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Employment Law

The Perils of Unpaid Internships

By
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Unpaid interns are making headlines for their lawsuits demanding compensation. As courts grapple with whether unpaid internships violate minimum wage laws, all businesses - including law firms - should consider whether their unpaid internship program warrants revision.

Businesses using unpaid interns must comply with federal and state labor regulations. Often, they do not. Those flouting such laws do so at their peril, because an unpaid employee improperly labeled an "intern" can recover back pay, liquidated damages, and attorney's fees. Sanctions by federal and state agencies also loom.

Historically, actions to recover pay were unheard of. Not paying interns was the jaywalking of employment law. Businesses received free labor, while interns got much needed experience; with everyone satisfied, government agencies and wage and hour counsel turned a blind eye.

No more. High profile lawsuits against the Hearst Corporation,[1] Fox Searchlight Pictures,[2] Warner Music Group,[3] and NBCUniversal,[4] coupled with Department of Labor rumblings,[5] have required businesses to reevaluate their use of interns and courts to consider whether unpaid internships violate minimum wage requirements.

This article examines unpaid internships, applicable federal and Illinois laws, and recent litigation. It also suggests how to structure a legal internship program. It concludes with examining the plausibility of unpaid internships in law firms, and the American Bar Association's recent pronouncement on the issue.

Unpaid internships: opportunity or exploitation?

Once a last resort, unpaid internships are now coveted. The bleak job picture for recent college graduates has forced students desperate for experience to work for free. The College Employment Research Institute found that 75 percent of college students work as interns at least once before graduating, and 50 percent of those interns are not paid.[6] This phenomenon is recent - only 17 percent of all graduating students in 1992 held internships.[7]

Internships have become essential for obtaining full-time work after college. Many employers value internship experience more than grades.[8] Unpaid internships provide tremendous opportunities to learn and network, especially in the entertainment, public relations, and publishing industries, where paid internships are rare. Small start-up companies offer ideal learning environments, but lack the resources to compensate interns.

While unpaid internships provide substantial benefits, money is not one of them. Interns are ultimately volunteers who agree to work for free. Worse, students paying tuition for internship credits pay for the privilege of working.

They often endure these realities in the hope that a full-time job will result. But a recent survey suggests this hope is misplaced. The National Association of Colleges and Employers found paid internships lead to a job 60 percent of the time, while unpaid interns fared no better than graduates without an internship.[9] Specifically, 37 percent of unpaid interns received job offers compared to 36 percent of graduates with no internship experience.

The advantage of paid internships was further accentuated in the for-profit sector, where 64 percent of paid interns earned jobs compared to 38 percent of their unpaid peers. The survey also reported that the median starting salary for a new graduate with a paid internship is $51,930, contrasted with $35,721 for those with unpaid internships.

Some businesses portray their internship programs in an unrealistically sanguine light. Enticed by tales of interesting, hands-on experience, interns instead find themselves toiling in mundane tasks.

Anecdotes of such abuse abound. Interns at an e-commerce website spent their days steaming, hanging, and straightening clothing.[10] A law firm intern made coffee and cleaned restrooms.[11] An internship at a film company consisted of wiping door handles to curb the H1N1 virus.[12] While not being paid for such work (or paying to do it) is disconcerting, agreeing to do so under false pretenses is especially troubling.

Unpaid internships are also criticized for diluting the labor market. A Pew Charitable Trust study found that only 54 percent of those aged 18 to 24 are employed, suggesting that internships undercut entry-level jobs.[13] One commentator calculates that the millions of unpaid internships have eliminated hundreds of thousands of paying jobs.[14]

Further, unpaid internships are often unattractive to low-income students. A 2010 Economic Policy Institute report concluded that taking an unpaid internship depends on a "student's economic means, thus institutionalizing socioeconomic disparities beyond college."[15] Foregoing opportunities in entertainment, fashion, and publishing thus puts poorer students at a disadvantage when it comes to pursuing job opportunities in those industries.

While the drawbacks of unpaid internships can be debated, the minimum wage and overtime regulations set forth in the next sections cannot.

Federal law governing unpaid internships

The Fair Labor Standards Act ("FLSA") regulates much of the employment in the United States.[16] The statute is administered by the Wage and Hour Division ("WHD") of the U.S. Department of Labor.[17] Employees are protected by the FLSA if their work affects interstate commerce.[18]

Under the FLSA, an "employee" is anyone "employed by an employer."[19] "Employ" is defined as "to suffer or permit to work."[20] The FLSA requires that employees receive at least $7.25 per hour and time-and-a-half for all hours worked over 40 hours per week.[21] State laws may guarantee a higher minimum wage.[22]

Not everyone can be a "volunteer." The FLSA does not use the term "intern." However, it does address when services can be volunteered. Individuals who volunteer for public service, religious, or humanitarian objectives without contemplation of pay, are not considered employees of the religious, charitable, or similar non-profit organizations that receive their services.[23] The FLSA also permits individuals to volunteer for public sector employers.[24] In contrast, employees may not volunteer services to for-profit private sector employers.[25]

Not everyone can work for less than the minimum wage. The FLSA also permits for-profit, private sector employers to hire "students, learners, and apprentices" at a wage less than minimum wage.[26] These subminimum wage employees include full-time students working in retail, service, agriculture, or higher education and employees whose mental or physical disability impairs their earning or productive ability.

Subminimum wage employment requires a certificate issued by the WHD. An employer must demonstrate a subminimum wage is necessary "to prevent the curtailment of opportunities for employment" and that reasonable efforts were made "to recruit workers paid at least the minimum wage in those occupations...."[27]

Unpaid internship programs, on their face, appear to not satisfy these criteria. There would likely be workers who would accept minimum wage for the work in question. It is not unreasonable to believe, for example, that a law student would be willing to gain law firm experience for minimum wage given the weight of law school student debt.

The labor department's Wage and Hour Division addresses interns. An important function of the WHD is the issuance of non-binding bulletins and opinions interpreting the FLSA.[28] While the WHD has issued opinion letters applying the FLSA to internships, such letters lack the force of law and courts need only consider them if they are deemed "persuasive."[29] These limitations aside, the WHD's opinion letters are instructive and should be consulted when structuring an internship program.

To determine whether an intern is an "employee" under the FLSA, and thus entitled to minimum wage, the WHD uses a test from the U.S. Supreme Court decision of *Walling v. Portland Terminal Co*.[30] In *Walling*, prospective rail yard brakemen sought compensation for a week-long training course. The *Walling* Court applied a six-part test under which an intern is not an employee, and thus not entitled to compensation, if:

• the training the internship provides is similar to a vocational school;

• the training benefits the intern and not the company;

• the intern does not displace any regular employees and works under close supervision;

• the company gets no immediate advantage from the intern's activities;

• the intern is not entitled to a job at the end of the internship; and

• the company and the intern both understand there is no compensation.[31]

Because the *Walling* trainees displaced no employees, the trainees were closely supervised, and the employees did most of the work themselves, the Court determined the trainees were not employees. Thus, it was appropriate for them to be unpaid.

The WHD requires that all six *Walling* factors be met; otherwise, as the WHD explained in an opinion letter, an intern is an employee even if the internship is "academically oriented for the benefit of the students."[32] The WHD further advises that an internship involving "no or minimal work...is more likely to be viewed as a bona fide educational experience."[33] Internships also cannot serve as trial periods for individuals seeking a paid position after the internship.

In another opinion letter, the WHD found that a week-long university externship where students shadowed employees did not create an employment relationship.[34] While the students received no academic credit and performed some minor office tasks, they were not employees because "the sponsors invested significant effort into designing experiences for the externs" and future employment was not guaranteed.[35]

Enforcing minimum wage laws has become a WHD priority.[36] The WHD recently warned that "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."[37]

This pronouncement should not be dismissed. FLSA violations entitle successful plaintiffs to unpaid minimum wages and overtime, liquidated damages, and attorney's fees.[38] Aggrieved workers can also sue an employer who discharges or discriminates against them for asserting their FLSA rights.[39] The FLSA further enables the Secretary of Labor to recover back wages and liquidated damages.[40] Intentional FLSA violations may be criminally prosecuted by the U.S. Department of Justice.[41] Finally, the danger of the class action always lurks.

Illinois law governing unpaid internships

State wage requirements, codified in the Illinois Minimum Wage Law ("IMWL"), offer little beyond the FLSA.[42] The IMWL echoes the FLSA's standards, including attorney's fees.[43] Workers not covered by the FLSA because they or their employers are not engaged in interstate commerce are protected by the IMWL.

The evolution of unpaid internship litigation

Prior to 2013, there appear to be no judicial decisions addressing the legality of unpaid internships under the FLSA. However, outside the intern context, courts have addressed when someone is an "employee" for FLSA purposes.

For example, a New York federal district court found homeless volunteers doing administrative work at an outreach mission were employees because they "performed productive work," despite receiving job skills and an employment history.[44] The court concluded that when an employer "suffers or permits [an individual] to work," it benefits and must compensate.[45]

The U.S. Court of Appeals for the Fifth Circuit held that attendees of an airline's training program were not employees because regular workers were not displaced and the benefits to the airline were not immediate.[46] And the U.S. Court of Appeals for the Tenth Circuit determined that firefighting academy participants were not employees despite an expectation of employment upon course completion.[47] While distinct from the student intern setting, these cases capture the fact-intensive nature of the "employee" determination under the FLSA.

That interns have historically not sued to recover wages is understandable. To do so could jeopardize their opportunities for meaningful, paid work in a profession of their choosing. But the catalyst for change appears to be unpaid internships in which menial tasks were the major, if not only, assignment, and a full-time position did not follow.

For example, unpaid interns working on the film *Black Swan* brought a class action in New York federal district court.[48] Lead plaintiffs Eric Glatt and Alex Footman sued Fox Searchlight Pictures because their work was more janitorial than educational - preparing coffee, taking lunch orders, disposing of garbage, and cleaning offices. The class asserted that interns doing such work for the film, which grossed over $300 million, should have been classified as employees.

Both parties moved for summary judgment, and in June 2013, the district court granted in part the plaintiffs' motion. The district court found the interns were "employees" under the FLSA because the internship program lacked an educational component, did not benefit the interns, and displaced regular employees.[49] Benefits such as resume listings and

job references were the results of "simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns."[50]

Fox Searchlight Pictures conceded it benefited from the interns' work, but asserted the WHD's six-factor test should be replaced with a "primary benefit test" which considered whether the internship benefited the intern more than the employer. The district court found this test incompatible with *Walling* because the Supreme Court "did not weigh the benefits to the trainees against those of the railroad, but relied on findings that the training program served only the trainees' interests and that the employer received no immediate advantage from any work done by the trainees."[51] The district court further criticized the primary benefit test as "subjective and unpredictable" because the same internship position could benefit one intern but not another.

After *Glatt* was filed, other interns followed suit. Xuedan Wang worked up to 55 hours a week as an unpaid intern at Harper's Bazaar and she sued the magazine's parent company, Hearst Corporation, in New York federal district court claiming the internship violated the FLSA and New York labor laws.[52] The suit alleged that classifying Wang and hundreds of others as unpaid interns to work as "messengers, delivery people, assistants, and secretaries" enabled Hearst to avoid paying wages.[53]

Plaintiffs moved for partial summary judgment. Hearst countered that issues of fact existed because *Walling* necessitated considering the "totality of circumstances" of the training program.[54] Unlike *Glatt*, the district court in *Wang* agreed with the defendant and used a "totality of circumstances" test to deny summary judgment in May 2013.

The district court noted that since the trainees in *Walling* were not employees because the company gained no immediate advantage, "it does not logically follow that the reverse is true, i.e. that the presence of an 'immediate advantage' alone creates an employment relationship."[55] The WHD's six-factor test was not a rigid checklist but "a framework for an analysis of the employee-employer relationship," and since Hearst showed some educational training and some benefit to interns, summary judgment was improper.[56]

The plaintiffs in *Wang* also sought class certification, a common vehicle for FLSA lawsuits. Hearst argued that since the internship's benefit depended on the totality of circumstances for each intern, individualized questions precluded certification. The district court agreed and denied class certification.

New York state court has also been a venue of choice for intern suits. PBS television host Charlie Rose was sued by intern Lucy Bickerton and a class of 189 interns in New York state court.[57] Job duties entailed doing research, escorting guests, and cleaning up after the show. The class alleged working 25 hours a week without pay in violation of New York labor laws. The class settled with Rose for $250,000.

The class actions against Rose, Hearst, and Fox Searchlight Pictures may be the opening of a deluge. In June and July of 2013, unpaid interns filed suits against NBCUniversal, Warner Music Group, and Condé Nast.

Interns Jesse Moore and Monet Eliastam sued NBCUniversal in New York federal court for violating the FLSA and New York labor laws.[58] Moore alleged working over 24 hours a week in the booking department at MSNBC while Eliastam worked over 25 hours a week at Saturday Night Live.

Additionally, former unpaid interns sued Warner Music Group in New York state court for wage violations.[59] Lead plaintiff Justin Henry alleged working seven hours a day answering phones, making photocopies, and getting lunches.

Interns also filed a federal suit in New York against magazine publisher Condé Nast.[60]The interns worked at magazines published by Condé Nast and were paid less than $1 an hour for tasks ranging from proofreading to unpacking boxes. The classes in these cases, which will likely number in the hundreds, have not yet been certified.

The evolving 'employee v. intern' tests

The dueling district court decisions in *Glatt* and *Wang* are the opening salvos in the intern interpretation battle. *Glatt* strictly applied the WHD's six factors, while *Wang* used the more flexible "totality of circumstances"

test. *Glatt*'s requirement that an employer satisfy all six factors virtually ensures an intern will be deemed an "employee." In contrast, *Wang*'s "totality of circumstances" approach neutralizes, or at least downplays, the employer benefit factor, increasing the odds employers will prevail.

While both the *Wang* and *Glatt* approaches are viable, the origins of the WHD's six-factor test may shed light on which is more practicable. The test derives from *Walling*, which involved a blue-collar internship. But the office setting for today's typical unpaid intern is far removed from the rail yard in *Walling*. Further, the week-long training in*Walling* necessitated significant oversight of the trainees, essentially making the program a burden to the company.

In contrast, the tasks of many office interns today can be done with minimal oversight, generating more benefits than costs to businesses. The requirement that a company not receive immediate benefits from an intern's work will thus be difficult to meet. As such, *Wang*'s "totality of circumstances" test, although deviating from the WHD's strict application, may be more apt for the modern day office intern setting.

Ultimately, the WHD may revise the six factors to craft a test that is more practicable. A one-size-fits-all approach does not account for company size or revenue. Injecting flexibility into the analysis might enable small start-ups to use unpaid interns while ensuring that established corporations do not abuse the internship process.

Developing an FLSA-compliant unpaid internship program

While class actions against media conglomerates have garnered the most attention, the FLSA transcends industry and company size, making any business with an unpaid intern a potential defendant. As courts grapple with the legality of unpaid internships, businesses contemplating unpaid internship programs should consider the following. (See sidebar for specifics about law-firms and interns.)

In designing an internship program, the lodestar should be what the intern can learn, not how the intern can be used. Companies should thus avoid internships consisting of menial tasks. When an internship benefits the intern, an employment relationship does not exist.[61] But if interns perform filing, clerical, or customer assistance work, they are

employees because the employer benefits. Further, the WHD considers interns as employees if they substitute for regular workers.

The WHD has warned that academic credit alone will not circumvent the six-factor test.[62] Still, employers might consider working with schools to decrease the risk of litigation, both through granting interns academic credit and establishing different credit requirements for programs based on an intern's academic interest.

Ultimately, satisfying the WHD's requirements will turn on the facts of each intern's experience. To that end, the best way to avoid legal entanglements is to treat interns as employees by paying them minimum wage. Companies that have been sued by unpaid interns have done just that. NBCUniversal now pays its interns, as does Fox Searchlight Pictures.[63]

Conclusion

The issue of unpaid internships is currently in a state of flux, and how courts will ultimately decide the issue remains to be seen. Regardless, classifying workers as interns to avoid paying wages violates the FLSA. Businesses using unpaid interns should thus assess whether their interns are "employees" under the six-factor test and adjust their compensation structure accordingly. ■

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Unpaid internships in law firms

The Department of Labor gives law-firm employers special protection for pro bono projects.

Legal employers should be especially sensitive to the consequences of unpaid internships. Law students are often used as unpaid interns by law firms and businesses. The specter of litigation will likely curtail this practice. Still, for some students, unpaid internships are the only way to gain real world experience.

Recognizing this dilemma, the former president of the American Bar Association wrote the United States Department of Labor regarding law students who work as unpaid interns on pro bono matters, and pointed out that the FLSA does not "permit or prohibit pro bono internships with private law firms…." (Letter from Laurel G. Bellows, President of the American Bar Association, to Hon. M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor (May 28, 2013), available athttp://www.scribd.com/doc/144691085/ABA-Letter-to-Dept-of-Labor-Legality-of-Unpaid-Interns.)

This "uncertainty" has precluded firms from using law students as unpaid interns on pro bono work, prompting the ABA to seek assurance that such firms work would not be punished. The protection would be limited to pro bono projects, or projects for which the employer would not be expecting compensation, with interns' law schools acting as an intermediary between interns and their employers.

In response, the Department of Labor stated that students may work as unpaid interns on pro bono matters at law firms. However, the internship must offer training similar to that gained in an educational environment and the experience must be for the benefit of the intern. (Letter from Hon. M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor, to Laurel G. Bellows, Immediate Past President, American Bar Association (September 12, 2013), available athttp://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLSA_091213.pdf.)

Pro bono work aside, like businesses in other industries, the legal profession would be wise to reconsider its approach to unpaid internships and either pay interns minimum wage or ensure clerical, filing, and administrative work is not a mainstay of an intern's day.

- Chris Keleher

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