

DO WE HAVE TO PAY SUMMER INTERNS?

With summer approaching, many employers are receiving requests from college and high school students to work as summer interns. Many of these applicants are willing to work for free to gain valuable experience and frequently their contribution to the bottom line is minimal. Is it legal to allow them to work for free? The answer is often “No.” Read further to see what you need to consider before you inadvertently expose your organization to a wage and hour claim or lawsuit.

On June 11, 2013, the U.S. District Court for the Southern District of New York ruled that two unpaid interns on the Fox Searchlight movie, “Black Swan,” should have been paid because they were essentially regular employees, not “interns” under the Fair Labor Standards Act (FLSA). The “Black Swan” ruling and other recent decisions are a wake-up call for companies to re-evaluate unpaid internship programs to ensure compliance with the law.

Indeed, for-profit companies that are currently using unpaid interns should be acutely aware that the FLSA’s exception that allows this practice is extremely narrow, and that any “intern” who does not fit the narrow exception must actually be paid as any employee.

Every “employee” under the FLSA must be paid at least minimum wage and, when applicable, overtime. Courts interpret “employee” very broadly. In fact, courts sometimes presumptively view internships at for-profit companies as employment. However, interns who receive training for their own educational benefit, rather than the benefit of the employer, may nevertheless meet the unpaid intern exception and not be paid. The U.S. Department of Labor (DOL) has identified six criteria that must be met for determining whether an internship program meets this narrow exclusion:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training that 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, and on occasion its

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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.

While some courts do not require that all six factors be met, the Court in the recent Fox Searchlight decision agreed with the DOL that all six factors must be satisfied. In whatever court a company finds itself, the ultimate determination as to whether an unpaid intern is an “employee” entitled to compensation will be made on a case-by-case basis and depends upon all the facts and circumstances of the internship program.

In short, employers should proceed with caution and undertake a proper evaluation of their unpaid internship programs before those internships begin.