

# Unpaid Interns Can Be Costly

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Recently, media companies have been the targets of lawsuits filed by unpaid interns alleging that the company violated federal law by failing to pay them wages. In one such case, two former unpaid interns who worked on the set of the Oscar-nominated film "Black Swan" filed suit against Fox Searchlight Pictures alleging that, by failing to pay them for their work, the independent film company violated both state and federal wage-and-hour law. According to the plaintiffs, "[u]npaid interns are becoming the modern-day equivalent of entry-level employees, except that employers are not paying them for the many hours they work."

At the heart of the interns' suit is the Fair Labor Standards Act (FLSA). The FLSA is a federal statute that requires companies to pay most lower-level, hourly employees (often referred to as "non-exempt" employees) at least the minimum wage. Companies must also pay these employees overtime (time and a half) for work done in excess of 40 hours per week. Generally, workers cannot waive their right to receive compensation under the FLSA, even if they genuinely want to work for free. The Act does, however, provide an exception for certain "trainees." If a worker qualifies as a trainee, he or she need not be compensated for work performed.

## Commercial Broadcasters

The Department of Labor's Wage and Hour Division (WHD) has established a six-part test for private sector "for profit" entities, such as commercial broadcasters, to determine whether an individual is properly classified as a trainee or intern. Under that test, an individual is a trainee/intern if:

- The internship is similar to training that would be given in an educational environment;

## Authors

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Kathryne C. Dickerson  
Partner  
202.719.7279  
kdickerson@wiley.law

- 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 internship 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.

Whether all six of the criteria have to be met in order for an individual to be classified as an intern is subject to some debate. Regardless, the test is a demanding one, particularly the prong that requires the employer derive “no immediate advantage” from the intern's work. Often, broadcasters host an internship program precisely because they do receive a benefit, whether it be a more up-to-date public file, viewer calls or emails responded to, or promotional events that run more smoothly. The crux of the WHD's analysis, however, is not that employers receive no benefit at all, but rather that the purpose of the internship is to provide educational training, rather than allowing interns to simply do the work of regular employees without compensation. Accordingly, the WHD has stated that, in general, “the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations,” the more likely the individual is properly classified as an intern.

Broadcasters may avoid the inquiry altogether by paying interns minimum wage in accordance with state and federal law.

### **NCE Broadcasters**

The analysis for Non-Commercial Educational (NCE) broadcasters is somewhat different. Although the WHD has stated that the six-factor trainee test outlined above is intended to give guidance only to “for-profit” employers, it has affirmed that it recognizes an exemption to the FLSA for individuals who “volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to nonprofit organizations.” Nevertheless, the water remains somewhat murky as WHD has not expressly articulated an alternative “intern vs. employee” test for nonprofit employers. Opinion letters issued by the agency, however, advise that, typically, FLSA-exempt volunteers “serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.” Opinion letters further indicate that in determining the proper classification for a worker the DOL will consider whether the intern offers his or her services “freely without pressure or coercion” and whether the services are “of the kind typically associated with volunteer work.” To properly structure an internship program in accordance with this guidance, NCE broadcasters should consult with counsel. Among other considerations, NCE broadcasters should ensure that interns acknowledge that they have no expectation of compensation, that they are not entitled to future employment or compensation, and that they will accept assignments that will further their training and professional development.