

Black Swan Backlash: How to Handle Unpaid Interns

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Two former unpaid interns filed a lawsuit against Fox Searchlight Pictures, the producers of the hit movie *Black Swan*, alleging violations of wage and hour laws. This is the first case on the subject of unpaid internships in 10 years and over 50 years since the Supreme Court ruled on the subject of unpaid labor. Although the lawsuit is focused on the common Hollywood practice of hiring unpaid interns on movie sets, the outcome will likely impact all industries.

The Backstory

The complaint alleges that Fox Searchlight hired hundreds of unpaid interns to perform menial tasks on the movie set of *Black Swan* and other productions. The plaintiffs' claim that the work they performed on behalf of the producer should have been done by paid employees and that the internships did not provide the type of educational opportunities necessary to exempt the producer from paying the interns.

Specifically, one plaintiff, Alex Footman, a graduate of Wesleyan, spent approximately four months as an unpaid intern preparing coffee, taking lunch orders, delivering lunches, taking out trash and cleaning the production office. Another plaintiff, Eric Glatt, an MBA graduate of Case Western Reserve University, worked 40-50 hours per week performing administrative accounting department duties on the set of *Black Swan*. His duties included creating spreadsheets, preparing purchase orders, gathering information for personnel files and generally keeping financial records for the production. The plaintiffs state that their responsibilities on the set were no different than entry-level employees

and, as a result, the producers violated federal and state wage and hour laws by not compensating the interns properly for their work time.

According to the complaint, Fox Searchlight used unpaid labor in an attempt to keep film production costs low and improve margins. The lawsuit states that *Black Swan* was produced for just \$13 million and has grossed more than \$300 million worldwide.

The lawsuit seeks class-action status for the plaintiffs and more than 100 other unpaid interns on various Fox Searchlight productions. The plaintiffs are hoping to recover back pay for the time they spent on the movies' sets. In addition, the lawsuit seeks an injunction that would keep Fox Searchlight from improperly using unpaid interns in the future.

A Common Practice

Unpaid internships are a widely accepted practice in many industries. As a result of high unemployment and a super competitive job market, it's often vital for individuals to accept unpaid work in exchange for résumé-building opportunities. Oftentimes, an unpaid internship represents a necessary step into the workforce to gain experience and build connections in an individual's chosen field.

An internship, if structured and managed properly, can provide a valuable educational experience for entry-level employees. However, in a recession, many companies may improperly increase their workforce with unpaid labor to reduce costs. Many so-called internships involve tedious, unskilled work with little opportunity for networking or to gain industry experience. Recently, the U.S. Department of Labor's Wage and Hour Division (DOL) investigated unpaid



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internships and found widespread exploitation by employers of unpaid interns, individuals who often have difficulty otherwise finding paid employment. As a result, the DOL is stepping up enforcement nationwide.

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Definition of "Employ"

The Fair Labor Standards Act (FLSA) broadly defines "employ" as to "suffer or permit to work." Individuals who are "suffered or permitted" to work must be compensated under the law for the services they perform for an employer. The rules for unpaid internships at nonprofit organizations are less stringent. However, only in extremely limited situations may an individual participate in an internship or training program with a for-profit corporation without compensation. The determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.

Unpaid internships are considered legal only if they're planned educational experiences for the benefit of the intern as opposed to the company and don't displace the work of regular employees. The DOL created a "Six-Point Test," described in detail below, to assist employers in determining whether a trainee or intern will be considered an "employee." The test requires that all points in the Six-Point Test must be true; if not, the intern is in actu-

ality an employee entitled to at least minimum wage and overtime compensation.

The Six-Point Test

On April 21, 2010, the DOL issued Fact Sheet No. 71 "Training and Employment Guidance Letter No. 12-09 (Jan. 29, 2010)" that outlines the following Six-Point Test that for-profit internships must pass to comply with labor laws:

Point 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.

Point 2: The internship experience is for the benefit of the intern.

Point 3: The intern does not displace regular employees, but works under close supervision of existing staff.

Point 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.

Point 5: The intern is not necessarily entitled to a job at the conclusion of the internship.

Point 6: The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Generally, an internship program should be focused on providing a broad-based educational experience for an intern and should not promise a job at the end of the internship. Both parties need to clearly establish, prior to the commencement of the internship, that the program will be unpaid.

A proper learning experience for the intern can be accomplished through cooperation with colleges or universities that may provide oversight and college credits in exchange for the intern's time at the company. A company can also set up a structured internal program for interns with employee mentors to guide them. If the employer is providing job training opportunities that allow an intern to learn certain functions under the close supervision of regular employees, the activity is more likely to be viewed as a bona fide education experience. An internship program structured similarly to a vocational school experience, as opposed to focusing on a specific company's products or operations, will also be viewed favorably.

Another important aspect of the Six-Point Test is that the intern should not be used as a substitute for regular workers or as a means to increase a company's existing workforce during busy work periods. An intern should not perform the regular work of the business on a routine basis, and the business should not rely upon the work of the intern. For example, interns should not perform menial labor, administrative tasks or clerical tasks such as answering phones, copying, filing or any other duties that may displace a regular worker. The DOL will look approvingly on a program that provides individuals with broad-based skills that can be used throughout the particular industry rather than just for a particular employer.

If an employer would have had to hire additional employees or required existing staff to work additional hours had the interns not performed the work, then the

interns will be viewed as employees and entitled to compensation. Another factor that may indicate employment status is if an intern requires strict supervision similar to the employer's regular workforce.

Err on the Side of Caution

The time period of the internship should be set at the beginning of the internship and should be for a definitive duration. The DOL has further clarified that unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

If a company fails to properly classify an intern, such company may be



Fox Searchlight, the company that produced the award-winning film Black Swan, hired unpaid interns to assist with tasks during the production of the movie. The interns are now suing producers for back pay for not being compensated for their work.

subject to serious legal and financial consequences. If an intern is improperly classified and found to be an employee, the company may be subject to a claim for unpaid wages, including overtime and associated penalties.

The federal and state wage and hour laws often also provide for the reimbursement of attorneys' fees and costs – an expensive outcome for many companies. Additional claims may be made for benefits, workers' compensation claims and other workplace benefits. As a general rule for employers, if possible, all internships should be paid. An offer of a paid internship is likely to produce a better-qualified candidate and reduce the risk of violations related to federal and state wage and hour laws. If payment is not possible, work with an educational institution to sponsor the company's internship program. At all times, a company should strictly adhere to the Six-Point Test. 