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When Are Interns Employees? Second Circuit Issues Groundbreaking Holding

By **Thomas E. Chase**

On July 2, 2015, the U.S. Court of Appeals for the Second Circuit decided *Glatt v. Fox Searchlight Pictures*, 2015 WL 4033018 (2d. Cir., July 2, 2015), an important decision concerning whether Fox's unpaid interns are "employees" under the federal Fair Labor Standards Act and the New York Labor Law (collectively, the FLSA) and, therefore, entitled to recover minimum wage, plus time-and-a-half for overtime, for the periods they worked at Fox.

The Second Circuit reversed the lower court's decision that Fox's interns were employees under the FLSA. Media coverage characterized the Second Circuit's decision as a decisive victory for employers and a defeat for interns. See "Interns, Victimized Yet Again," The New York Times, July 3, 2015; "'Black Swan' Interns Suffer Setback in Wage Fight," The Wall Street Journal, July 2, 2015. The careful employment practitioner, however, should not believe the hype. The Second Circuit held that the lower court applied the wrong test for determining whether interns are exempt from the FLSA and remanded the case to be decided under a different—but not necessarily more lenient—test. The Second Circuit's decision, moreover, stands out as the only significant decision addressing this important topic, newly imposes important educational requirements upon exempt internship programs, and will flunk many internship programs.

Groundbreaking Holding

Glatt announces a remarkable new test for determining whether internships are exempt from the FLSA. *Glatt* focuses on whether an internship provides a significant educational benefit to the intern, including whether the internship (1)"provides training that would be similar to that which would be given in an educational environment"; (2) "is tied to a formal educational program by integrated coursework or the receipt of academic credit"; (3) "accommodates an intern's academic commitments by corresponding to the academic calendar"; (4) is of a duration that "is limited to the period in which the internship provides the intern with beneficial learning"; and (5) complements, rather than displaces, the work of paid employees while providing "significant educational benefits" to the intern.[1] Id. at *6. The requirement that internships must provide tangible educational benefits as part of a formal educational program to be exempt from the FLSA is unprecedented.

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Glatt should curb abusive internship programs, which have developed to an industrial scale at some large employers. A spate of recent FLSA internship cases in the Southern District of New York has brought to light the massive internship programs at some employers, especially employers in the media and entertainment fields. Plaintiffs' counsel in these cases successfully pursued groundbreaking challenges to unpaid internship programs. In *O'Jeda v. Viacom*, 13 Civ. 5658 (S.D.N.Y. 2013) the parties recently settled plaintiffs' class-action claims for $7.2 million, covering a class of approximately 10,500 interns who had worked at the entertainment conglomerate during the class period. Docket No. 112 at 2. In *Ballinger v. Advance Magazine Publishers*, 13 Civ. 4036 (S.D.N.Y. 2013), the parties settled plaintiffs' claims for $5.8 million, covering a class of approximately 7,000 Condé Nast interns. Docket No. 63 at 8. In *Grant v. Warner Music Group Corp*., 13 Civ. 4449 (S.D.N.Y. 2013), the parties settled plaintiffs' claims for $4.2 million, covering a class of approximately 4,500 interns at the record label. Docket No. 96 at 9. In *Fraticelli v. MSG Holdings*, 13-cv-06518 (S.D.N.Y. 2013), the parties settled plaintiffs' claims for $800,000, covering a class of approximately 1,000 interns at the sport franchise. Docket No. 69 at 2.

Presumably the facts in the settled intern cases were as meritorious as the facts in the cases still being contested, which cases provide a more developed view of prevailing internship practices. In *Glatt*, for example, the district court found little evidence that interns at Fox received any significant educational benefit from their internships:

> They worked as paid employees work… performing low-level tasks not requiring special training. The benefits they may have received—such as knowledge of how a production or accounting office functions or references for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational…[t]hey received nothing approximating the education they would receive in an academic setting or vocational school.

Glatt, 293 F.R.D. 516, 534, 535 (S.D.N.Y. 2013).

Similarly, in *Wang v. The Hearst Corporation*, 2012 WL 2864524, *2 (S.D.N.Y. 2012), the court credited evidence that Hearst "used interns to perform entry-level work with little supervision… job duties were similar to what a web editorial assistant would have done if Hearst had hired one…[his] primary job responsibility was to pick-up and return sample clothing items that were being considered for inclusion in the magazine."

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While these cases have not been adjudicated through trial, it is doubtful that all, or even most, of the interns in these large programs received the type of tailored educational benefit required by the Second Circuit. Further, the Second Circuit was writing on a blank slate. The Glatt decision therefore does not supplant any established employee-friendly law, and the law that had developed in this area was sufficiently opaque that questionable internship programs flourished. As it clearly announces unprecedented benchmarks that internship programs must meet, it is difficult to view the Glatt decision as a victory for employers operating internship programs.

No Precedent Applying FLSA

Despite the fact that the FLSA was adopted over 75 years ago (in 1938) and unpaid internships have been a staple of career development for decades, no decision prior to *Glatt* addressed whether unpaid internships comply with the FLSA.[2] The primary authority on the issue was an anachronistic 1947 Supreme Court decision *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639 (1947). *Walling* concerned whether participants in a one week instructional course for train brakemen were employees under the FLSA. Unlike modern office internships, the brakemen's instruction in *Walling* was short in duration, was highly task oriented, was closely supervised by instructors, clearly did not displace existing workers, and resulted in a participant being prequalified for employment as a brakeman in the event such a position opened with the employer. Id. at 150, 67 S.Ct. at 640.

Based on *Walling*, in 1967 the Department of Labor issued informal guidelines concerning trainees exempt from the FLSA. Only in 2010, did the Labor Department issue a similar informal "Fact Sheet" addressing unpaid interns working in the private sector.[3] The Labor Department Fact Sheet stated that six criteria should be met for unpaid interns to be exempt from the FLSA: (1) the internship is similar to training provided in an educational environment; (2) the internship experience is for the benefit of the intern; (3) interns do not displace other employees; (4) the employer derives no immediate advantage from the activities of the intern and the employer's activities may actually be impeded by the program; (5) the intern is not entitled to a job at the end of the internship; (6) the intern understands that wages will not be paid for the time spent in the internship.

The district court in *Glatt* applied the Labor Department's six-factor test (although not explicitly requiring that all the factors be met) and held that the plaintiffs were covered by the FLSA. On appeal, the Labor Department appeared as amicus curiae and encouraged the Second Circuit to adopt the six-factor test promulgated in the Labor Department Fact Sheet.

The Second Circuit declined to adopt the criteria set forth in the Labor Department Fact Sheet. The court held that the department's criteria were merely an interpretation of the Walling decision and therefore not entitled to special deference. "Unlike an agency's interpretation of ambiguous statutory terms or its own regulations, an agency has no special competence or role in interpreting a judicial decision." Id. at *5 (citations omitted).

Unconstrained by any relevant precedent or administrative guidance, the court held that internships should be evaluated under a "primary beneficiary" test to determine if the primary beneficiary is the employer or intern. To that end, the court formulated the "non-exhaustive" list of factors focusing on the internship's educational benefits to interns, discussed above.

The Glatt decision makes it much harder to challenge internship programs through class actions. The Second Circuit reversed the lower court's certification of a plaintiff class of interns, holding that questions regarding the educational benefits obtained by interns are highly individualized.

Post-Glatt Future

Glatt suggests a safe harbor for carefully constructed internship programs. To be exempt from the FLSA, employers should, among other things: (1) schedule internships to accommodate interns' academic schedules, preferably permitting interns to work after class hours, on weekends, or during vacations; (2) limit the duration of internships to the time needed to impart specifically identifiable educational or training benefits to interns; (3) liaise formally or informally with interns' schools or instructors and document how the internship complements the interns' academic program, preferably resulting in the intern receiving academic credit for the internship; and (4) assign individual mentors/supervisors to each intern to ensure that the intern receives some structured instruction and is not relegated only to performing menial tasks.

As the first high-profile case succinctly addressing this issue, *Glatt* should have a powerful prescriptive effect as employers adopt these and other reforms in attempts to voluntarily to comply with its holding.

The Glatt decision, however, also makes it much harder to challenge internship programs through class actions. The Second Circuit reversed the lower court's certification of a plaintiff class of interns, holding that questions regarding the educational benefits obtained by interns are highly individualized: "common evidence will not help to answer whether a given internship was tied to an education program, whether and what type of training the intern received, whether the intern continued to work beyond the primary period of learning, or the many other questions that are relevant to each class member's case." Id. at *8.

It is too early to tell how the plaintiff bar will respond to *Glatt's* decision on class certification. This aspect of the decision certainly will deter employers from entering the type of class-wide settlements that had become common, and the decision therefore will discourage class action firms from pursuing these claims. Nevertheless, the provisions of the FLSA allowing for compensatory and liquidated damages, together with attorney fees and interest, should still incentivize counsel to pursue individual or group actions in this area.

In conclusion, *Glatt* is a remarkable decision. It announces a bold new test in an important area of the law where there was virtually no controlling precedent. The decision is a milestone holding which may affect the employment and training prospects of thousands of young people entering the work force.

1. The two other criteria identified in *Glatt* are (1) the intern and employer clearly understand that there is no expectation of payment; (2) whether the intern and employer understand that the internship does not create an entitlement to a paid position at its conclusion.

2. See e.g., "America's New Glass Ceiling: Unpaid Internships, The Fair Labor Standards Act, and the Urgent Need for Change," 61 Hastings L.J. 1531, 1542 (2010) ("it does not appear that federal courts have squarely addressed the legality of the kinds of internships that are ubiquitous today"); "The Obama Crackdown: Another Failed Attempt to Regulate the Exploitation of Unpaid Internships," 41 Sw. L. Rev. 281, 290 (2012) ("Federal courts have never specifically addressed whether unpaid interns qualify as employees under the FLSA").

3. See Department of Labor, Wage & Hour Div., Fact Sheet # 71, Internship Programs Under the Fair Labor Standards Act, available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf (last visited on July 20, 2015).