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Unpaid Intern: The Unpaid Employee?

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Unpaid interns: They are as ubiquitous as taxis in New York and suntans in Los Angeles, especially in the entertainment, media, and fashion industries. Indeed, for many college students and graduates, unpaid internships represent a door to possible future employment in these competitive industries.

The Federal Fair Labor Standards Act (FLSA) and most if not all states require employees to be paid a minimum wage for all hours worked, and overtime for all hours worked over 40 in a week (some states also require overtime pay for all hours worked over 8 in a single day). While the FLSA and some state wage laws make an exception for unpaid internships, the exception is narrow.

According to the U.S. Department of Labor, the unpaid internship is lawful only if it meets the following criteria:

- 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;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- 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;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If the internship does not meet ALL of the above criteria, then the intern is an employee and entitled to minimum wage and overtime. States may have similar or additional requirements.

Although interns have the right to be paid if they do the work of employees, there has been a lack of cases where an unpaid intern or former unpaid intern has challenged the practice of relying on the labor of unpaid interns. However, in November 2011, a class of unpaid interns sued Fox Searchlight pictures for their unpaid work on *Black Swan*, and on February 1, 2012, a class action lawsuit was filed against the Hearst Corporation on behalf of more than 100 individuals who worked as unpaid interns at Hearst and are now seeking wages for their internship work.

The lead plaintiff in the Hearst case alleged that she sometimes worked as many as 55 hours a week as the “Head Accessories Intern.” Her duties included, among other things, coordinating pickups and deliveries of samples between *Harper’s Bazaar* and outside vendors, showrooms and PR firms; maintaining records of the contents of sample trunks and the fashion closet; managing corporate expense reports; and processing reimbursement requests – productive work for which she alleges she

was not paid any wages. As the case is in an early stage, it remains difficult to assess the likelihood of success of the plaintiff's claims. However, the filing of the complaint, standing alone, signals the fact that internship classification has become a vibrant source of wage/hour litigation.

In light of the above, we encourage our clients to review their practices concerning unpaid interns. This review may include, but is not limited to, revising hiring policies (whether written or otherwise) concerning the interviewing, hiring, and retention of unpaid interns, and ensuring that managers are trained regarding the necessary criteria established by the U.S. Department of Labor and applicable state law before engaging an unpaid intern. Of course, if you have any questions regarding whether a worker may be properly classified as an intern, please feel free to contact a member of Mintz Levin's Employment, Labor & Benefits Practice.

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