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corpcounsel.com | August 26, 2015

Unpaid Internships and Wage/Hour Law: Feeling Lucky?

From the Expert

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Many companies, large and small, hire unpaid interns to perform various tasks. In many cases, the interns have a very positive experience, learning all about a particular industry from a front-row seat. In other cases, however, the interns are exploited, learn little or nothing, and perform menial jobs for free, or – in the alternative – they do the same work that regular employees do and allow the employer to save a salary by using an intern instead of a paid employee. In the last few years a growing number of unhappy interns have filed lawsuits, either as individuals or as lead plaintiffs in a class action, asserting that they were in truth employees – not interns – and they are owed back wages.

This paragraph from a lawsuit filed against Sirius XM radio by an intern on the "Howard Stern Show" typifies such claims: "While employed for Defendants, Plaintiff Tierney's primary job duties included running errands, placing orders, obtaining breakfast orders, delivering food items to on-air personality and office staff, reviewing news clips, reporting to on-air personalities, compiling data, and obtaining signatures from guests, along with other tasks necessary to the maintenance of Defendants' operation." Tierney et al v. Sirius XM Radio Inc. (S.D.N.Y.)

It was recently reported that this class action was settled for $1.3 million.

The list of job duties that the plaintiff in this case claims she was assigned to perform is interesting because it includes menial tasks, such as getting coffee for the staff, as well as tasks that would normally be performed by paid employees. What is missing, of course, is any learning experience, which is supposed to be what an internship is all about. The U.S. Department of Labor has issued guidelines regarding interns, which essentially state that the more it looks like the internship is providing a learning experience for the intern, the more likely it is that it is permitted. However, "if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work."

One of the first of the new wave of unpaid intern lawsuits was Glatt v. Fox Searchlight Pictures Inc. (S.D.N.Y.). Lead plaintiff Eric Glatt served as an unpaid intern for Fox on the motion picture "The Black Swan." He alleged that he was an accounting department intern and worked five days a week from 9 a.m. to 7 p.m. copying, scanning and filing documents, tracking purchase orders, transporting paperwork from the set, maintaining personnel files and answering questions about the accounting department.

Glatt originally filed his suit as a class action, but later changed it to an individual claim. At the same time, another Fox employee sought to certify a class of unpaid interns. On Glatt's motion for summary judgment, the trial court ruled that he was in fact an employee and was due wages. The court relied on the DOL guidelines and preliminarily certified a class of former interns. The decision sent shockwaves throughout the entertainment industry, and Glatt's case was soon followed by others.

On appeal in July, however, the U.S. Court of Appeals for the Second Circuit reversed the order granting summary judgment. The court disagreed with the trial judge's reliance on the six-part test in the DOL guidelines, which, the court explained, actually was a distillation of a 1947 U.S. Supreme Court case involving railroad trainees. The Second Circuit determined that the old test was outdated and set forth its own seven-part test to determine if an unpaid intern is really an employee and must be paid wages.

The two tests don't seems all that different, but in any event, here is a summary of the Second Circuit's non-exclusive list of factors to consider in determining employment status:

- Whether the intern and the employer both clearly understand that the intern will not be paid;
- The extent to which the internship provides training similar to an educational environment;
- The extent to which the internship is tied to the intern's formal coursework;
- Whether the internship accommodates the intern's academic commitments;
- The duration of the internship;
- Whether the intern's work complements or displaces the work of regular employees while providing the intern significant educational benefits; and
- The extent to which the intern understands that there is no entitlement to a job at the conclusion of the internship.

In summarizing these factors, the Second Circuit distilled them into a basic test, which it called the "primary beneficiary" test, and a reviewing court must ask whether the intern or the employee is the primary beneficiary of the internship. As a rule, it would follow that giving an unpaid intern a bunch of "gofer" jobs, such as taking orders for lunch, picking up the employees' dry cleaning or getting coffee for the group, would not benefit the intern at all, as she would not be learning anything that would complement her academic endeavors. So, too, an intern who is doing, in effect, the real work of an employee, such as filing, answering the phone, or getting documents from one employee to another employee for signature and approval, would also fail the test.

The court sent the Glatt case back to the trial court for further analysis consistent with the new primary beneficiary test. Based on the facts alleged by Glatt, it certainly appears that he was doing the work of a regular accounting department employee, and it is hard to understand why the Second Circuit thought that the trial court needed to determine whether Glatt or Fox was the primary beneficiary of his internship. In any case, the matter will surely be watched closely to see whether the trial court will again reach the conclusion that Glatt was an employee and must be paid.

While the Second Circuit's seven-part test is not all that different from the DOL guidelines' six-part test, a major question arises from the primary beneficiary test that does not arise from the DOL guidelines. Under the DOL guidelines, courts look at what the intern is actually doing and make a determination. But under the primary beneficiary test, there is a new factor: What benefits does an employee get out of an internship even if she is getting coffee for the crew?

For example, many students or even post-graduates looking for work would love to have the name of a highly recognized company on their resumes. If Glatt or an intern at another Hollywood studio applies for a job in the industry, it must be argued the reference to an internship with a major studio such as Fox would clearly be a plus. Does this potential benefit to an intern like Glatt outweigh the fact that, when looking at his day-to-day job duties, he was much more of an employee than an intern?

And going back to the intern for Sirius XM, does the fact that she can put the "Howard Stern Show" on her resume constitute a benefit to her that outweighs all the coffee runs she did for the employees? And what about the potential benefits to interns of meeting many different people who work in their chosen industry and who might later hire them or help them get jobs with other companies? Is this potential benefit enough to outweigh the benefits to the employer from the intern's filing and phone answering?

If an intern files a lawsuit – claiming that she is owed wages since she either was a coffee-runner and learned nothing or that she did the work of a regular employee – and if by the time the case came to trial it could be shown that the internship led the employee to get a terrific job based on connections she made while an intern, should a court take that into account when deciding who was the primary beneficiary?

There are no answers yet to these and other questions that arise from the primary beneficiary test. To be safe, employers should look closely at the actual work the interns perform and ask if the internship is primarily a learning experience for the intern or not. If the answer to the question is no, the employer is at risk of a court later determining that the intern was really an employee, entitled to at least minimum wage and overtime for extra hours.

Better to be safe than sued.

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