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UNPAID INTERNS –DOES THE Second CIRCUIT'S AMENDED OPINION IN FOX SEARCHLIGHT HELP OR HURT EMPLOYERS?

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Hearst Corporation, publisher of such magazines as *Cosmopolitan*, *ELLE* and *Harper's BAZAAR,* has filed a motion for summary judgment against the claims of former unpaid interns seeking unpaid minimum wages and overtime based on a recent Second Circuit opinion in the *Glatt v. Fox Searchlight Pictures, Inc.,* case. As we have covered in a number of prior blog posts (2013 and 2014), there have been a variety of class action claims filed by unpaid interns in the movie and publishing industries where thousands of individuals have sought backpay (minimum wage) and overtime. In the *Fox Searchlight* case, the Second Circuit upheld the decision to vacate the class certification and partial summary judgment order in favor of the interns but it included some significant changes to the original opinion. The Second Circuit rejected the six factor test set forth by the Department of Labor (DOL) in its Intern Fact Sheet as the proper test for the employment relationship. However, while the Second Circuit has created a new test for this analysis, it remains to be seen how the district courts will apply these factors as "no one factor is dispositive." In particular, while the court upheld the decision to vacate the class certification, the court also held that certain cases, may be appropriate for "collective actions" which would consider evidence "about the internship program as a whole rather than the experience of a specific intern." Hearst cited the revised test from *Fox Searchlight* in arguing that the following factors should have proven that the unpaid internships were primarily for the benefit of the students and not the employer:

1. the internship provided them with a learning opportunity about the magazine industry; and
2. the internship was approved by their respective schools for academic credit.

Hearst also argued that all seven non-exhaustive factors set forth by the Second Circuit were met in proving that the internship primarily benefited the intern not the company: each intern understood it was unpaid, each received no promise of employment, and each internship qualified for academic credit, accommodated the intern's academic commitments, was of limited duration, provided hands-on experience and did not displace any paid employees. In some ways the amended opinion appears to favor the interns, but Hearst filed a motion for summary judgment based on the new decision. Since this is an area of law still in flux, employers should carefully consider whether they want to risk the potential liability of an unpaid internship program.

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