

2024

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Introduction



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WORKPLACE 2023

ANNUAL LABOR, EMPLOYMENT & HR CONFERENCE

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TODAY'S AGENDA

Kristen Smith– (12:00PM-12:05PM)

- Introduction / Agenda

Caroline Westover – (12:05PM-12:15PM)

- I-9 Spring Cleaning

Kerry Langan – (12:15PM-12:25PM)

- The Supreme Court Considers Religious Accommodations & Undue Hardship: *Groff v. DeJoy*

Suba Viswanathan – (12:25PM-12:35PM)

- Unpaid Interns and Volunteers

Amy Rhinehardt – (12:35PM-12:45PM)

- Key Leasing Provisions

Kristen Smith – (12:45PM)

- Wrap Up

I-9 Spring Cleaning



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The Supreme Court Considers Religious Accommodation & Undue Hardship



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Unpaid Interns and Volunteers



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Unpaid Interns

- *Glatt v. Fox Searchlight Pictures, Inc.* (2nd Circuit 2016)
 - The plaintiffs were unpaid interns either on the film *Black Swan* or at Fox Searchlight Pictures' corporate office in New York City
 - The plaintiffs alleged they should have been paid as employees under the Fair Labor Standards Act and New York Labor Law
 - Lower court found in favor of the plaintiffs
 - On appeal, Second Circuit did not address the merits of the claim, but found that the lower court used an incorrect legal standard in analyzing whether the interns were employees under the FLSA and NYLL
 - Second Circuit created a new legal standard and remanded back to the lower court

Unpaid Interns

- *Glatt v. Fox Searchlight Pictures, Inc.* (2nd Circuit 2016)
 - “Primary Beneficiary Test” – Seven Factors
 - The extent to which the intern and employer understand that there is no expectation of compensation
 - The extent to which the internship provides training that would be similar to that which would be given in an educational environment
 - The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit
 - The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar

Unpaid Interns

- *Glatt v. Fox Searchlight Pictures, Inc.*
 - “Primary Beneficiary Test” – Seven Factors (cont.)
 - The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning
 - The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern
 - The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship

Unpaid Interns

- USDOL Fact Sheet # 71: <https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships>
 - Adopts the *Glatt* seven-factor analysis
 - All seven factors need not be met – issue is “primary beneficiary”

Unpaid Interns

- New York State DOL Fact Sheet:
<https://dol.ny.gov/system/files/documents/2021/03/p725.pdf>
 - Higher standard than under federal law to classify individuals as unpaid interns
 - 11-factor test – all 11 factors must be met

Unpaid Interns

- New York State DOL 11-Factor Test:
 - The internship training is similar to training provided in an educational program
 - The training is for the benefit of the intern
 - The intern does not displace regular employees
 - The activities of the intern do not provide an immediate advantage to the employer, and on occasion, operations may actually be impeded
 - The intern is not necessarily entitled to a job at the conclusion of the internship
 - The intern is notified in writing that he/she will not receive any wages and is not considered an employee for minimum wage purposes

Unpaid Interns

- New York State DOL 11-Factor Test (cont.)
 - Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity
 - The intern does not receive employee benefits
 - The training the intern receives is general, and qualifies the intern to work in any similar business
 - The screening process for the internship program is not the same as for employment
 - Advertisements for the internship program clearly discuss education or training, rather than employment

Volunteers

- No such thing as unpaid volunteers in a for-profit business
- Not-for-profit organizations can have unpaid volunteers
 - USDOL Fact Sheet 14A: <https://www.dol.gov/agencies/whd/fact-sheets/14a-flsa-non-profits>
 - Cannot volunteer in commercial activities run by a not-for-profit organization (such as a gift shop)
 - No expectation of compensation
 - Cannot perform work ordinarily performed by paid employees
 - Employees of the organization can only volunteer to perform work that is different from the work they perform as an employee

General Considerations

- Begin with the assumption that everyone who performs work for your business should be classified as an employee
- Written contracts or offer letters stating that someone is an unpaid intern might be helpful, but will not be determinative
- The fact that the intern requested to work at your business without being paid will not shield you from liability
- Consult with legal counsel before allowing anyone to work at your business on an unpaid basis

Leasing 101: Key Leasing Provisions for Tenants



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Holdover Provision

Addresses What Happens Following Expiration of the Lease

Key Points:

- Should address the type of tenancy following expiration of the Lease;
- Negotiate a low rental amount or not address rent at all;
- Eliminate any liability for holding over (e.g., loss of rent, liquidated damages, etc.);
- Ensure holdover rent only applies to base rent, not additional rent.

Generally speaking (with limited exceptions), if there is no “holdover provision” in the Lease, if the Tenant pays rent and Landlord accepts rent, the tenancy is month to month and the same terms and conditions of the Lease apply unless and until notice to terminate is given by either party

Force Majeure

Addresses Delays in Performance by Landlord and/or Tenant

Key Points:

- Broad Coverage;
- Mutual

Abandonment

Addresses What Happens if Tenant Abandons the Premises (i.e., “goes dark”)

Key Points:

- Best if there is no operating covenant;
- If there is an operating covenant, ensure there is a lengthy period until it is triggered;
- Allow a carveout for renovations.

*Please note, this provision could be a separate standalone covenant, or part of a default section

Landlord Remedies Upon Default

Addresses Landlord's Remedies in the Event of Tenant Default

Key Points (Monetary Remedies Only):

- Try to negotiate for Rent to be due only up until the time of default;
- When that is unsuccessful, try to limit damages to accrual of Rent on a *monthly basis*;
- Avoid an “acceleration” provision;
- Ensure to include a provision that allows for rental credit for any re-letting

Your Questions



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Leasing 101: Key Leasing Provisions for Tenants

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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