June 11, 2014

# S.D.N.Y. Rules on the Outer Limits of Conditional Certification in a Collective Action Brought By Unpaid Interns Under the FLSA

A recent case in the Southern District of New York, *Fraticelli* v. *MSG Holdings, L.P.,* No. 13 Civ. 6518 (JMF), 2014 WL 1807105 (S.D.N.Y. May 7, 2014), has tested the outer limits of the relatively lenient requirements for obtaining conditional collective action certification under the Fair Labor Standards Act ("FLSA") in unpaid intern suits.

The case follows a spate of high-profile collective actions brought by unpaid interns, which has continued unabated this summer intern season. In the past year alone, dozens of these suits have been brought against private employers such as Sirius XM Radio, Madison Square Garden, Sony, NBC Universal, and Gawker.

## Background

Employers are legally obligated to pay minimum wages and overtime pay to interns if the interns are considered "employees" under the FLSA. 29 U.S.C. § 206. Employees may bring suit under the FLSA through an individual action or through a collective (opt-in) action on behalf of "similarly situated" employees. 29 U.S.C. § 216(b).

FLSA collective actions involve a two stage certification process. At the initial stage, plaintiffs have the "'low' burden of making a 'modest factual showing' that they and 'potential opt-in plaintiffs together were victims of a common policy or plan that violated the law.'" *Fraticelli*, 2014 WL 1807105, at *1 (citing *Myers* v. *Hertz Corp.,* 624 F.3d 537, 555 (2d Cir. 2010)). If conditional certification is granted, employers can move to decertify the collective action after discovery. The examination of whether opt-in plaintiffs are "similarly situated" to the named plaintiffs is more demanding at the second stage.

## The *Fraticelli* Case and Recent District Court Opinion

In *Fraticelli,* plaintiffs asserted claims against Madison Square Garden under the FLSA and New York State Labor Law for unpaid wages during their internships in various departments at Madison Square Garden. Plaintiffs moved for conditional certification of an FLSA collective action and for approval of a collective action notice to be sent to "[a]ll current and former interns engaged by MSG Holdings, L.P. and the Madison Square Garden Company and all of their entities . . . from September 16, 2010 through the present."



*© 2014 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising.*
*Past representations are no guarantee of future outcomes.*

On May 7, 2014, the district court denied conditional certification, holding that plaintiffs did not meet the relatively low evidentiary burden for conditional certification. Specifically, the court found that the evidence that the *Fraticelli* plaintiffs had presented of a centralized internship program—a corporate code of conduct that governed all MSG employees; a standardized time sheet with the word "Intern" at the top; and a script distributed to interns on how to manage telephone calls—was insufficient. Moreover, the court found that there were "significant differences [] among the interns in terms of the activities they performed," "the supervision, training, and benefits they received," "the burdens they imposed on MSG," and "the manner in which they were selected for their positions."

Although the court denied conditional certification, *Fraticelli* nonetheless affirms the relative ease of obtaining conditional collective action certification for FLSA plaintiffs, and provides a roadmap for the circumstances in which conditional certification would likely be granted. The court suggested, for example, that certification could be granted if plaintiffs presented facial evidence of a centralized internship program, such as company-wide internship guidelines, memoranda setting forth requirements applicable to all interns, and centralized web-based listings of open internship positions. In addition, the *Fraticelli* court noted that certification was recently granted in two other unpaid intern FLSA cases in the Southern District of New York where the plaintiffs had provided generalized proof suggesting that "unpaid interns were systematically used as substitutes for paid employees."

## Analysis

The relatively low bar for conditional collective action certification under the FLSA poses a significant risk to employers of being subjected to costly discovery even if an action is later decertified. In light of the potential for expensive and time-consuming litigation against minimum wage and overtime pay claims brought by interns, employers with unpaid internship programs should review their compliance with the FLSA.

While the Second Circuit has not addressed the standard governing whether interns qualify as employees under the FLSA and, thus, are entitled to receive minimum wage and overtime pay for their work, New York courts generally look to a totality of circumstances test that incorporates six factors enumerated by the U.S. Department of Labor.[1]

---

[1] There is a split between district courts in the Southern District of New York over how much deference to give the Department of Labor factors. Whereas Judge Pauley in *Glatt* v. *Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) adhered closely to the factors, Judge Baer in *Wang* v. *Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013) applied a totality of circumstances test that gave the factors less deference. Both rulings have been certified for immediate appeal to the Second Circuit. *Wang* v. *Hearst Corp.*, No. 12 CV 793 (HB), 2013 WL 3326650 (S.D.N.Y. June 27, 2013); *Glatt* v. *Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

The thrust of the inquiry is that the more the internship program is structured for the benefit of the intern, and not the employer, the more likely that the internship will be found to be exempt from FLSA wage requirements.

The six Department of Labor factors are as follows:

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; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Employers can substantially limit their likelihood of liability under the FLSA for unpaid intern claims by adhering to the foregoing guidelines in structuring their internship programs.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Allan J. Arffa
212-373-3203
aarffa@paulweiss.com

Jay Cohen
212-373-3163
jaycohen@paulweiss.com

Robert A. Atkins
212-373-3183
ratkins@paulweiss.com

Eric A. Stone
212-373-3326
estone@paulweiss.com

Daniel J. Toal
212-373-3869
dtoal@paulweiss.com

Liza M. Velazquez
212-373-3096
lvelazquez@paulweiss.com

Maria H. Keane
212-373-3202
mkeane@paulweiss.com

**Associate Lin Ting Li contributed to this memo.*