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Adam Klein Discusses Unpaid Intern Litigation, Wage-Hour Issues Related to Remote Connectivity and Employer Misclassification



ADAM T. KLEIN (INTERVIEWED BY KATARINA E. WIEGELE)

BLOOMBERG BNA: [Editor's note: Adam Klein serves as lead counsel for unpaid interns in numerous wage-hour class actions currently pending before the U.S. District Court for the Southern District of New York, including *Xuedan Wang v. Hearst Corp.*, No. 1:12-cv-00793 (S.D.N.Y. June 27, 2013), *Glatt v. Fox Searchlight Pictures Inc.*, No. 1:11-cv-06784 (S.D.N.Y. June 11, 2013), *Ballinger v. Advance Magazine Publishers Inc.*, No. 1:13-cv-04036 (S.D.N.Y. June 13, 2013), and *MacKown v. News Corp.*, No. 1:13-cv-04406 (S.D.N.Y. June 25, 2013). Whether plaintiffs-interns are statutory "employees" under the FLSA and New York Labor Law and what legal standard governs the issue are in dispute.]

Recent summary judgment rulings in *Hearst* and *Glatt* have spurred a sudden increase in wage-hour

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class actions on behalf of unpaid interns and assistants in the media industry. In each case, the court has attempted to formulate a standard for determining whether interns at for-profit businesses are "employees" or fall under the "trainee" exception established by the U.S. Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

What are some important takeaways from these decisions?

Klein: Our position all along has been that employers cannot just create a new class of workers and then decide that the class is somehow not entitled to wages. The FLSA was enacted to create a national minimum wage rate that applies to all workers throughout the U.S. workforce regardless of the title or position of the worker. The use of the term "intern" does not create an exception to that requirement, as the court in *Glatt* confirmed. This is not a new concept; the FLSA was specifically enacted to combat this type of abusive and deceptive employer practice.

BLOOMBERG BNA: How would you argue the class/collective action mechanism is useful in challenging companies' unpaid internship policies?

Klein: This is a classic example of a negative value claim—where the economic value of lost wages for each individual intern is simply too small to justify filing a lawsuit. Given that reality, the only effective way to prosecute this type of case is through class litigation.

BLOOMBERG BNA: With advancements in technology and the need for flexible work arrangements, more and more employees are working from home. What wage-hour issues do telecommuting and remote connectivity (i.e., mobile devices, virtual private networks (VPNs)) pose with respect to nonexempt employees?

Klein: This issue is challenging. Basically, the FLSA and analogous state laws require the payment of wages for time worked. What is compensable time worked can be difficult to assess when employees are permitted to use mobile devices remotely without limitation or on an ad hoc or sporadic basis. However, employers can handle this situation through the use of clear written rules for when an employee is on the clock and entitled to wages or is not working. The bottom line is that employers cannot accept the benefit of work but then disclaim liability for earned wages. Compliance with these concepts takes effort but can be accomplished.

BLOMBERG BNA: What practical advice would you offer to employers in developing and implementing work-at-home policies and procedures?

Klein: My job is to prosecute wage-hour class actions. In that context, my suggestion is for employers to take seriously their obligations to comply with the law and to pay workers for all time worked.

BLOMBERG BNA: In the past ten years, the number of wage-hour cases and class and collective action lawsuits filed in the United States has increased. To what do you attribute this continued proliferation? (The changing economy? Changing business models? Employer misclassification? Enactment of the Class Action Fairness Act of 2005?)

Klein: There are a few explanations for this trend. First, many employers took very aggressive positions in how they classified workers relating to overtime. Frankly, we have seen numerous examples where employees are classified as exempt for overtime purposes but then aren't even coming close to meeting the underlying white-collar duties test. Second, I think that employees are now much more willing to (a) critically evaluate what their employers are saying about these issues and (b) then file suit if they are owed money. The concern about speaking up has dissipated as more and more cases are filed in this area.

BLOMBERG BNA: One might argue recent U.S. Supreme Court decisions on arbitration clauses and class certification standards will allow businesses to more effectively contest class certification and could stem such growth. How do you foresee *American Express Co. v.*

Italian Colors Restaurant, No. 12-133, 2013 BL 163177 (June 20, 2013), *Oxford Health Plans LLC v. Sutter*, No. 12-135, 2013 BL 151235 (June 10, 2013), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 2013 BL 80435 (Mar. 27, 2013), will affect the ability of individual employees to pursue employment claims collectively in arbitration and in litigation?

Klein: This is nothing new. The practice of law is always a game of cat and mouse where the defendant rolls out a new tactic or defense that some courts adopt but eventually goes out of favor. Last years' model of this tactic was the so-called inherent incompatibility argument relating to filing an FLSA collective action along with a state-law class action. It took a few years, but inherent incompatibility is now firmly at the bottom of the dustbin. It may take congressional action to unwind some of these new tactics, particularly forced arbitration. Perhaps I'm an optimist, but I just don't see process trumping the rights of workers to recover their unpaid wages. Generally, the equities overcome procedural obstacles.

BLOMBERG BNA: As employers wrestle with FLSA exemption rules and how they apply to specific positions, what kinds of jobs are most likely to be misclassified as exempt and are best candidates for FLSA classification reviews? How should employees pursue potential misclassification claims?

Klein: The assistant manager position in the retail setting is the obvious poster child for this award. We have seen numerous examples where the assistant store manager spends the majority of her time performing nonexempt duties—sweeping floors, working the cash register, and stocking shelves. Calculating an assistant manager's effective hourly rate may also indicate a potential misclassification. If subordinate hourly workers actually earn more money per hour than the exempt manager, this is a clear sign that there's something seriously wrong. I would also urge employees to assess whether they are being treated fairly by the employer and ask whether they are really performing the primary duties listed in their job descriptions. If they are not, that's another clear sign that there's something terribly wrong with their overtime classification.

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