SEYFARTH SHAW LLP
ATTORNEYS

Management Alert

New York Federal Court Complicates the Use of Unpaid Interns

The Fair Labor Standards Act (FLSA) requires that all employees be paid the federally established minimum wage or more. However, as explained in the U.S. Supreme Court case of *Walling v. Portland Terminal Co.*, this requirement does not apply to individuals who qualify as "trainees" rather than employees. On June 11, 2013, in *Glatt v. Fox Searchlight Pictures, Inc.*, Judge William Pauley of the U.S. District Court for the Southern District of New York ruled that unpaid interns were misclassified as trainees and were actually employees entitled to be paid in accordance with the FLSA.

The Facts

The two plaintiffs at issue in *Glatt* were interns who worked on the production of the film "Black Swan." The court found that in their positions, the plaintiffs performed a variety of tasks such as obtaining documents for personnel files, picking up paychecks for employees, tracking and reconciling purchase orders and invoices, and traveling from offices to the sets to get managers' signatures. The court found that the plaintiffs also performed basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands. One of the plaintiffs also arranged travel plans, took out trash, took lunch orders, answered phones, watermarked scripts, and made deliveries, according to the court. They were not paid for their work.

Due to their allegedly having been misclassified as trainees, the plaintiffs filed a collective/class action lawsuit in which they claimed they were entitled to have received the minimum wage and, if applicable, overtime.

The Court's Ruling

The parties filed cross motions for summary judgment on a variety of issues—most significantly, whether the plaintiffs were "employees" under the FLSA and the New York Labor Law. The defendants relied on the "primary beneficiary" test set forth in the *Walling* case. Under that test, if an individual serves only the individual's own interest in performing work for another who provides aid and instruction, and the "employer" receives no "immediate advantage" from the work performed, then the individual is not an employee.

The plaintiffs, on the other hand, relied on the six-factor test articulated by the U.S. Department of Labor (DOL) for determining whether a worker is a bona fide "intern." Judge Pauley deferred to the DOL factors and refused to adopt the "primary beneficiary" test. He ruled that the test is "subjective and unpredictable," such that "an employer could never know in advance whether it would be required to pay its interns."

The court then held that five of the six DOL factors weighed in favor of employee status for the plaintiffs. Specifically:

- they did not receive any formal training or education during the internship;
- they benefitted from the experience only in a manner "incidental to working in the office like any other employee" and

not as "the result of internships intentionally structured to benefit them;"

- they "performed routine tasks" – such as filing, taking lunch orders, and answering phones – that "would otherwise have been performed by regular employees;"
- the company "obtained an immediate advantage" from the interns' work; and
- the interns did not appear to be entitled to a job at the end of the internships.

As to the sixth factor—whether the interns were paid—the court acknowledged that the interns "understood they would not be paid," but said this factor "adds little," since the FLSA does not allow employees to waive their entitlement to wages.

Having analyzed the six DOL factors, the court entered summary judgment for the plaintiffs, concluding that they were improperly classified as unpaid interns and were in fact employees under the FLSA and New York Labor Law.

What *Glatt* Means for California Employers

First, *Glatt* was not an appellate court decision and is not binding on any other court. However, *Glatt* is sure to serve as a roadmap for plaintiffs' counsel who are looking to capitalize on the recent growth (if anecdotal reports are to be believed) of internships in private-sector workplaces as a consequence of the sluggish job market.

Second, while the decision was based on the FLSA and New York Labor Law, the California courts tend to follow decisions under the FLSA where it mirrors, or does not conflict with, the California Labor Code. Thus, California employers should expect that some courts in California may rely on *Glatt's* reasoning in adjudicating similar claims under the California Labor Code.

Third, to the extent this Judge's reasoning is followed in California, employers should be cautious: the mere fact that a worker is labeled an "intern," and is willing to work for free (or work for pay without entitlement to minimum wage and overtime premiums), is not by itself enough to remove the worker from the coverage of wage-hour laws.

By: *Robert S. Whitman* and *Joshua A. Rodine*

Robert S. Whitman is a partner in Seyfarth Shaw's New York office and *Joshua A. Rodine* is an associate in the firm's Los Angeles office. If you would like further information, please contact your Seyfarth attorney, Rob Whitman at *rwhitman@seyfarth.com* or Josh Rodine at *jrodine@seyfarth.com*.