



# UNPAID INTERNS: PAY THEM NOW OR PAY THEM LATER

By Joel M. Grossman

In an old commercial, a mechanic hands a large bill to a customer for repairs to an engine damaged because the customer had not replaced a \$4 oil filter. As the commercial ends, the mechanic looks directly at the camera and says, “You can pay me now, or you can pay me later.”

This commercial might resonate with employers facing a growing number of lawsuits stemming from unpaid internships. These lawsuits, some of them class actions, allege unpaid interns did work for which they should have been compensated, and seek damages for unpaid wages.

In its “Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act,” the Department of Labor (DOL) states that employers may use unpaid interns only under the following rules: (a) the internship is similar to training that would be given in an educational environment; (b) the internship is for the benefit of the intern; (c) the intern does not replace regular employees; (d) the employer derives no immediate advantage from the intern’s activities; (e) the intern is not guaranteed a job at the end of the internship; and (f) both the employer and the intern agree that the intern will not be paid for the intern’s work. If these conditions are not met, the employer must pay the intern at least minimum wage.

Of all of these rules, perhaps the most important is that the internship is to benefit the intern, not the employer. If, for instance, an intern can participate in meetings, see how certain tasks are done and learn skills from experienced workers, the internship might be said to benefit the intern. But if the intern is forced to spend most of her day filing and photocopying, the employer is clearly benefiting more than the intern is. Despite these clear rules, many young (and not so young) people have experienced the frustration of landing an internship in a field of great interest to them and spending a good part of their day doing coffee runs and manning the phones. And the interns have started to fight back.

In a recent case against Elite Model Management, the company is reported to have settled the unpaid interns’ claims for \$450,000.

Other well-known lawsuits were brought against Fox Searchlight Pictures concerning the film *Black Swan*, against the television show *Charlie Rose*, and against *The New Yorker*, as well as lesser-known employers. The common denominator of the lawsuits is that interns were not paid even though the internships were allegedly benefiting the employer, not the intern, and were displacing other paid employees.

It is surely true that at least some unpaid interns obtain benefits from their internship, even though they work for free. However, such benefits may not be enough. In certifying the class of interns who worked on *Black Swan*, the court addressed the benefit issue in this way: “Undoubtedly, [the interns] received some benefits from their internships, such as resume listings, job references and an understanding of how a production office works. But those benefits were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them. Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor.” (*Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 533 (S.D.N.Y. 2013))

Going back to the oil filter commercial, employers need to know that in the event of a successful suit by unpaid interns, they could end up paying considerably more than the minimum wage, which should have been paid in the first place. Federal and many states’ laws require an employer to pay liquidated damages equal to the unpaid wages to employees who were not paid minimum wage. Thus, the employer will pay double what should have been paid. In addition, the employer would most likely be ordered to pay the interns’ legal fees and costs, and if the interns worked overtime, that too would have to be paid. So before hiring unpaid interns, employers need to carefully review the DOL’s six-part test set forth above and remember the auto mechanic who once said, “You can pay me now, or you can pay me later.” ■

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