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Structuring Unpaid Internships After Wang V. Hearst

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The Fair Labor Standards Act mandates the payment of minimum wage and overtime to employees in most U..S workplaces. However, when it comes to unpaid educational internships, the FLSA does not include a helpful definition or standard to determine when an employer is excused from paying wages. In the absence of guidance from Congress, the task has fallen to the U.S. Department of Labor and the courts to determine when interns must be paid.

In 2015, the Second Circuit, which issues opinions binding on Federal Courts in New York, Connecticut and Vermont, adopted a flexible, multifactor "primary beneficiary" test for unpaid interns in Glatt v. Fox Searchlight Pictures, a case involving interns working on the film Black Swan. On Dec. 8, 2017, the Second Circuit issued an opinion in Wang v. Hearst Corporation which helped to further explain and clarify this test. The Glatt and Hearst line of cases recently took on more significance, when on Jan. 5, 2018, the Wage and Hour Division of the DOL issued a news release indicating that it would apply the primary beneficiary test in its role in investigating and enforcing wage and hour law. Previously, the DOL applied a stringent six-factor test for unpaid internships, including a requirement that the employer derive "no immediate advantage" from these types of internships. As the recent Hearst decision demonstrates, the primary beneficiary test is easier for employers to satisfy.

The plaintiffs in Hearst were college-age interns at various fashion magazines owned by the Hearst Corporation, including Marie Claire, Cosmopolitan and Esquire. While each internship was slightly different, all were unpaid and lasted only one semester or one summer. Interns were not promised compensation or future employment, and all interns were required to receive prior approval for academic credit from a college or university. In addition, each intern had some connection to or interest in the fashion industry, and each admitted that they gained valuable knowledge and skills in their internships. However, the plaintiffs claimed that they should have been paid because they were assigned "menial and repetitive" work, even after mastering those tasks early on in their internships. The plaintiffs also claimed that they did not receive enough training and guidance.

In August of 2016, the U.S. District Court for the Southern District of New York concluded that the Hearst plaintiffs were not employees entitled to compensation, and granted the Hearst Corporation's motion for summary judgment. On appeal, the Second Circuit agreed with the district court and affirmed the dismissal of the plaintiffs' claims. In its opinion, the Second Circuit applied the seven-factor "primary beneficiary" test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggest that the intern is an employee — and vice versa;

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training

provided by educational institutions;

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;

6. The extent to which the intern's work compliments, rather than displaces, the work of paid employees while providing significant educational benefits to the intern;

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The court emphasized that the primary beneficiary test is flexible, and that no one factor is determinative. The ultimate goal of the test is to determine whether the "tangible and intangible benefits provided to the intern are greater than the interns' contribution to the employer's operation."[1]

The Hearst court began its analysis with the first (no expectation of compensation) and seventh (no entitlement to paid employment) factors, which favored the employer because the interns were aware that their internships were unpaid. Moving to the second factor (educational training), the court acknowledged that the internships did not provide the same level of training as classroom instruction, but concluded that those issues were offset by the practical benefits of the internships, including the benefits of practicing a skill in a professional environment. The Second Circuit agreed with the lower court that the duration of the internships were not excessive, and concluded that the fifth factor (limited duration) also favored Hearst.

The court also agreed that the third factor (academic integration) favored Hearst for all interns, except for one whose major was unrelated to fashion or writing. Here, the court looked to the undisputed evidence that some of the interns used their internships to satisfy a graduation requirement, receive class credit, write a paper or gain professional experience prior to starting a graduate program. While not all of the interns ultimately received academic credit, requiring preapproval shifted this factor in Hearst's favor for most of the plaintiffs. The court also concluded that the fourth factor (academic calendar) favored Hearst for the majority of the interns, because most of the internships corresponded to summer breaks, and there was no evidence of any interference between the internships and academic schedules.

Finally, the Second Circuit agreed with the district court that the sixth factor (displacement) favored the interns, since they performed some work such as data entry and delivery duties that could have been completed by paid employees. However, the court did not view this factor as fatal, since the Glatt test is based on the totality of the circumstances.

The Second Circuit concluded that while the Glatt factors were mixed, the district court had enough undisputed evidence to support its conclusion that Hearst's internships passed muster under the primary beneficiary test as a matter of law. Hearst was an important victory for employers because it showed that internship programs, if structured correctly, can be exempt from wage payment requirements as a matter of law — thus avoiding the cost and uncertainty of a full trial.

Recommendations

The Hearst case also offers several takeaways for employers wishing to structure their unpaid internships to avoid liability:

- Make expectations clear from the outset. In Hearst, the employer benefited from the fact that the interns were well aware that they would not be paid, and would not be entitled to paid employment at the conclusion of their internships;

- Require academic approval. Hearst’s decision to require interns to obtain preapproval for academic credit was a key factor in its favor. The stronger the connection to academic programs, the less likely internships will be considered paid employment.

- Limit the length of internships. Internships that last only for a summer or one academic semester are less likely to be considered employment under the FLSA.

- Supplement day-to-day work with learning opportunities. While the interns in Hearst complained about having to do rote work on a day-to-day basis, some of the internships included short classes on business topics, opportunities to attend marketing meetings, and presentations about career path options. Some of the rote work that the plaintiffs complained about, such as taking meeting minutes during meetings, also provided practical experience. As a result, the plaintiffs in Hearst admitted that they gained practical skills.

The central lesson of Hearst is that while unpaid internships must primarily benefit the intern, internships need not be perfect. Employers can derive some benefit from unpaid interns, and interns can even perform some work that overlaps with paid employees — within reason. The primary beneficiary test is designed to ferret out internships that are educational in name only, but are in reality a vehicle to take advantage of unpaid labor. Therefore, employers offering unpaid internships should carefully structure their programs to ensure that they are providing enough benefits to each intern (in the form of training and real-world industry exposure) to outweigh the benefits they receive in the form of additional productivity. Routine tasks or “busy work” should be minimized, and connected to learning opportunities whenever possible. Employers should also consider documenting the educational and experiential portions of their internship programs, and have interns provide written feedback about what experiences they found valuable, in the event their programs are later called into question.

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[1] Glatt, 811 F.3d at 536.