

## **The Fair Labor Standards Act and Internships and Why Most Interns Must Be Paid**

By Susan Richards Salen

High Schools and University Students are out of school for the summer and looking for a job. It's a good time to take advantage of free summer labor. Or is it? Unfortunately, if you are expecting your summer intern to be productive and make you some money while saving on expenses, you are committing a violation of the Fair Labor Standards Act ("FLSA").

The FLSA regulates the payment of minimum wage and overtime pay for any hours worked in excess of forty (40) in any given workweek. There is no exemption from the requirement to pay minimum wage and overtime pay for interns unless they are apprentices or in a vocational training program. Employees have the right to file a private action or file a claim with the United States Department of Labor ("DOL"), the federal agency responsible for administering, regulating and enforcing the FLSA. Under the regulations, a for-profit company can use an intern without paying them, but only if the company's internship program meets the following six (6) requirements:

- 1) The main focus of the internship has to be training, and it should be similar to what an intern would learn in a vocational or educational program;
- 2) The internship is for the benefit of the intern--not the employer;
- 3) The intern must not displace employees--meaning, if the intern is performing productive work and doing the job of a regular employee supporting the primary operations of the employer, it is not an internship;
- 4) The employer must not derive an immediate benefit from the intern--this test is met if the employer loses money because of the time vested in training the intern;
- 5) The intern is not entitled to a job at the end of the internship--an internship that is not part of a formal college or university program should not be used in the place of "on-the-job training"; and
- 6) The intern understands that he/she is not entitled to wages.

In most instances, unless an intern is participating in a formal program through a university or college for credit, internships with a private company will not meet the requirements above. If you are hiring an intern expecting the intern to be productive, or save you from hiring an employee to do the same work, you are violating the FLSA.

Some high profile cases are shining a "spotlight" on this issue. Interns that worked on the *Black Swan* production filed an action against Fox Entertainment Group in the United States District Court for the Southern District of New York alleging violations of the FLSA and seeking remuneration, liquidated damages and attorney's fees for violations of the FLSA and New York State wage and hour laws. In addition, they requested that the Court permit a collective action

under the FLSA—opening up the lawsuit to participation by other similarly situated interns. The interns on the film worked at least forty (40) hours a week performing administrative duties for the production. The job duties of one of the interns, Eric Glatt, a plaintiff in the case of *Eric Glatt, et al. v. Fox Searchlight Pictures, et al.*, included: reviewing personnel files, preparing spreadsheets to reconcile purchase orders and delivering time sheets. On June 11, 2013, a United States District Court Judge for the Southern District of New York found that these unpaid interns were, in fact, employees because:

They worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received--such as knowledge of how a production or accounting office functions or references for future jobs--are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer. They received nothing approximating the education they would receive in an academic setting or vocational school.

You can avoid an FLSA audit, paying back wages, liquidated damages and potentially attorney's fees by simply paying the intern minimum wage and overtime for any hours worked in excess of forty (40) in the workweek. The alternative is to “pay it forward” and spend time truly training and teaching your intern. Remember the benefit of an internship is for the intern not the company.

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