UNPAID INTERNSHIPS: A THING OF THE PAST?

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Recent court decisions have bottom-line implications for businesses.

Employers have historically used unpaid interns for a wide variety of reasons, it being taken for granted that the research, filing, memo preparation, Xeroxing and coffee-schlepping were necessary steps to robust career growth. And the significance of unpaid interns in the United States is unmistakable—some estimates place the number of unpaid student internships at between 300,000 and 500,000 per year.

In light of these sluggish economic times and rising labor costs—including rising healthcare premiums (coupled with heightened coverage requirements) and upward pressure on minimum wages—the incentives to utilize unpaid interns would seem to be greater than ever. However, a relatively recent case and a multitude of new lawsuits suggest that unpaid interns should not be returning to work come this summer—or at least not in the same capacity.

In 2011, Eric Glatt and Alexander Footman brought a class action suit against Fox Searchlight Pictures Inc. and Fox Entertainment Group, Inc. (collectively "Fox"). Plaintiffs worked as unpaid interns on production of the film *Black Swan* in New York. Their lawsuit contended that Fox violated federal and state labor laws by classifying them as unpaid interns instead of paid employees.

A Department of Labor fact sheet helped the court evaluate whether interns at for-profit businesses fall within an exception to the employer-employee relationship. The fact sheet enumerates six criteria for determining whether an internship may lawfully be unpaid: (1) 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, and not merely on-the-job training; (2) the internship experience is for the intern's benefit; (3) the intern does not displace regular employees, but is closely supervised by existing staff; (4) the employer derives no immediate advantage from the intern, and on occasion, the intern may actually impede operations); (5) the intern is not necessarily entitled to a job following the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In June, the court found that Fox received the immediate advantages and benefits of plaintiffs' unpaid work, which consisted of routine tasks that otherwise would have required paid employees. While there was no evidence plaintiffs were entitled to jobs at the end of their internships, and plaintiffs understood they would not be paid, considering the totality of the situation, the court found that plaintiffs were improperly classified as unpaid interns and instead were "employees." The benefits plaintiffs may have received—such as knowledge of how a production office functions or references for future jobs—were the result of simply having worked as any other employee works, not of internships designed to be uniquely educational and of little utility to the employer.

Under similar circumstances to the *Glatt* case, NBCUniversal, Warner Music Group, Gawker Media, Sony, Hearst Magazines and Conde Nast also have been sued. These lawsuits may mirror a larger cultural shift in the acceptability of using unpaid interns. A short time ago, Sheryl Sandberg drew criticism for posting unpaid internship positions for her not-for-profit foundation, *LeanIn.Org* (although, in fairness, the criticism may be exacerbated by her wealth and the foundation's aim).

The exposure to employers for using unpaid interns can prove quite costly: unpaid wages and overtime can be recovered for a period of two years (three years in the case of a willful violation), and a court may double the amount owed as liquidated damages.

What then are employers to do? In the short term, employers should analyze their intern hiring practices in light of the six criteria listed above to determine whether an internship can remain unpaid. In the near-future, employers should consider proactively implementing written policies shaping unpaid internship programs to ensure compliance with those criteria. From a non-legal perspective, employers may also wish to more fully weigh the economic and publicity pros and cons of using unpaid interns. Already, marketplace trends are reflecting the withdrawal of internship postings and relocation of internship opportunities overseas.

Whatever the decision, the issue promises to have bottom-line, finance-intensive implications for companies. Continued use of unpaid interns will result in amplified compliance expenses, due to the necessity of wading through and implementing the Department of Labor fact sheet, and an augmented risk of federal and state labor violation claims. Discontinued use of unpaid interns will result in increased labor costs (as unpaid interns become paid employees) or diminishing labor productivity (as unpaid internship programs are abolished and substantive work is transferred to current employees). Employers are effectively being forced to choose between the price of litigation, the payment of a minimum wage, or a reallocation of job responsibilities.

While it is too soon to tell what the *Glatt* case means for local businesses, come this summer there may be a few more executives schlepping their own coffee. iBi