

Thinking about Hiring Interns? New Case Reminds Employers of Rules on Interns

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Following similar decisions involving Hearst Corporation and Viacom, a federal judge in the Southern District of New York recently granted conditional certification of a potential nationwide class of approximately 3,000 current and former unpaid interns for Warner Music Group. These unpaid interns allege that they were employees of Warner who were entitled to minimum wage and overtime pay under the Fair Labor Standards Act (FLSA) because they completed some of the same work as paid employees; did not receive academic credit for their internship; and received little to no supervision. The interns emphasized the internship benefits to Warner (and downplayed the benefits of the internship received by the interns) by using Warner's own internship position posting, which provided:

“Every intern is assigned a special project that will both assist them in increasing their understanding of how each department operations and aid the department in addressing a business need.”

As to conditionally certifying the class of unpaid interns, the court found that the interns had met the “low burden” required to show that they were subject to a centralized policy that violated the FLSA. Accordingly, they may proceed as a class in court seeking to obtain wages for the time spent during their internships.

Although the court's decision involved the issue of nation-wide conditional certification in FLSA actions, and did not yet rule on the merits of the interns' claims, this case is a stark reminder to employers of the stringent standard to qualify interns as unpaid interns under the FLSA, **particularly with respect to for-profit employers.**

By way of background, in 1947, the United States Supreme Court provided for a trainee exemption in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). This very limited exemption has been used by employers to provide unpaid internships to individuals whose work serves the individual's interest, includes aid or instruction from the employer, and typically includes collaboration with the intern's educational institution to qualify for academic credit. However, employers—particularly for-profit employers—must take care to develop and manage internship programs within the trainee exemption to prevent liability for wage-and-hour claims.

The United States Department of Labor (DOL) has developed a six-part test to determine whether an intern meets the exemption and need not be paid for his or her work. Interns are presumed to be employees, unless they meet each of these six criteria:

- the internship is similar to the training that the intern would receive in an educational environment;
- the internship experience is for the benefit of the intern;
- the intern does not displace regular employees and works under close supervision of regular employees;
- the employer does not obtain an immediate advantage from the intern's activities;
- the intern is not necessarily entitled to job following the internship; and
- the employer and the intern understand that the intern is not entitled to wages for time spent in the internship.

A limited number of internship programs will meet these strict standards. At a minimum, employers must follow these guidelines:

- Establish a specific duration for the internship prior to the beginning of the internship and clearly articulate that the internship is not paid.
- Do not use interns to increase the workforce during a period of increased workload—if the employer would have hired additional employees or required existing employees to work longer hours to perform the work that interns are performing, then the interns must be paid minimum wage and overtime.
- Design internship programs with the benefits to the interns in mind. The internship should provide interns with skills that can be used in multiple employment settings, rather than skills that are specific to the employer's business.
- Structure the internship around the academic experience of the intern, not the regular business operation of the employer.
- Provide interns with the opportunity to shadow and learn rather than directing them to perform the routine work of the employer's business.
- Closely supervise and mentor interns.
- Coordinate the program with an educational institution.
- Assure that the intern will receive academic credit or that the internship fulfills a requirement of his or her program.

The potential risk for employers of misclassifying interns is enormous, especially in view of both the stringent standard to qualify as a unpaid intern and the lenient standard for conditional certification of a collective class under the FLSA. Employers should evaluate each internship or

internship program on a case by case basis to determine whether the interns are entitled to minimum wage and overtime under the FLSA.