

Unpaid Interns a Costly Mistake for Employers?

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With the 2008 recession creating a fiercely competitive job market that is still affecting recent college graduates, unpaid internships have become increasingly common as job seekers are willing to forego pay in order to gain experience, references, or anything else that might provide an advantage in finding future employment. For employers also facing tough economic times, this influx of free labor may appear to be an easy way to cut costs and increase profitability. Unfortunately, a recent court ruling underscores that unpaid internships offered by for-profit employers may ultimately cost those employer far more than simply paying the interns in the first place.

On June 11, 2013, Judge William H. Pauley, III of the U.S. District Court for the Southern District of New York - in the case of *Glatt v. Fox Searchlight Pictures, Inc* - ruled that three former unpaid interns of the motion picture studio Fox Searchlight Pictures were entitled to payment for their services to the studio. Remarkably, Judge Pauley made his decision without allowing the issue to go to trial; typically in employment cases it is the *employer* who seeks judgment before trial. The former interns had worked on the films *Black Swan* and *500 Days of Summer*, and in Fox Searchlight's corporate office, where they performed routine tasks such as obtaining documents for personnel files, traveling between movie sets and Fox Searchlight's offices to obtain signatures, tracking and reconciling purchase orders and invoices, and other administrative work. After their internships ended, the interns brought a lawsuit against Fox Searchlight under the federal Fair Labor Standards Act (FLSA) and New York's state law equivalent, seeking damages and certification as a class action.

In determining that the interns did not qualify for the FLSA's "trainee" exception, and as such were entitled to at least a minimum wage, Judge Pauley looked to administrative guidance issued by the Department of Labor (DOL) in 2010. The DOL stated that in order to be exempt from the FLSA's minimum wage and overtime requirements, an unpaid internship must:

1. Provide similar training to that which would be given in an educational environment;
2. Be for the benefit of the intern, not the employer;
3. Not perform duties that would displace the employer's regular employees;
4. Provide no immediate advantage to the employer, and on occasion actually impede the employer's operations;
5. Not necessarily entitle the intern to a job at the conclusion of the internship; and
6. Be entered into with an understanding by both the intern and employer that the intern will not be entitled to wages.

Judge Pauley found that the Fox Searchlight interns did not qualify under the DOL's standard. First, he ruled that a valid unpaid internship must provide the intern with skills beyond those acquired through the on-the-job training that any employee receives. He then determined that the intern must receive academic or vocational training benefits, rather than benefits such as resume listings, references, and knowledge of how an office functions, which are simply incidental to working as every other employee works. In addition, he concluded that the intern should not perform tasks that would otherwise be done by a paid employee. Judge Pauley found the fact that a regular employee could have performed the duties better or quicker to be irrelevant. While the Fox Searchlight interns were not entitled to jobs and understood that they would not be paid - DOL's final two criteria - Judge Pauley heavily discounted these factors.

The ruling in *Fox Searchlight Pictures, Inc.* makes clear that unpaid internships may not be worth the trouble from an employer's perspective. The FLSA entitles eligible employees who are not paid the minimum wage to collect double the amount that they should have been paid, as well as their reasonable attorney's fees and costs in bringing an action against their employer. In addition, the Department of Labor can pursue fines of up to \$10,000 and imprisonment if the FLSA violation is found to be willful. Most states have their own wage and hour laws, which may impose additional penalties and damages on an employer.

Keep in mind that an intern's agreement to work without pay is no defense; it is well established that an employee's FLSA rights cannot be bargained away or waived. In the face of these possible sanctions, many employers might find it preferable to simply pay their interns a minimum wage and skip the headache of a future wage and hour lawsuit.