

Spotlight On: The Use of Unpaid Interns

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Introduction

- Unpaid internships are a time honored tradition in the workplace, providing interns with experience in their chosen profession and, frequently, a stepping stone to a paying job.
- The legal landscape recently has changed. Unpaid internships are increasingly leading to lawsuits with interns claiming that they are really employees who should have been paid at least the Fair Labor Standards Act ("FLSA") minimum wage and/or overtime wages.

What is an Internship?

- Internships are generally arrangements in which college students, recent graduates and/or career changers lend their talents to companies in return for an opportunity to develop business skills, learn about a new industry, gain experience and contacts in the work environment.
- Internships may be paid or unpaid. The focus of our presentation is on unpaid internships in the for-profit sector.

Mutual Benefits of an Internship

- Internships are beneficial to the intern because he or she receives "real world" business experience and an early opportunity to impress potential employers.
- Employers benefit from internship programs by obtaining the services of skilled personnel for modest cost and by being exposed to new ideas, perspectives and a talent pool.

The FLSA Requires Employees be Paid for their Work

- The FLSA requires that each non-exempt employee who is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in such commerce or production, be paid at least the minimum wage for every hour worked. See 29 U.S.C. §206.
- Several individual States however, maintain minimum wage requirements in excess of the federal minimum wage. In these States, employees must be paid the State minimum wage.

Employees Cannot Waive Their FLSA Rights

- In Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), the United States Supreme Court held that a worker may not waive his or her FLSA rights.
 - Therefore, even when an individual worker is willing to waive the right to compensation, courts will not recognize such a waiver, because of the potential harm to the public at large and because it is difficult to determine whether an individual's waiver actually is voluntary.

Is there an Employer – Employee
Relationship

The Employer Employee Relationship

- In order for the FLSA to apply, there must be an employment relationship between an "employer" and an "employee."
 - The FLSA defines the term "employ" very broadly: to "suffer or permit to work."
 - Covered, non-exempt individuals who are "suffered or permitted" to work must be compensated under the law for the services they perform for an employer. See 29 U.S.C. §203.
 - Internships in the "for-profit" private sector will most often be viewed as employment, unless the test for "trainees" is met. Interns who qualify as employees rather than trainees must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.

The Employer Employee Relationship (Continued)

- In Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947), the U.S. Supreme Court held that, "individuals working for another for their own benefit without expectation of compensation may not be employees. . . [T]he definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages."

The Employer Employee Relationship (Continued)

- Walling made clear that the FLSA does NOT cover an individual who "without promise or expectation of compensation, but solely for his personal purposes or pleasures, worked in activities carried on by other persons either for their pleasure or profit."

The Unpaid Intern Exception to the FLSA

The Unpaid Intern

I've employed interns my whole career, gotten lots of "immediate advantage" out of them. They've done most of the research for my books and most of the research that won me Emmy Awards for consumer reporting. I asked my TV bosses to pay for the research to help, but they laughed at me, saying, "You think we are made of money?" From then on, I got much of my help from unpaid college students.

. . . Am I evil? Am I going to jail?

– John Stossel

The Unpaid Intern (Continued)

- In April 2010, the DOL published Fact Sheet #71 which provides guidance for employers who operate internship programs under the FLSA.

The Unpaid Intern (Continued)

- The Fact Sheet # 71: The Six Factor Test for unpaid Interns:
 - 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;
 - the internship experience is for the benefit of the intern;
 - the intern does not displace regular employees, but works under close supervision of existing staff;
 - the employer that provides the training derives no immediate advantage from the activities of the intern; on occasion, its operations may actually be impeded;
 - the intern is not necessarily entitled to a job at the conclusion of the internship; and
 - the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
- According to the DOL, if all of the factors listed above are met, an employment relationship **does not exist** under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the for profit employer. See Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act; see also 5 C.F.R. § 551.104 (applying the same factors above to "trainees"). As discussed below, several Federal Appellate Courts employ a different analysis.

The Unpaid Intern (Continued)

- Similar to an Education Environment
- For the unpaid intern exception to apply, the purpose of the internship must not be to perform productive work.
 - The more an internship program is structured around a classroom or academic experience, as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience.
 - The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training.
 - Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern.

The Unpaid Intern (Continued)

- Displacement And Supervision Issues
 - If an employer uses interns as substitutes for regular workers or to augment its existing workforce, these interns will be viewed as employees and should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.
 - If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then they will be viewed as employees and entitled compensation under the FLSA.
 - Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs minimal or no work, the activity is more likely to be viewed as a bona fide education experience.
 - On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training. See Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act.

The Unpaid Intern (Continued)

- Job Entitlement
 - The internship should be of a fixed duration, established prior to the outset of the internship.
 - Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period.
 - If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be deemed an employee under the FLSA. Id.

DOL's Fact Sheet # 71:
The Catalyst to Litigation
Under the FLSA

Fact Sheet # 71

- Fact Sheet # 71 was instrumental in the DOL redoubling its efforts to crack down on employers that fail to pay interns properly.
 - In conjunction with the DOL's increased efforts, Nancy J. Leppink, then Acting Director of the DOL's Wage and Hour Division, said: "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law." Steven Greenhouse, *The Unpaid Intern, Legal Or Not*, The New York Times (Apr. 2, 2010).

Fact Sheet # 71 (Continued)

- Fact Sheet #71 also contains the following language:
 - "... if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work."

Fact Sheet # 71 (Continued)

- If this language is correct the unpaid intern must do nothing more than "observe" in the workplace; as soon as the intern performs any productive work, he or she must be paid.
 - Regardless of the fact that Fact Sheet # 71 has no legal effect, many courts give deference to the fact sheet and its language has been instrumental in spawning significant litigation.

Unpaid Interns, Local Laws, and the Differing Approaches of the Appellate Courts

New Jersey law relating to the use of Unpaid Interns

- In addition to the USDOL six factor test, New Jersey law requires:
 - The employment for which the trainee is training requires some cognizable trainable skill;
 - The training received during the internship is not specific to the employer and its needs, but may be applicable elsewhere for another employer or in another field or endeavor; and
 - The internship is sponsored by the employer, is outside regular work hours, and the intern does not perform productive work during the internship.
 - If a trainee does not meet all of the above-listed criteria, the trainee shall be considered to be an employee. See N.J.A.C. 12:56-2.1.

Pennsylvania law relating to the use of Unpaid Interns

- Pennsylvania law does not address the use of unpaid interns and would likely follow the DOL six factor test.

New York law relating to the use of Unpaid Interns

- According to the New York State Department of Labor ("NYSDOL"), an unpaid internship is only lawful in the context of an education training program, when the interns do not perform productive work and the employer derives no benefit. "If an employer used trainees as substitutes for regular workers to augment its existing workforce during specific times or in general, these interns would be treated as employees." The NYSDOL's test, mirroring that of the U.S. Department of Labor, is based on the United States Supreme court's 1947 decision in Walling v. Portland Terminal Co., which held that the federal definition of "to employ" as "to suffer or permit to work" does not include student participation in an educational or vocational training program, so long as the employer derives no benefit from the trainees' work. The Court cautioned against arrangements "in which an employer has evasively accepted the services of beginners at pay less than the legal minimum without having obtained permits from the [Secretary of Labor]."

California law relating to the use of Unpaid Interns

- On April 7, 2010, the California Division of Labor Standards Enforcement (“DLSE”) issued an opinion letter addressing the requirements employers must meet in order to have unpaid interns in compliance with California law.
- The DLSE followed the federal Department of Labor's (DOL's) criteria for determining whether the interns were exempt from minimum wage coverage and examined the "totality of the circumstances" surrounding their activities. Ultimately, the DLSE's opinion letter reiterated its longstanding position that California follows the same stringent federal factors in analyzing the classification of interns. See DLSE Opinion Letter dated April 7, 2010.
- Like the US DOL, the DLSE's opinion letter concluded that all six criteria also must be satisfied in California. Id.

The Differing Views of the Federal Appellate Courts

- Appellate courts interpreting the FLSA have not consistently followed the DOL six-factor test for determining an intern's status.
 - Some courts have explicitly criticized the test. Others apply an "economic realities" test or look at the primary beneficiary of the work performed.

The Differing Views of the Federal Appellate Courts (continued)

- The Tenth Circuit applied a totality of the circumstances test considering the DOL's six criteria, but finding that all six criteria are not required for trainees to be excluded from the FLSA. See Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993).

The Differing Views of the Federal Appellate Courts (continued)

- The Fourth and Sixth Circuits applied a "primary beneficiaries" test, which means that the individual's status as a trainee depends on whether the employer or the individual is the primary beneficiary of the work performed. See, Solis v. Laurelbrook Sanitarium and Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011); see also McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

The Federal Appellate Courts Interpretation of the FLSA (continued)

- The Fifth Circuit cited the DOL's six factor test with approval and held that it is entitled to substantial deference. See Atkins v. General Motors Corp., 701 F.2d 1124 (5th Cir. 1983); see also Donovan v. Am. Airlines, Inc., 686 F.2d 267 (5th Cir. 1982).

Not for Profit/Government Agency Unpaid Interns

Not for Profit/Government Agency Unpaid Interns

- Under the FLSA unpaid internships are generally allowable for individuals who **volunteer** their time to nonprofit organizations for religious, charitable, civic, or humanitarian purposes, provided they do so freely and without expecting any compensation.
- There are limits, however. For example, individuals who work in a commercial operation (such as a clothing store or a farm) operated by a non-profit organization are likely to be deemed employees and therefore subject to the FLSA. See *Alamo Found'n v. Secy. Of Labor*, 471 U.S. 290 (1985).

Not for Profit/Government Agency Unpaid Interns (Continued)

- Relevant factors may also include whether the volunteer intern works full-time and whether the volunteer intern displaces any employees.
- In a 2006 opinion letter the United States Department of Labor (“USDOL”) stated: “Typically, such volunteers serve on a part-time basis and do not displace paid workers or perform work that would otherwise be performed by employees.” See Opinion Letter FLSA2006-4, January 27, 2006.

Litigation by Unpaid Interns Under the FLSA

Fox Searchlight Class Action

BLACK SWAN

- On September 28, 2011, Eric Glatt and Alexander Footman, two unpaid interns who had worked on production of the film Black Swan filed a class action complaint in the United States District Court for the Southern District of New York against Fox Searchlight, the specialty and independent film division of Twentieth Century Fox Film Corporation.
 - While working on the set of Black Swan, the pair had performed basic chores such as manning phones, fetching coffee, and taking out the trash.
 - The complaint alleges that Fox Searchlight violated federal and state labor laws by failing to pay wages to interns who perform the work of production assistants, bookkeepers, secretaries and janitors on films produced and co-produced by Fox Searchlight.

Fox Searchlight Class Action

BLACK SWAN (Continued)

- On June 11, 2013, U.S. District Court Judge William H. Pauley III, of the Southern District of New York ruled Fox Searchlight Pictures Inc. and Fox Entertainment Group, Inc. ("FEG") liable for failing to pay interns in violation of federal and state labor laws.
 - In the first ruling of its kind, the judge concluded that named plaintiffs were employees of Defendant Fox Searchlight Pictures protected by federal and state wage and hour law.
 - According to the judge: "Searchlight received the benefits of their unpaid work, which otherwise would have required paid employees."

Fox Searchlight Class Action

BLACK SWAN (Continued)

- In reaching its decision, the court examined:
 - Was the training similar to an educational environment.
 - Was the internship experience for the benefit of the intern.
 - Did the interns displace regular employees.
 - Did Searchlight obtain an immediate advantage from plaintiffs' work.
 - Were the plaintiffs entitled to a job at the end of the internship.
 - Did Searchlight and the plaintiffs understand that they were not entitled to wages.

Charlie Rose Class Action

- On March 14, 2012 Lucy Bickerton, a former intern on a PBS talk show, filed a class action complaint in New York against Charles Rose and Charles Rose, Inc.
 - Bickerton alleged that she regularly worked at least 25 hours per week without pay while interning in 2007.
 - Bickerton alleged that her responsibilities included performing daily background research from print and online sources to prepare Mr. Rose for guest interviews, assembling press packets, escorting guests through the studio, breaking down the set after filming, and cleaning up the green room.
- On June 28, 2013, days after the Black Swan case was decided, Rose settled this matter for approximately \$110,000.00, agreeing to pay each eligible intern \$110.00 for each week worked up to a maximum of 10 weeks – the average length of an academic semester internship.

NBC Universal Class Action

- On July 3, 2013, a class action complaint was filed in the United States District Court for the Southern District of New York against NBC Universal. The named plaintiffs are two former NBC Universal interns who had provided services for Saturday Night Live and MSNBC cable news.
- The complaint seeks at least \$5 million and alleges that NBC Universal violated federal and state labor laws by failing to pay proper wages to interns who performed productive work on its television programs and in other parts of its multi-media enterprise.
 - Plaintiffs allege that they are owed the applicable minimum wage rate for all hours worked.
 - Plaintiffs are seeking to have the lawsuit certified as a class action to recover unpaid wages, liquidated damages, interest and attorneys' fees for interns who worked for NBC Universal between July 3, 2007 and the date of final judgment.

Wang v. Harper's Bazaar Class Action

- On February 1, 2012, former Harper's Bazaar intern, Xeudan Wang filed a class action lawsuit in the United States District Court for the Southern District of New York against the Hearst Corporation.
 - The Complaint alleges that Hearst pays its interns no compensation for the work they perform, including minimum or overtime wages, in violation of federal and state labor laws.
 - On May 7, 2013, the Court denied plaintiffs' motion for partial summary judgment with respect to their "employee" status under the FLSA and the New York labor law.
 - On June 27, 2013, the Court granted plaintiffs' motion to appeal the decision.

Practical Concerns –Protecting
Against Potential Exposure to
Litigation by Unpaid Interns
Under the FLSA

Reducing the Risk of Litigation by Unpaid Interns

- To reduce the potential for a lawsuit, the focus of a compliant internship program should be on providing interns with learning opportunities that build transferable skills that are aligned with specific learning objectives and can be used in multiple employment settings.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Employers who use unpaid interns must consider:
 - how similar the internship is to an educational environment, as opposed to the employer's actual operations.
 - The more educational, academic, or classroom-like the internship experience is, the less likely the intern will be considered an employee.
 - Note however, merely offering school credit to unpaid interns as a benefit to the intern does not eliminate the employer's obligation under the FLSA. School credit alone likely will not satisfy the USDOL test, because all six factors must be considered.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Be confident that the internship experience is for the benefit of the intern – not the employer.
 - If the intern's services include tasks such as filing, performing other clerical work, or assisting customers, it is likely that the employer is benefiting from the internship experience, creating employee status under the FLSA.
 - Conversely, if the intern is not engaged in performing tasks and observes employees performing their duties, or shadows an employee during their work day, the internship will likely be viewed as a benefit to the intern.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Do not allow the intern to displace regular employees.
 - If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- The employer must not derive any immediate advantage from the activities of the intern; on occasion, its operations may actually be impeded.
 - This is often the most difficult factor for employers to meet, because many of the tasks that interns are asked to perform will, by their very nature, provide immediate advantages to the employer.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Do not create an internship that promises, or creates an expectation of, a job to the intern at the end of the internship.
 - If so, it is more likely that the intern will be considered an employee under the FLSA.
 - This factor can become more problematic for employers that wish to use internship programs as a "proving ground" for new workers just finishing school or entering the workforce.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Get It in Writing.
 - All employers should require interns to sign a written agreement that clearly spells out the purpose of the internship and the business's expectations for the intern.
 - The agreement should also make clear that interns do not have any expectation of employment at the end of the internship and are not entitled to wages for their time spent as an intern.
 - Because an individual cannot waive their FLSA rights, an employer should not depend solely on any waiver by the intern of the statutory entitlement to wages for his or her services.
 - Regardless of any agreement, the intern may still be considered an employee under the FLSA and entitled to wages.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Create Program Materials for the Interns.
 - While a compliant internship program need not mimic the curricula developed in college-level courses, there should be some academic or educational component incorporated in all internships.
 - This would normally include:
 - written materials that cover specific learning objectives
 - shadowing experiences
 - experiential learning opportunities and traditional classroom learning.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- Assign a Mentor to Each Intern.
 - An appropriate mentor can be a valuable resource, providing a wealth of knowledge to an intern.
 - Having a mentor supervise the work of an intern lessens the likelihood that the person will be perceived as having a level of autonomy that would threaten their status as an intern.

Reducing the Risk of Litigation by Unpaid Interns (continued)

- **Select Interns Based on Scholastic Achievement.**
 - Interns should be selected based on their scholastic achievement and demonstrated willingness to learn.
 - Employers that use an intern selection process that is substantially similar to the hiring process for new employees may threaten intern status.

Questions?

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