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Employment Law Alert December 2017

Unpaid Interns Back in the Spotlight: Second Circuit Hands Employers a Win

On December 8, 2017, the United States Court of Appeals for the Second Circuit issued a decision in favor of Hearst Corporation ("Hearst") in the *Wang v. Hearst Corp* intern classification case.[1] The Court addressed the proper application of the seven-factor "primary beneficiary" standard for assessing whether an intern qualifies as an employee under the Fair Labor Standards Act ("FLSA").

In a concise opinion, the Court affirmed the district court's grant of summary judgment to Hearst. It found that, even though some of the seven "primary beneficiary" factors supported the interns, as long as the interns (and not the alleged employer) are the primary beneficiaries of the relationship when considering the factors overall, the interns are properly classified as interns and not employees.

Background

Plaintiffs were six individuals who participated in Hearst's fashion-related internship programs. The interns performed a range of tasks at various magazines and, by all accounts, gained knowledge and skills. Hearst, however, also used the interns to do operational tasks, such as making deliveries and organizing clothing and accessories.[2] The internships were unpaid, brought with them no expectation of eventual employment, and required any intern candidate to receive approval for college credit.

In 2012, the interns sued for minimum wage under FLSA and New York Labor Law ("NYLL") in the Southern District of New York. After the district court denied the interns' motion for partial summary judgment with respect to their "employee" status, the Second Circuit vacated that denial and sent the case back to the district court for reconsideration in light of its 2015 decision in *Glatt v. Fox Searchlight Pictures, Inc*.[3]

In *Glatt*, the Court recognized the flexible "primary beneficiary" test as the proper way to distinguish employees from interns.[4] Under this test, courts apply a non-exhaustive list of seven factors to determine whether the primary beneficiary of the internship is the intern (in which case he or she is not covered by the FLSA's and NYLL's minimum wage and overtime provisions) or the employer (in which case the intern is an employee and, accordingly, entitled to minimum wage and overtime).

The seven factors are:

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, suggests 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.

1 No. 16-3302 (2d Cir. Dec. 8, 2017) ("Op.").
2 Op. at 4; *see also Wang v. Hearst Corp.*, 203 F. Supp. 3d 344, 347-48 (S.D.N.Y. 2016).
3 811 F.3d 528 (2d Cir. 2016). (*Glatt* was decided on July 2, 2015 and amended on January 25, 2016.)
4 *Id.*

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 complements, 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.[5]

Based on the *Glatt* decision, the district court in *Wang* found six[6] of the seven factors to favor Hearst and granted summary judgment in its favor, finding that its interns were properly classified.

The Second Circuit Decision

At the core of the dispute on appeal was whether the district court impermissibly granted summary judgment to Hearst given the "mixed inferences" at play. Put another way, the facts presented to the district court about the internships permitted inferences that supported both Hearst (as to certain *Glatt* factors) and the interns (with respect to other factors). Notably, the district court found that the sixth factor (displacing the work of paid employees) slightly favored the interns. But most of the factors favored Hearst, and the Second Circuit disagreed with the interns. Despite some factual disputes and the interns' critiques of the internship programs, the district court was able to "weigh the *Glatt* factors on the basis of facts that [were] not in dispute" and determine that the interns were properly classified.[7]

The interns also challenged the district court's determinations as to five of the seven factors. One of the interns' primary arguments was that the district court had improperly broadened the bounds of "training" (factor two) to encompass "practical skills" as opposed to the type of training more commonly received in an educational environment. The Circuit rejected the interns' argument, noting that "*Glatt* clearly contemplates that training opportunities offered to the intern include 'product[s] of experience on the job.['] "[8] Relatedly, the Court rejected the interns' position that "beneficial learning" (factor five) cannot include repetitive tasks or performing duties that the intern has already learned.[9] It stated that "practical skill may entail *practice*, and an intern gains familiarity with an industry by day to day professional experience."[10]

Key Takeaways

The decision is another positive development for employers, making clear that an employer need not satisfy all of the *Glatt* factors in order to prevail at summary judgment in cases arising under FLSA. The *Wang* decision helpfully clarifies that "training" can stretch beyond classroom-style instruction. It highlights that employers can integrate on-the-job experience into their understanding of "training" for interns.

Employers, however, must still be prudent and structure internship programs in ways that satisfy the *Glatt* factors. Employers must continue to ensure that internship programs carry with them educational or vocational benefits.

5 *Id.* at 536-37.
6 As to factor four (academic calendar), the Court found in Hearst's favor for some interns and determined that the factor was neutral as to other interns.
7 Op. at 11.
8 *Id.* at 8 (first alteration in original) (quoting *Glatt*, 811 F.3d at 536).
9 Op. at 8.
10 *Id.* (emphasis added). The interns also disputed the district court's findings as to factors three (academic integration) and four (academic calendar). In a fact-specific discussion of the interns' academic trajectories and schedules, the Court agreed with the district court that these factors favored Hearst.

Moreover, while certain tasks that apply specific skills to a professional setting may count towards proper "training"—for example, taking notes at a marketing meeting—the Court has certainly not instructed that all tasks—for example, fetching coffee—will qualify.

Finally, New York employers must also be aware that, though the Second Circuit treats the question of whether an intern is an "employee" the same under New York state law and federal law,[11] the New York Department of Labor sets out a much lengthier test for determining whether an employment relationship exists.[12] New York employers must remain cognizant of these additional criteria when structuring internship programs.

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11 *Glatt*, 811 F.3d at 534.
12 *See* "Wage Requirements for Interns in For-Profit Businesses" fact sheet, *available at* https://www.labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf.

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