



EMPLOYMENT ALERT

FEBRUARY 2012

Unpaid Internships May Subject Employers to Investigations, Fines and Potential Litigation

With summer on the horizon, employers will soon face a deluge of résumés from college students, recent graduates, and recently laid-off workers hoping to land a summer internship. In this tough economic climate, employers may be tempted to offer unpaid internships as a way to receive free labor while keeping costs low. However, employers should be aware that there are federal and state guidelines regarding unpaid internships. Employers who violate these guidelines and fail to properly compensate interns may face harsh penalties that include owing back wages, overtime pay, attorneys' fees, interest, and liquidated damages. Furthermore, employers may face civil lawsuits brought by former unpaid interns.

Guidelines for Unpaid Interns

In April 2010, the U.S. Department of Labor ("DOL") issued a fact sheet regarding internship programs under the Fair Labor Standards Act ("FLSA").¹ It provides that employers may offer internships without having to provide compensation, but the unpaid internships must meet all of the following six criteria:

1. The internship is comparable to the training that would occur in an educational environment.
2. The internship must be for the intern's benefit.
3. The intern does not displace the position of a regular employee, and the intern must be closely supervised by staff.
4. The employer "derives no immediate advantage" from the intern's work.
5. The intern is not necessarily entitled to an offer of employment at the end of the internship.
6. Both the intern and the employer understand that the intern will not receive compensation for the duration of the internship.

The fact sheet also provides that "the more an internship program is structured around a classroom or academic experience..., the more likely the internship will be viewed as an extension of the individual's educational experience." Thus, if the intern receives academic credit as part of a structured program from a college or university, the internship may be considered educational training, rather than employment.

Furthermore, employers should ensure that interns are not acting "as substitutes for regular workers." Finally, the internship should be for a fixed period of time, and it

¹ U.S. Department of Labor, Wage and Hour Division, "Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act," <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> (last visited Feb. 10, 2012).

HERRICK

New York Office

2 Park Avenue

New York, New York 10016

Phone: (212) 592-1400

Fax: (212) 592-1500

Princeton Office

210 Carnegie Center

Princeton, New Jersey 08540

Phone: (609) 452-3800

Fax: (609) 520-9095

Newark Office

One Gateway Center

Newark, New Jersey 07102

Phone: (973) 274-2000

Fax: (973) 274-2500

Attorney Advertising

should not be used as a trial employment period with the expectation of a permanent position at the conclusion of the internship or upon graduation from college.

Unpaid Internships at Non-Profit Organizations

The guidelines issued by the DOL are specifically directed at unpaid internships in the "for-profit" private sector. The FLSA provides special exceptions for volunteers at state or local government agencies or volunteers who work at private non-profit food banks. There is also an exception for "individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations." As the DOL recognizes, public interest or non-profit employers may offer unpaid internships without violating labor and wage laws, even if they do not satisfy all the criteria above, because unpaid interns may be considered volunteers for these organizations, rather than employees, but the internship has to be structured as such and not as an opportunity for a student to get experience and increase résumé value.

Additional Criteria for the NYS Department of Labor

Along with the six criteria set forth by the DOL, the NYS Department of Labor ("NYSDOL") has issued a fact sheet that includes five additional criteria for "for-profit" employers to evaluate whether there is an employment relationship.² These criteria include:

- The intern receives clinical training under the supervision and direction of knowledgeable and experienced people.
- The intern does not receive employee benefits, such as insurance or retirement benefits.
- The training is general, transferable, and is not specifically designed for an employment position with the employer who offers the internship.
- The hiring process for the internship is different from the hiring process for employment and does not include employment-related criteria.
- Advertisements or postings for the internship program clearly discuss education or training.

For an employer to avoid violating New York labor laws, the unpaid internship must meet *all eleven* criteria. As for non-profit organizations, the NYDOL provides that these organizations may offer unpaid internships, as long as they also meet *all eleven* criteria. Therefore, the state guidelines are much stricter than the federal guidelines for both non-profit and for-profit employers.

Litigation Over Unpaid Internships

Employers should also be aware that having unpaid internships that do not comply with the criteria set forth by the DOL may expose them to litigation. In New York, former unpaid interns recently filed lawsuits against their former employers for allegedly violating federal and state labor and wage laws. In *Glatt & Footman v. Fox Searchlight*

² NYS Department of Labor, "Fact Sheet: Wage Requirements for Interns in For-Profit Businesses," <http://www.labor.ny.gov/formsdocs/wp/P725.pdf> (last visited Feb. 13, 2012).



HERRICK

Pictures,³ the plaintiffs were unpaid interns for the film studio during the production of the critically acclaimed film *Black Swan*. They allege that they were denied compensation and all the benefits of employment, even though they worked between 40 to 55 hours a week for several months. Similarly, in *Wang v. The Hearst Corp.*,⁴ the plaintiff alleged that she worked as an unpaid intern at *Harper's Bazaar* for at least 40 hours a week. The plaintiffs in both lawsuits allege that they displaced entry-level employees, and the employers violated federal and state labor laws for not compensating them even though they worked full time. The plaintiffs are currently seeking class action status to bring their claims for unpaid wages, liquidated damages, attorneys' fees, and interest.

Reminder

On October 13, 2010, then Governor David Patterson signed into law the New York State Wage Theft Protection Act (the "Act"), which became effective on April 9, 2011. Pursuant to the Act, on February 1, 2012, employers were required to inform all existing employees in writing of their regular rate of pay, pay day and overtime rate, if applicable, as well as the basis of the wage payment, any allowances that will be claimed as part of the employee's minimum wages, and the employer's main address and telephone number. This notice must be given to the employee both in English and the employee's primary language,⁵ and employers must obtain a signed and dated written acknowledgement from the employee, confirming receipt of the notice each year. Employers should remember that they must inform all new employees of this information at the time of hire, and they must provide this information to their employees every subsequent year on or before February 1. Employers should confirm with their payroll service providers as to whether the providers are issuing the requisite notice on the Employers' behalf, as many are. For more information on the Act's provisions, please refer to Herrick, Feinstein's "Employment Alert," January 2011, available at <http://www.herrick.com/siteFiles/Publications/70E73138FBCBC14320E29AA0591E3E3C.pdf>.

For more information on this issue or other employment matters, please contact [Mara Levin](mailto:mlevin@herrick.com) at mlevin@herrick.com or 212.592.1458, or [Carol Goodman](mailto:cgoodman@herrick.com) at cgoodman@herrick.com or 212.592.1465.

Copyright © 2012 Herrick, Feinstein LLP. Employment Alert is published by Herrick, Feinstein LLP for information purposes only. Nothing contained herein is intended to serve as legal advice or counsel or as an opinion of the firm.

³ *Glatt & Footman v. Fox Searchlight Pictures Inc.*, Complaint, No. 11 CIV 6784 (S.D.N.Y. Sept. 28, 2011).

⁴ *Wang v. The Hearst Corp.*, Complaint, No. 12 CIV 0793 (S.D.N.Y. Feb. 1, 2012).

⁵ Sample forms and templates are available on the NYS Department of Labor's website at <http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>.