

The Hazards of Unpaid Internships

As the academic year draws to a close, summer will soon be upon us, and with it, an abundant supply of college and graduate students looking for that sometimes elusive summer job. In today's economy, many of these young people may readily offer their services for free, if just to get experience in the field they wish to pursue. The idea of an unpaid internship may seem like the perfect vehicle both to satisfy your staffing needs and provide real-world experience for your summer help. Be very careful, however, going down this road. Depending on the work they perform, the law may consider your "unpaid" interns to be actual employees who must be paid.

The federal Fair Labor Standards Act ("FLSA") sets forth minimum wage and overtime pay requirements for all "employees." The Act broadly defines the term "employ" as "to suffer or permit to work." Thus whether a person—in this case your summer intern—is an "employee" under the Act (and whom you must pay) will depend upon all of the circumstances surrounding their activities on your premises.

Depending on the work they perform, the law may require your 'unpaid' interns to be paid.

Individuals working for another, but for their own benefit and without expectation of compensation, may not be considered employees. So held the Supreme Court in *Walling v. Portland Terminal Company*, a 1947 decision. From that ruling, the Department of Labor developed a six-factor test to determine whether trainees/interns are employees. If the internship satisfies the following DOL criteria, you need not pay your interns:

- The internship provides similar training to that 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 instead works under their close observation;
- The employer does not derive "immediate advantage" from the intern; in fact, the intern's training may actually hinder somewhat the operations of the business;

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About the Firm

In 2012 Shapiro Sher Guinot & Sandler was named the top medium-size law firm in Maryland for "Business & Transactions" by Super Lawyers, a division of Thomson Reuters. Founded by renowned sports lawyer Ronald M. Shapiro in 1972, the firm represents clients in numerous practice areas, including employment law, litigation, corporate, real estate, tax, and banking.

Shapiro Sher Guinot & Sandler's **Employment Law Group** is co-chaired by **Eric R. Harlan** and **Renée Lane-Kunz**. They are prepared to assist organizations with a wide spectrum of employment law matters, including recruiting and hiring practices, employee handbooks, discrimination matters, executive compensation, wrongful termination claims, and issues involving Title VII of the Civil Rights Act, The Family and Medical Leave Act, and The Americans with Disabilities Act. The Employment Law Group also assists with employment, severance, non-disclosure and non-compete agreements, among other matters.

Renée Lane-Kunz offers ongoing employment counsel to small and mid-sized companies as well as schools and institutions. She works closely with clients to help them anticipate and avoid litigation and regulatory complications. From handbooks to employment agreements, to general HR policies, she is ready to provide employers the tools they need in today's legal environment. As she brings to her practice extensive HR management experience in the hospitality industry, she fully appreciates the concerns of business owners.

Eric R. Harlan is a trial lawyer dedicated to the vigorous representation of clients in litigation. He has achieved favorable results in employment-related matters including claims involving violations of federal and state anti-discrimination laws, actions to enforce non-compete and non-solicitation agreements, wrongful discharge, and wage-and-hour litigation.

- 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 his or her services.

Avoiding intern litigation

Still, there may exist the temptation to train your interns for a short time but then reap some return for your effort, and have them perform tasks similar to your other employees. Surely your interns wouldn't think to press a legal claim against an employer in the area where they wish to obtain a job after graduation. Think again. Unpaid intern litigation is on the rise, with several high profile cases being filed in just the past few years.

For example, a former intern for the Charlie Rose show on PBS filed a class action against the show claiming her duties mirrored those of paid employees – only without the salary. Rose agreed to pay each intern \$110.00 per week for weeks worked, in addition to paying \$50,000.00 in legal fees to the lead plaintiff. This followed similar class actions against movie company FOX Searchlight, and Hearst Corporation's Harper's Bazaar, where the suits alleged that the companies used unpaid interns merely as free labor, instead of providing them with bona fide training.

Indeed there are online sites, such as internjustice.com, that will match plaintiffs' attorneys with disgruntled unpaid interns who wish to sue their employers if the employer's internship program fails to meet with DOL's criteria. A simple litmus test is this: does your company's unpaid internship benefit the intern more than it benefits your company? If so, you are likely providing good training and not subject to a wage and hour claim. If there is any gray area, then it is best to evaluate whether the internship should really be a paid position, or exist at all.

Finally, it should be noted that the FLSA payment requirements cannot be avoided simply by offering your interns a nominal "stipend"—so that they will not be considered "unpaid." If the intern is indeed paid for the tasks he or she performs, then it is not an internship. It is a job for which minimum-wage laws apply and which may require you to offer any additional benefits your other employees enjoy. If the internship meets the DOL test and you still wish to provide a stipend, make sure the intern understands that the stipend is an allowance for expenses, educational costs, etc.—not payment for services.

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