UNPAID INTERNSHIPS: A VIOLATION OF MINIMUM WAGE REQUIREMENTS?

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"Who is that kid?" That is the first question asked upon seeing a 20-something college student, arriving for the first day of his or her summer internship. Now, according to the U.S. Department of Labor, there needs to be a second question – "should we be *paying* that kid?"

For decades, unpaid internships have been common in the American workforce. Intern Bridge, a firm that conducts research on internships, estimates that undergraduate students work in more than one million internships a year – half of which are unpaid. Undoubtedly, an internship can provide a valuable, hands-on learning experience to a young professional. But is that experience, without monetary recompense, sufficient compensation?

Supporters of unpaid internships argue that if employers are forced to pay interns, they will instead simply hire full-time employees and it will become more difficult for students to find internships. Critics argue that unpaid internships exploit college students and cause regular employees to lose jobs because students are willing to work for free. Additionally, critics point out that unpaid internships unfairly benefit students from wealthy families because many students cannot afford to take unpaid positions. Supporters counter that unpaid internships are a voluntary exchange – if a student wants to work for free and a company wants to give the student an opportunity, why should the government interfere?

Regardless of which side of the debate on which you may fall, employers need to ensure they are in compliance with the law in providing internships. Until recently, courts had not been confronted with the question of whether unpaid internships violate federal and state minimum wage laws. Now, however, the issue has become an increasingly popular source of litigation.

In June of 2013, a Federal District Court in New York ruled that Fox Searchlight should have been paying interns that worked on the production set of "Black Swan," a movie that was released in 2010.[1] Although Fox is currently appealing the ruling, the court's opinion provides some helpful guidance for companies that offer unpaid internships.

An intern can either be a "trainee" or an "employee." Interns in the for-profit, private sector who qualify as employees (not trainees) must be paid at least the minimum wage and overtime for hours worked over 40 in a workweek. It is important to note that these requirements only apply to the private sector; unpaid internships in the public sector and non-profit charitable organizations are still permissible.

A Department of Labor fact sheet provides guidance to for-profit businesses in determining whether their interns should be monetarily compensated.[2] It lists six general criteria that every employer should weigh in determining whether interns are trainees or employees. Interns are likely to be considered trainees, not employees, when:

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 at the internship.

In examining these factors with regard to the facts of the *Fox* case, the court noted that the employer's operations with which the interns became intimately familiar on this movie set were the coffee maker, the photocopier, and how the company watermarked its movie scripts. An educational environment teaches skills that a person can use for many different employers in an industry. The court reasoned that the new skills the interns learned at Fox were the same skills that Fox's normal employees learned through on-the-job training. Simply put, the court concluded that the internship was not designed to be more educational than a paid position.

Next, the court looked at which party truly benefited from the internship. The interns were free to list the internship on their job resumes and acquired some job references in the process – not to mention the experience itself. While arguably highly beneficial, the court found that these rewards were available from any working relationship and "not the result of internships intentionally structured to benefit the interns."

The court also found that Fox was the entity that truly benefited from the internship. The interns organized filing cabinets, took out trash, and ran errands, all at no cost. Normally, paid employees would have done these tedious yet essential activities. Thus, Fox benefitted by having the interns perform work that a paid employee normally would perform (see factors two, three and four listed above).

Regarding the final two factors, the court found that there was no evidence that the interns were entitled to positions at Fox at the end of the internship and that the interns understood that they would not be paid for the internship. While these factors supported a finding that the interns did not need to be paid, the court ruled that, based on the "totality of the circumstances" they should have been.

Under *Fox*, to qualify as an unpaid internship, the internship should be "designed to be uniquely educational to the interns and of little utility to the employer." The internship program should resemble an academic setting or vocational school. While many employers justify unpaid internships by offering academic credits, the *Fox* court said that academic credits alone do not automatically convert an unpaid employee into a trainee.

Based on the Department of Labor guidelines and decisions like the *Fox* case there are now clear liability risks associated with unpaid internships. In 2012, PBS paid approximately $110,000 to settle a class-action suit filed on behalf of unpaid interns of Charlie Rose's show. Similarly, in 2013 unpaid interns sued Sean Combs, MTV, Fox Soccer Channel, Warner Music Group, Nickelodeon, MSNBC, *Saturday Night Live*, Gawker, and the Pittsburgh Power arena football team, among other employers, for unpaid wages. *Condé Nast*, which had one of the most coveted internship programs in its industry for years, closed its internship program in 2014 after former unpaid interns brought a lawsuit against the company.

Notably, the cases so far have been mostly centered in New York and Los Angeles as unpaid interns attacked primarily entertainment, fashion and publishing industry employers. It is likely only a matter of time, however, before similar claims are brought against other private businesses. At least two other unpaid internship lawsuits, both of which are still in the beginning stages of litigation, have already been brought against a law firm and a marketing/public relations firm. Even the White House, which legally has unpaid interns because it is in the public sector, has felt pressure from critics of unpaid internships to change its program.

This threat of litigation should cause all employers to take a hard look at their internship programs. What can employers do to make sure their internship programs are in compliance? Foremost, employers need to remember that there is no such thing as free labor – even when the intern is willing to work for free.

When an employer substantially benefits from the intern's work, then the intern will likely be considered an employee who is entitled to compensation. This is true even if the intern gains valuable skills and experience along the way. Also, interns should be paid when they are performing normal work functions on behalf of the employer that would otherwise be undertaken by paid employees.

If, however, routine employees take time away from their normal duties to supervise and train the interns, the experience is likely for the *benefit* of the intern and not the employer. In this situation, an unpaid internship may well be appropriate. Conversely, if an intern is working independently and without supervision, he or she is probably functioning as a standard employee who should be compensated.

To establish a legal, unpaid internship, employers may have to impede their own productivity to offer opportunities to an intern that would not be available to a regular employee; for example, where an intern "job shadows" a regular employee but performs little or no productive work. In this situation, the internship clearly benefits the intern, but not the employer. Similarly, when regular employees take time to describe their careers or teach interns how to perform some of their specific work functions the intern, not the employer, benefits.

Often an internship program will be beneficial to *both* the intern and the employer. But what benefit the intern may perceive after the internship is over could vary drastically, and with costly results, from the perception of the employer. As a result, businesses may consider consulting an employment lawyer to better understand what tasks an unpaid internship can entail.

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[1] See *Glatt v. Fox Searchlight Pictures Inc.*, 2013 U.S. Dist. LEXIS 82079, 20 Wage & Hour Cas. 2d (BNA) 1436, 2013 WL 2495140 (S.D.N.Y. June 11, 2013).

[2] U.S. Department of Labor Fact Sheet #71 (April 2010), which can be found at http://www.dol.gov/whd/regs/compliance/whdfs71.htm