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A recent case in the U.S. District Court for the Southern District of New York, ***Glatt v. Fox Searchlight Pictures, Inc.,*** **highlights how difficult it is for a for-profit business to create lawful unpaid internships. The court held that unpaid interns on the "Black Swan" movie set did not fall under the narrow "trainee" exception to the FLSA's minimum wage and overtime requirements, despite the fact that they received academic credit for their internship.**

The *Fox Searchlight* plaintiffs performed low-level tasks such as picking up paychecks for colleagues, answering phones, and making deliveries. The court described their work as menial, but essential to the company's work. The interns were given on-the-job training relating to their specific duties. However, they received no training—formal or otherwise—that would be generally applicable within the film production industry. Although the interns were not compensated for their work, they received academic credit for their respective internships, and acquired resume-enhancing experience and insights into the employer's business.

The court applied a two-step analysis in its decision. After first finding that the interns were, in fact, employees of Fox Searchlight, the court then analyzed whether they fell under the FLSA's narrow "trainee" exception that would allow them to work without pay. Rejecting the employer's "primary beneficiary" test as subjective and unpredictable, the court utilized six criteria enumerated in a Department of Labor fact sheet in order to determine whether the FLSA trainee exception should be applied:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees, but works under close supervision of existing staff.
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The court focused on the first four criteria, as there was no evidence the interns had been promised a job at the end of their internships (criterion 5), and there was no dispute about the fact that the interns understood their positions to be unpaid (criterion 6). However, the court was clear that employees cannot waive their right to the FLSA's protections by agreement. In other words, **the mere fact that an intern signs a written agreement waiving the right to compensation is not sufficient, by itself, to make the waiver valid.**

With respect to the question of whether the "training" is similar to what is provided in an educational environment, the court noted that **an intern or trainee must receive "something beyond on-the-job training that employees receive.**" At Fox Searchlight, however, the interns never received any sort of special training other than that which a normal Fox Searchlight employee would have received.

Likewise, the mere fact that an intern receives benefits one might receive as a regular employee—such as work experience, resume listings, and job references—is insufficient to qualify the intern as a trainee. The Fox Searchlight interns never received any benefits other than those received by the company's paid employees, whereas the company received the full benefit of the interns' labor.

As to whether the interns displaced regular employees, **an intern is *not* likely to qualify for the trainee exception if the intern is performing work that would otherwise have been performed by an employee.** The Fox Searchlight interns performed tasks that Fox Searchlight needed to have done, either by an intern or a paid employee. Consequently, this factor weighed in favor of a finding that the interns should have been paid.

Finally, with respect to the fourth factor, whether the employer received an immediate advantage from the interns' activities, the court described the Fox Searchlight interns' activities as "[m]enial" yet "essential." It was irrelevant that the interns were beginners. The court found that they performed jobs that provided the employer with an immediate advantage. **To qualify for the trainee exception under this factor, the employer should not realize an immediate advantage from the trainee's work.** Indeed, if the employer's operations are impeded in

some way by taking on the interns, then it would weigh in favor of unpaid status.

Weighing the DOL factors, the court concluded that the Fox Searchlight interns did not fall under the FLSA's narrow "trainee" exception. This conclusion may come as a surprise to employers, particularly those who believe that the extension of academic credit relieves them from having to pay interns. The fact that the interns received academic credit was given little weight by the court: **"[a] university's decision to grant academic credit is not a determination that an unpaid internship complies" with wage and hour laws**. The focus of the law "is on the requirements and training provided by the alleged employer."

The *Fox Searchlight* opinion is a timely reminder of the risks of using unpaid interns. To avoid potentially costly wage and hour claims, employers should review their internship programs for compliance with applicable labor laws and modify them as needed.

Key Contacts

Wendy Brenner **Palo Alto**	**brennerwj@cooley.com** **+1 650 843 5371**
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330