Is There an Unexpected Pay Day In Your 'Unpaid' Intern's Future?

by Timothy McCarthy and M. Trevor Lyons

The days of the coffee-fetching, cubicle-dwelling unpaid intern appear to be numbered due to a recent explosion in wage and hour litigation: collective actions filed by unpaid interns alleging violations of the federal Fair Labor Standards Act (FLSA) and its state analogs. Companies like Conde Nast, the publishing corporation that owns a number of high-profile magazines including *Vanity Fair* and *The New Yorker*, have gone so far as to discontinue their internship programs altogether in response to these wage and hour lawsuits.[1] While commentators disagree on the benefit of these unpaid jobs for the interns, one thing is certain: Employers face a threat of liability that could cost them millions.

The central issue in cases involving unpaid interns is whether the intern is an 'employee' under the FLSA. This basic question dates back to 1947, when the United States Supreme Court created a trainee exception to FLSA coverage in *Walling v. Portland Terminal Co.*[2] There, the Court determined that because the trainee, rather than the employer, was the primary beneficiary of the one-week training program at issue, the trainee was not an employee under the FLSA.

Adopting the factors analyzed in *Walling*, in April 2010, the Department of Labor issued Fact Sheet #71 to act as guidance in determining whether an unpaid intern is an employee. Fact Sheet #71 explains that an intern is not an employee, and an internship may be unpaid, only when six criteria are met: 1) the internship must be similar to training that would be given in an educational environment; 2) the internship must be for the benefit of the intern; 3) the intern cannot displace regular employees; 4) the employer cannot derive an immediate advantage from the activities of the intern, and on occasion its operations might actually be impeded; 5) the intern is not necessarily entitled to a job at the conclusion of the internship; and 6) the employer and the intern must understand that the intern is not entitled to wages for the time spent in the internship.

Under these factors, a surge of unpaid intern lawsuits cropped up in 2013, two of which were filed in the Southern District of New York (SDNY). In *Wang v. The Hearst Corporation*,[3] Hearst was sued by unpaid interns who had worked for its various magazines, including *Cosmopolitan* and *Seventeen*. The SDNY denied the interns' motion for summary judgment on the issue of whether they were employees, finding that disputes of fact existed regarding the level of educational training offered to the interns and the benefit of the program for the interns. U.S. District Judge Harold Baer also denied the interns' motion for class certification under Rule 23 for the New York Labor Law (NYLL) claims and collective action under FLSA § 216(b) for the federal wage claims, but shortly thereafter permitted an interlocutory appeal to the Second Circuit Court of Appeals to decide the class certification issue on an interim basis, before the case proceeds to final judgment.

Shortly thereafter, in *Glatt v. Fox Searchlight Pictures Inc.*,[4] former production interns, including two who had worked on the set of the 2010 film *Black Swan*, sought certification of an FLSA collective action and summary judgment on the question of whether they were employees. Regarding whether the internship provided training similar to that found in an educational setting, the SDNY determined that the interns derived no educational benefits aside from on-the-job learning that any employee would receive. Similarly, the court determined that the production internships were designed more for the benefit of the company than the interns. The interns were performing "chores," which were essential functions that would have alternatively been performed by paid employees. Therefore, the court also found the internships displaced regular employees.

The court, however, also acknowledged the wave of unpaid intern wage-and-hour actions in the SDNY and stated, "Several intern cases have been filed in the Southern District of New York since [the court's previous] order, and this issue affects all of them." Finding

a substantial basis for a difference of opinion regarding the standard that should be applied based upon the intra-district split and by the disparate approaches taken by other jurisdictions, U.S. District Judge William H. Pauley III concluded that immediate appeal to the Second Circuit was appropriate. The Second Circuit accepted the appeal.

In a third case, *Bickerton v. Rose*,[5] a New York court approved a class action settlement in a case brought by a group of former interns who had worked on the set of *The Charlie Rose Show*. In approving a settlement that entitled claimants to $110 for each week of work performed, up to a maximum of 10 weeks, the lawsuit cost *The Charlie Rose Show* an estimated $110,000 between these payments and attorneys' fees.[6]

An even costlier settlement was reached in *Davenport v. Elite Model Management*,[7] in which a New York federal judge recently approved a settlement of $450,000 to former interns.[8] This settlement is set to pay between $700 and $1,750 to more than 100 former interns. Nearly one-third of the $450,000 settlement fund will be going to the attorneys representing the interns.

These cases demonstrate that employers who utilize unpaid interns must beware of minimum wage and overtime restrictions under the FLSA and similar state laws, such as the NYLL and the New Jersey Wage and Hour Law. If it is determined that an unpaid intern is, in fact, an employee, then the employer's failure to comply with minimum wage requirements potentially exposes the employer to a number of penalties, including criminal prosecution, liability for back wages, liquidated damages, and injunctions. Employers also face the potential of collective action under the FLSA, which is similar to a class action brought pursuant to Rule 23 in federal courts but with a less burdensome showing required to certify a collective action.[9] Employers should be aware of these risks and cautiously evaluate their unpaid internship programs utilizing the factors enumerated by the Department of Labor.

Emerging Trend to Expressly Protect Unpaid Interns from Employment Discrimination

On Nov. 18, 2013, the New Jersey Senate introduced a bill (S-3064), which would permit unpaid interns to seek relief from purported harassment, discrimination, and retaliation under the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and the Worker Freedom From Employer Intimidation Act. The proposed bill expressly defines an unpaid intern as an individual who performs work for an employer, for the purpose of training, where:

- the employer is not committed to hiring the individual as an employee or in any other compensated capacity at the conclusion of the training period;
- the employer and the individual agree in writing that the individual is not entitled to any compensation for the work performed; and
- any work performed by the individual:
  - supplements employer training given in an educational environment intended to enhance the employability of the individual;
  - provides experience for the benefit of the individual; and does not displace employees of the employer.

The legislation appears to be an attempt by the Senate to respond to a recent SDNY opinion, *Wang v. Phoenix Satellite Television US*,[10] in which the court held that an unpaid college intern could not bring a sexual harassment lawsuit against her employer because, as an intern, she was not an employee, as recognized under New York State and New York City's analogous anti-discrimination laws. In that case, the plaintiff alleged she was unlawfully subjected to sexual harassment by her former supervisor's sexual advances. The court dismissed the plaintiff's sexual harassment claim brought under the New York City Human Rights Law (NYCHRL), holding that, as an unpaid intern, the plaintiff was not an employee within the meaning of the NYCHRL. In so holding, the court based its determination on analogous interpretations of the New York State Human Rights Law and Title VII of the Civil Rights Act of 1964, which have both been interpreted to exclude unpaid interns from their protections.

Presently, only one state—Oregon—provides such protections to unpaid interns. However, at least one other state—New York—is currently considering similar protections. If passed, S-3064 will afford unpaid interns the same protections against discrimination, harassment, and retaliation as paid employees. Employers, therefore, should consider reminding all employees that all individuals in the workplace are entitled to work in an environment free from unlawful discrimination and retaliation, and should consider including express examples involving interns in their periodic training sessions. Additionally, employers should evaluate their

current policies and practices to make certain they protect unpaid interns from discrimination, harassment, and retaliation.

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Endnotes

1. *See* Cara Buckley, Sued Over Pay, Conde Nast Ends Internship Program, *N.Y. Times* (Oct. 23, 2013), *available at* http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html?_r=0.
2. 330 U.S. 148 (1947).
3. 293 F.R.D. 489 (S.D.N.Y. 2013).
4. 293 F.R.D. 516 (S.D.N.Y. 2013).
5. No. 650780/2012, 2013 WL 3335076 (N.Y. Sup. Ct. June 28, 2013).
6. *See* Amanda Becker, *PBS' Charlie Rose settles with unpaid interns as lawsuits spread*, Reuters (July 1, 2013), *available at* http://www.reuters.com/article/2013/07/01/entertainment-us-interns-lawsuit-charlie-idUSBRE9601E820130701.
7. 1:13-cv-01061-AJN.
8. *See* Michael Lipman, Elite Modeling Reaches Largest-Ever Unpaid Intern Settlement, Law360.com (Jan. 13, 2014), *available at* http://www.law360.com/articles/500826/elite-modeling-reaches-largest-ever-unpaid-intern-settlement. Additionally, the plaintiffs' memorandum of law in support of their motion for settlement is available at 2013 WL 6919169.
9. *See* 29 U.S.C. § 216(b). For a comparison of the requirements for Rule 23 class actions and Section 216 collective actions, see Sam J. Smith and Christine M. Jalbert, *Certification – 216(b) Collective Actions v. Rule 23 Class Actions and Enterprise Liability under the FLSA*, American Bar Association (2011), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Flabor_law%2Fmeetings%2F2011%2Fac2011%2F084.pdf&ei=3Mn_Uq_ZKbHeyQHD8oGoAg&usg=AFQjCNGnxxqXqwyG5d4q4QJh0jLQ0ytL0w&sig2=up3-05Af3KMsR5TuTBp8mA.
10. No. 13 Civ. 218(PKC), 2013 WL 5502803 (S.D.N.Y. Oct. 3, 2013).