
16. 42 U.S.C. §2000e et seq.
17. *Wang v. Phoenix Satellite TV US*, at *13-14. See *O'Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997) (holding that an unpaid intern is not an "employee" under Title VII); *Sweeney v. Bd. of Educ. of Rocky Point Union Free Sch. Dist.*, 112 A.D.2d 240, 241, 491 N.Y.S.2d 455 (2d Dept. 1985) (holding that the NYSHRL does not extend protection to unpaid positions other than volunteer firemen, who are expressly covered by the statute).
18. Id. at *8.
19. Id. at *12 (citing *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997)).