Where Have All the Unpaid Internships Gone?

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"It's not what you know; it's who you know." Today's college and graduate school students seeking employment opportunities in a difficult job market would probably agree with this maxim. Historically, students and graduates have used internship programs as opportunities to gain experience in a particular industry in the hope of establishing a career or finding permanent employment. Internships are often viewed as a rite of passage, the benefits of which are obvious to those who seek them and include: (i) on-the-job training that cannot be taught in an academic setting; (ii) networking opportunities with professionals who are established in the industry; and (iii) an opportunity to observe and experience the day-to-day operations of a particular profession, industry or trade.

It should come as no surprise that some of the most respected and highly successful people in this country began their careers as interns in their respective professions. By way of example, National Football League commissioner Roger Goodell started as an intern for the NFL after graduating from college in 1981; Steven Spielberg began his career in the film industry as intern for Universal Studios at the age of 17; Sean "Diddy" Combs began his career in the music industry as an intern for Uptown Records; and Oprah Winfrey interned for a local CBS affiliate during her sophomore year at Tennessee State University. Well-publicized lawsuits against companies like NBC Universal, Condé Nast and Sony over the past few years, however, have caused many employers to reevaluate whether to make use of an unpaid internship program.

Perhaps motivated by a slow economy and sluggish job market, many groups of unpaid interns have filed class action lawsuits in which they claim that, under federal and state wage and hour laws, they were actually (and should have been treated as) "employees," and are thus owed the minimum wage and in some instances overtime for all the hours during which they served as interns. Counsel who file lawsuits for classes of interns—and who, in addition to recovery for their clients, typically seek attorneys' fees and costs—have been fueled by inconsistent and unclear legal standards for private sector interns. For example, the U.S. Court of Appeals for the Second Circuit has recognized the inconsistent approach taken by district courts and soon will hear an appeal on two class certification decisions involving former unpaid interns at Fox Entertainment Inc. and Hearst Corporation. In so doing, the Second Circuit is expected to clarify the proper standard through which to determine whether interns qualify as "employees" under the applicable wage and hour laws.

Another recent class action lawsuit likely to be monitored closely—given the current notoriety of the employer—involves claims filed by an unpaid intern for the Los Angeles Clippers. The intern alleges that the basketball team, including owner Donald Sterling, misclassified him and others who were performing tasks similar to those performed by paid employees. That case, Cooper v. LAC Basketball Club and The Sterling Family Trust, is pending in the United States District Court for the Central Division of California. This is quite clearly an unwanted distraction for the Clippers, given the other well-publicized matters in which the team is involved. This action is nonetheless further proof that even the most coveted internship programs in professional sports are not immune from litigation, and that employers, regardless of the industry, are probably better off eliminating similar unpaid internship programs than risk being a defendant in this wave of new litigation.

The U.S. Department of Labor has published internship guidelines for employers in the private sector that make it difficult for employers to demonstrate that their unpaid internship programs are lawful. In April 2010, the department established a multipronged test to determine if an internship program is excluded from the wage requirements of Fair Labor Standards Act. An employer must classify and pay an intern as a traditional, common law employee unless the following six criteria are met:

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.

2. The internship experience is for the benefit of the intern (as opposed to the "employer").

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

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.

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

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

Unfortunately, the DOL's criteria make it difficult for employers in the private sector to maintain with confidence an unpaid internship program. Indeed, the DOL has gone on record stating that there will likely be only limited circumstances in which a for-profit company can operate an unpaid internship program that is in compliance with applicable law. Thus, according to the DOL, an employer cannot maintain a legally compliant internship program if it derives any benefit from its interns or uses interns to displace the work of its regular employees. Regardless of whether or not this seems counterintuitive—especially in a country where so many giants of industry got their start as interns—the DOL has recognized that the impediments to maintaining a lawful unpaid internship program are likely too burdensome on employers to be successfully implemented.

Notwithstanding these guidelines, not all courts have used as strict a standard in analyzing whether an intern has been wrongfully denied wages. In the recent case Fraticelli v. MSG Holdings (denying plaintiff's request for class certification), the United States District Court for the Southern District of New York concluded that plaintiffs had not met their burden. Until there is greater clarity on the appropriate standard to which a company's use of unpaid interns will be measured, many businesses will continue to opt not to operate an internship program, concerned that their program, if put to the test, would not pass muster.

For those employers that nonetheless choose to continue utilizing unpaid interns, there are practical steps to reduce potential liability. These include (i) requiring that interns receive school credit for participating in the program; (ii) designating specific managerial personnel to oversee the program to ensure that education and training are prioritized (and that interns are not being used as entry-level employees); and (iii) documenting the relationship so that there is a clear record showing that the internship program is geared toward education, and a mutual understanding that interns will not be paid for what will primarily be their "learning" experience.

These safeguards notwithstanding, prudence also dictates that employers maintain detailed time records for all interns in order that they may contest any minimum wage or overtime claims by zealous interns who may choose to exaggerate their hours in the program, should a lawsuit ever be filed.

In conclusion, until such time (if ever) as the Second Circuit—and potentially other appellate courts—recapture the premise and experiential value of unpaid internships to countless graduates embarking on important career paths, for-profit employers should think long and hard prior to implementing an internship program that does not compensate its interns for their time at minimum-wage rates at the very least.

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