WAGE AND OVERTIME QUARTERLY

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UNPAID INTERNSHIPS ARE NO LAUGHING MATTER

I recently watched a movie called *The Internship* in which Owen Wilson and Vince Vaughn play two middle-aged interns who blunder through a summer internship program at Google's corporate campus.

The Internship was quite funny. But, in the real world, unpaid internships are no laughing matter. Too frequently, unpaid internships require young adults to perform work that has little educational value. These companies are not providing a service to the interns. Instead, they are simply finding new ways to exploit the American workforce.

It's especially unfortunate when unpaid internships take paid jobs away from the unemployed men and women who desperately need a paycheck. Such job displacement is precisely what this Nation's wage and hour laws were enacted to prevent. The fact that an intern is willing to "voluntarily" work for nothing does not make the practice legal.

Make no mistake: If unpaid internships did not exist, many companies would need to either hire more paid employees or provide more hours (and wages) to the existing paid workforce.

Also, to the extent unpaid internship provide interns with future job opportunities, these internships tend to disproportionately favor the wealthy. That's because young adults from poor and working class backgrounds cannot afford to work for free. As such, unpaid internships exacerbate our Nation's ever-widening gap between rich and poor.

For these reasons, workplace justice advocates should be especially skeptical of this Nation's unpaid internship phenomenon. Here's what you need to know in evaluating whether an unpaid intern actually is an employee entitled to the minimum wage and overtime pay benefits of the Fair Labor Standard Act ("FLSA"):

In deciding whether an unpaid intern is a covered employee, the courts and Department of Labor consider the following six criteria:

- The extent to which the internship provides training similar to the training that would be given in an educational environment;
- The degree to which the internship experience benefits the intern rather than the employer;
- Whether the intern displaces regular employees;
- Whether the intern is closely supervised by existing staff;
- Whether the company derives immediate advantages from the intern's activities;
- Whether the intern is entitled to a job at the conclusion of the internship; and
- Whether the employer and the intern have reached an agreement that the intern is not entitled to wages for his/her work.

No single criterion is dispositive. Rather, as with most multi-factor legal tests, the judge or jury must balance all the above criteria in determining whether the unpaid intern should be considered an employee and paid back wages.

In a recent decision entitled *Glatt v. Fox Searchlight Pictures, Inc.*, 2013 U.S. Dist. LEXIS 82079 (S.D.N.Y. June 11, 2013), Federal Judge William Pauley applied the above principles to a class action lawsuit brought by unpaid interns who worked on the production of the film *Black Swan*. The Judge ruled that the plaintiffs should have been classified as employees and paid in accordance with the FLSA's minimum wage and overtime pay protections.

In reaching his decision, Judge Pauley observed that the plaintiffs did not receive any significant training:

> Footman did not receive any formal training or education during his internship. He did

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In This Edition . . .

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ABOUT WINEBRAKE & SANTILLO, LLC

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Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Yet, every year, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and overtime laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

Winebrake & Santillo, LLC believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

Winebrake & Santillo, LLC goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth millions of dollars to American workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***Winebrake & Santillo, LLC*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. Your clients never pay a fee unless they recover, and ***we always pay a fair referral fee.***

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> not acquire any new skills aside from those specific to *Black Swan's* back office, such as how it watermarked scripts or how the photocopier or coffee maker operated. It is not enough that Footman "learned what the function of a production office was through experience." He accomplished that simply by being there, just as his paid co-workers did, and not because his internship was engineered to be more educational than a paid position.

The Judge also explained that the internship did not provide the plaintiffs with any benefits beyond those benefits ordinarily available to all workers:

> Undoubtedly, Glatt and Footman received some benefits from their internships, such as resume listings, job references, and an understanding of how a production office works. But those benefits were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them. Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor.

And the Judge cogently observed that the plaintiffs displaced regular employees:

> Glatt and Footman performed routine tasks that would otherwise have been performed by regular employees. In his first internship, Glatt obtained documents for personnel files, picked up paychecks for coworkers, tracked and reconciled purchase orders and invoices, and traveled to the set to get managers' signatures. His supervisor stated that "[i]f Mr. Glatt had not performed this work, another member of my staff would have been required to work longer hours to perform it, or we would have needed a paid production assistant or another intern to do it." At his post-production internship, Glatt performed basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands. This is work that otherwise would have been done by a paid employee.

Most importantly, the Judge obliterated the false argument that unpaid internships should be permitted because the intern "voluntarily" is willing to work for free:

> Glatt and Footman understood they would not be paid. But this factor adds little, because the FLSA does not allow employees to waive their entitlement to wages. "[T]he purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." This protects more than the Plaintiffs themselves, because "[s]uch exceptions to coverage would . . . exert a general downward pressure on wages in competing businesses." It also protects businesses by preventing anticompetitive behavior. "An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive [FLSA claims] than are those of his competitor.

In sum, Judge Pauley's *Glatt* decision is a breath of fresh air. Going forward, workers (including the unemployed) stand to benefit if other judges and government agencies view unpaid internships with the careful eye demonstrated by Judge Pauley.

WORKER'S COMPENSATION LAWYERS SHOULD FEEL FREE TO USE OUR FACILITIES

Some of the Trial Lawyers who receive this Newsletter appear at the Workers' Compensation Hearing Room located on the first floor of the Twining Office Center, 715 Twining Road, Dresher, PA.

If you are one of these Trial Lawyers, please remember that our Office is located *directly above* the hearing room in **Suite 211**. Over the years, many of our Trial Lawyer friends have used our conference room to meet with clients and used our fax machine and photocopier to prepare "last-minute" hearing exhibits.

Please don't ever hesitate to use our office resources (or just stop by to visit) when you are in the Dresher Hearing Room.

CABLE AND SATELLITE DISH INSTALLERS CONTINUE TO BE MISCLASSIFIED AS INDEPENDENT CONTRACTORS

Over the past several years, we have successfully represented many workers who spend long hours installing cable television and satellite dish hookups at households throughout Pennsylvania and beyond. These workers usually hold the job title of "Technician" or "Installer," and they often are classified as "independent contractors" rather than "employees."

This independent contractor classification is very bad for the workers and very good for the company. By designating Technicians/Installers as independent contractors, the cable/dish industry avoids paying valuable benefits, including "time-and-one-half" overtime pay for hours worked over 40 in a week. The independent contractor designation also enables the industry to make pay deductions that are not permitted for employees. Such deductions include, for example, withholding pay for supposedly inadequate installation work or for late arrivals to job sites.

Trial Lawyers should be on the lookout for Cable/Satellite Dish Installers and Technicians who have been classified as independent contractors. If you come across such workers, our firm would be happy to interview them. And, as many of you know, we always pay a fair referral fee.

MANY PAY DEDUCTIONS ARE ILLEGAL

Many workers and Trial Lawyers believe that companies can subject workers to any type of pay deductions agreed upon between the worker and the company. In Pennsylvania, this belief is mistaken.

In fact, the Pennsylvania Wage Payment and Collection Law ("PWPCL") includes regulations that strictly limit the types of pay deductions an employer can make. *See* 34 Pa. Code § 9.1(1)-(12). Permissible pay deductions generally are limited to deductions for: retirement, pension and other savings plans; FICA contributions and similar tax withholdings; charitable contributions; union dues; the repayment of *bona fide* loans from the employer; and the replacement of certain items given to the worker. *See id.* at § 9.1(1)-(11).

All other pay deductions must ***both*** (i) be agreed upon in writing between the worker and the company ***and*** (ii) be specifically approval by the Pennsylvania Department of Labor and Industry ("Pa. L&I"). *See* 34 Pa. Code § 9.1(12); *Ressler v. Jones Motor Co., Inc.*, 487 A.2d 424 (Pa. Super. 1985).

Pennsylvania employers frequently fail to obtain Pa. L&I approval for pay deductions. This failure can lead to substantial liability.

For example, our law firm has obtained settlements on behalf of mortgage loan officers who were charged fees associated with the loan underwriting process, salespeople whose pay was reduced when customers returned purchased items, and satellite dish installers whose pay was deducted for deficient installations. Currently, we are pursuing class action lawsuits on behalf of limousine drivers whose pay is deducted for "NICA" fees, taxi cab drivers who are required to "tip out" the dispatcher at the end of the shift, and food delivery drivers whose pay is deducted to account for damaged merchandise.

The above cases provide just a few examples of the many types of pay deduction schemes that can be challenged in court. If you think one of your clients has suffered an improper pay deduction, out attorneys would be delighted to consult with your client.

QUARTERLY QUOTE

"We must make our choice. We may have democracy, or we may have great wealth concentrated in the hands of a few, but we can't have both."

Hon. Louis D. Brandeis
(U.S. Supreme Court Justice, 1916-1939)

WE'RE HAPPY TO PROVIDE FREE LEGAL ADVICE TO OUR FRIENDS IN THE WORKERS' RIGHTS COMMUNITY

Many of the Trial Lawyers and community activists who receive this Newsletter also are *employers* who must comply with the wage and overtime laws. Thus, over the years, our law firm has provided *free legal advice* to many of our friends in the Trial Lawyer and workplace justice community.

If you have questions about how the wage and overtime laws impact your law firm/organization or whether you are in compliance with the law, please do not hesitate to call for a free consultation. Of course, all communications are strictly confidential.

Our law firm's success has been built on the many referrals you have sent us and the trust you have placed in us. Providing you with first-rate legal advice is the least we can do.