

Duff on Hospitality Law

Avoiding Pitfalls with Unpaid Internships

on 9.6.13 | Posted in Employment Law

To Pay or Not to Pay?

As the school year begins again, it is a great time for hoteliers to think about their unpaid internship programs. Unpaid internships can be great symbiotic relationships. College students or individuals trying out new fields are willing to work for free in exchange for real-life work experience and something to add to their resumes. However before accepting free labor, employers must be aware of the potential consequences of this relationship and take steps to ensure their internship program complies with the law.

The Fair Labor Standards Act (FLSA) is a federal statute that requires companies to pay all employees a minimum wage and overtime. Who counts as an “employee” is a tricky question and some companies who thought they had unpaid “interns” found out the hard way that they actually had “employees” they were not paying. A recent New York case that is getting a lot of attention is [Glatt v. Fox Searchlight Pictures, Inc.](#) In that case, unpaid interns who worked on the movie Black Swan brought a lawsuit claiming that they actually were employees and, as such, should have been paid minimum wage and overtime for their 50-hour weeks. The interns had performed routine administrative tasks such as making photocopies, running errands, ordering lunch, and getting people coffee.

Sounds like typical intern work, right? Wrong. The Federal District Court held these individuals did not categorize in the FLSA exception for interns because their work was purely routine and did not further their education in the way a true internship should. The court also found it was the employer, not the interns, who got the better deal, deriving the most benefit from the relationship. Significantly, the court also held the interns performed work that otherwise would have been done by regular employees, thereby permitting the employer to get the same amount of work done with fewer paid workers. Even though the interns had agreed to serve without pay, the court found overall that the interns were employees and should have been paid wages and overtime. This case is not a fluke — there have been a number of similar [intern-related cases](#) lately.

In ruling in favor of the interns, the Glatt court followed a [Fact Sheet](#) from the Department of Labor (DOL) detailing a test for whether an internship is exempt from minimum wage laws. To see if your internship program is kosher under the DOL guidance, check out these requirements for a legal unpaid internship:

- **Must be educational.** The internship, even though it includes actual work for the company, must be similar to training that would be given in an educational environment. This factor is often satisfied when the program is for course credit and when there is a degree of oversight by the intern's educational institution.
- **Must benefit the intern, not the company.** This is key. The internship experience must be set up for the primary benefit of the intern. The company must not derive immediate advantage from the activities of the intern; in fact, its operations should potentially be impeded by the intern's presence.
- **Must not displace regular employees.** Interns cannot be used to displace or substitute regular employees or to supplement the workforce during times when the company would otherwise hire more employees or ask existing employees to work longer hours.
- **Must not be a job interview.** The intern cannot necessarily be entitled to a job at the conclusion of the internship. The internship should be for a fixed period of time, established prior to the outset of the internship, with no expectation that it will lead to a permanent position.
- **There must be no expectation of wages.** Both the employer and the intern must understand that the intern is not entitled to wages for the time spent in the internship.

In short, based on the above federal guidelines (which Washington state closely follows), it is fine for a company to have an unpaid intern, provided the intern — not the company — is the primary beneficiary of the program. To ensure the company is not deriving benefits from or depending on the intern's work, the company should ensure the intern's duties don't regularly include routine operational tasks, such as janitorial work, clerical work, or work that other employees would normally perform. The company should also make sure the intern is closely supervised, receiving more supervision than regular employees, and should give the intern plenty of training opportunities. If the intern is doing operational work, the company should ensure he or she is learning skills that would be transferable to another company, rather than skills that are specific to the company's own operations. Finally, the company should consider requiring the intern to sign a document expressly stating that he or she is an intern and not an employee, that the internship is unpaid, and that the intern is not entitled to a job at the conclusion of the internship.

For more information, please contact [Greg](#) or other attorneys in the [GSB's Employment Group](#).

Tags: Fair Labor Standards Act, FLSA, Intern, Internships