

A night sky with a crescent moon on the left and several bright stars with diffraction patterns in the center. The background is dark with many small, faint stars scattered throughout.

# Sleepless in Seattle: Issues to Keep You up at Night

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June 19, 2013

Beware the Black Swan:

**THE DANGER OF THE UNPAID  
INTERN**

# *Glatt v. Fox Searchlight*

## 11 Civ. 6784 (S.D.N.Y. 2013)

- Class action brought by unpaid interns who worked on the movie *Black Swan*
- Judge denied summary judgment relying on *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) and US DOL Fact Sheet #71 for when internship may be unpaid:
  - Internship is similar to training in an educational environment
  - Internship is for the benefit of the intern
  - Intern does not replace regular employees
  - Employer derives no immediate advantage from the intern and on occasion its operations may actually be impeded
  - Intern is not necessarily entitled to a job at the end of the internship
  - Understanding that intern will not be paid

# *Glatt v. Fox Searchlight con't.*

- Reviewed US DOL factors:
  - No formal training given to Black Swan interns
  - Resume building and references are not enough for the internship to be for the benefit of the interns
  - Interns performed tasks that would've been performed by paid employees such as picking up paychecks and reconciling invoices
  - Fox Searchlight derived immediate benefit from the work of the interns
  - No guarantee of jobs
- Class of approximately 40 plaintiffs certified

# Interns Hit Conde Nast with Class Action Lawsuit

- Two former interns who worked at *W Magazine* and *The New Yorker* allege violations of Fair Labor Standards Act and New York labor laws for failing to pay interns proper wages for their work
- *The AmLaw Litigation Daily*, June 13, 2013

# Washington Department of Labor & Industries

- ES.C.2
  - <http://www.lni.wa.gov/workplacerrights/files/policies/esc2.pdf>
- State looks to FLSA to determine when an intern can be unpaid – looks to 6 factors in US DOL Fact Sheet #71
  - <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>

Ban the Box:

**CRIMINAL BACKGROUND  
CHECKS IN SEATTLE**

# June 10, 2013 Job Assistance Bill Passed by Seattle City Council

“The legislation will prohibit employers from automatically excluding individuals with any arrest or conviction record from consideration for employment. While employers may inquire about an individual's criminal history after they have completed an initial screening to eliminate unqualified applicants, they may not reject a qualified applicant solely based on their criminal record unless they have:

- Identified to the employee or applicant the record or information on which they are basing their employment decision;
- Provided the applicant or employee a reasonable opportunity to explain or correct the information and hold the position open for a minimum of two business days after notifying the applicant or employee to provide them a meaningful opportunity to respond; and,
- A "legitimate business reason" for making the employment decision.”



# Seattle Job Assistance Bill: Timing of Background Check

- An employer can perform a criminal background check or ask about criminal convictions *only after* the employer has completed an initial screen of applicants and eliminated unqualified candidates

# Seattle Job Assistance Bill: Convictions

- Employer cannot take a tangible adverse employment action solely based on a criminal conviction or pending criminal charge, unless the employer has **a legitimate business reason** for taking such action
- Before taking action, the employer must identify the record to the individual and give an opportunity to explain (>2 days)

# Seattle Job Assistance Bill: Arrests

- Cannot take tangible adverse employment action solely based on an arrest record
- Can consider **conduct** underlying the arrest if there is a legitimate business reason

# “Legitimate Business Reason”

- Based on information known to employer at the time of the employment decision, employer in good faith believes:
  - Will have a negative impact on employee/applicant’s fitness or ability to perform the job
  - Will cause harm or injury to people, property, reputation or assets

# “Legitimate Business Reason”

- And the employer considers:
  - Seriousness of the conviction or pending charge
  - # and types of convictions or pending charges
  - Time that has elapsed since conviction (excluding time in jail) or pending charge
  - Verified information of rehabilitation
  - Specific duties of the job
  - Place & manner job will be performed

# Seattle Job Assistance Bill: Enforcement

- “This chapter shall not be construed to create a private right of action to seek damages or remedies of any kind.”
- Seattle Human Rights Commission
  - Fine up to \$1000 per offense and respondent may be ordered to pay SHRC’s attorney’s fees
  - No other remedies, damages, or affirmative action can be ordered

# Seattle Job Assistance Bill: Application

- Applies to “an employment position that will be performed in whole or in substantial part (at least 50% of the time) within the City”
- Effective November 1, 2013

# EEOC Sues Over Criminal Background Checks 6/11/2013

## EEOC Guidance: Criminal Convictions

- [www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)
- Issued April 2012
- Individualized assessment is key



# WAC 162-12-140 Pre-employment Inquiries for Arrests & Convictions

- “inquiries concerning **arrests** must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving **behavior that would adversely affect job performance**, and the arrest occurred within the last ten years”
- “crimes inquired **about relate reasonably to the job duties**, and if such **convictions** (or release from prison) occurred within the last ten years”

# Negligent Hiring

- Employers lose 72% of negligent hiring cases
- Average settlement is \$1.6 Million

Erin Shannon, Editorial, *Do not restrict employers from checking job applicants' criminal history*, Seattle Times, Jan. 31, 20013

*Rucshner v. ADT Security Systems, Inc.*  
149 Wn. App. 665 (2009)

- 14 year old girl alleged she was raped by a 20 year old man she met while he was doing door-to-door sales calls selling home security systems
- Rape occurred 2 months after the sales call
- No background check was conducted
- Employee had convictions for criminal impersonation, theft, possession of marijuana
- Summary judgment for employer reversed
- “[A]n employer’s liability is not necessarily limited to conduct performed within the scope of employment or during work hours . . . .”

Involuntary Facebook  
Friends:

**THE NEW SOCIAL MEDIA LAW**  
**SSB 5211**

# New Social Media Law: SSB 5211

- Employer cannot require an employee or applicant to:
  - disclose login information (user name & password) for a personal social media account
  - to sign-in in front of employer
  - alter privacy settings
  - to add employer as a “friend”

# Can ask for content in some workplace investigations

- “(a) The employer requests or requires the **content** to make a factual determination in the course of conducting an investigation;
- (b) The employer undertakes the investigation in response to receipt of information about the employee's activity on his or her personal social networking account;
- (c) The purpose of the investigation is to: (i) Ensure compliance with applicable laws, regulatory requirements, or **prohibitions against work-related employee misconduct**; or (ii) investigate an allegation of unauthorized transfer of an **employer's proprietary information, confidential information, or financial data** to the employee's personal social networking account; and
- (d) The employer does not request or require the employee to provide his or her login information.”

# SSB 5211

- Does not apply to intranets or other platforms intended to exchange work-related information
- Employer can require login information to devices or online accounts that are paid for by the employer as part of employment
- Ok if employer inadvertently acquires employee's login information, but employer cannot use it

# SSB 5211

- Passed unanimously
- Governor signed 5/21/2013
- Goes into effect 7/28/2013
- Employee can sue for \$500 penalty, actual damages, and attorneys' fees



Good luck!

**TRY COUNTING SHEEP**