

# Suggested Guidelines and Best Practices for Unpaid Internship Programs

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## The Rise in Unemployment, Unpaid Interns and Challenges to Intern Status

Amidst continued high unemployment and further cutbacks at many companies, unpaid internships have become increasingly more common in the private sector over the past few years.<sup>1</sup> The United States Department of Labor (“DOL”) and several state agencies responsible for enforcing wage and hour laws have been concerned that while unpaid internships have become more common, there may be little incentive for interns to report potential violations of federal and state wage laws. That is because interns often value the experience obtained during internships, even if they are not compensated with a paycheck for the hours worked. As a result, in 2010, the DOL and some of these state agencies, including those in California and New York, stepped up their enforcement of potential wage and hour violations by launching investigations into internship programs and fining employers where applicable. In very recent months, the use of unpaid internships has also come under civil attack by interns.

In February of this year, former intern Xuedaen Wang (“Wang”) filed a lawsuit against Hearst Corporation, on behalf of herself and all others similarly situated, alleging that the publisher violated federal and New York state wage and hour laws by failing to pay minimum wage and overtime to interns working for 19 magazines, including *Harper’s Bazaar*. Wang says

she worked for *Harper’s Bazaar* as the Head Accessories Intern for four months in the fall of 2011. She filed her lawsuit in February 2012, only two months after her internship had ended and five months after a similar lawsuit had been filed by unpaid interns working for Fox Searchlight Pictures (“Searchlight”) on the production of the Academy Award nominated film, *Black Swan*.

On October 9, 2012, the *Black Swan* production interns suing Searchlight in New York were granted leave to amend their lawsuit to add additional plaintiffs, expanding the purview of the case. The original lawsuit, filed in September 2011, was brought on behalf of Alex Footman and Eric Glatt, both of whom say they worked on *Black Swan* in late 2009 and early 2010. Eden Antalik, who apparently participated in the Fox Entertainment Group corporate internship program, and Kanene Gratts, who says she worked on Searchlight’s *(500) Days of Summer*, will now be added to the lawsuit. Anatalik would represent a class of “corporate interns” at Fox, and Gratts, who did her work in California (unlike Footman and Glatt, who worked in New York), will be able to pursue a new state-based claim of unfair competition. It remains to be seen which specific entities at Fox this lawsuit will ultimately reach.

Following Wang’s February lawsuit and with the assistance of Wang’s lawyers, in March 2012, former intern Lucy Bickerton filed her own lawsuit against prominent talk show host Charlie Rose and Charlie Rose, Inc., the producer of *The Charlie Rose Show*, on behalf of herself and others similarly situated, alleging violation of the minimum wage and record keeping requirements of New York state law.

A couple months later, on July 3, 2012, Wang and her lawyers filed yet another lawsuit, this time against designer Dana Lorenz and her jewelry company, Fenton Fallon, where Wang worked as an unpaid Press intern for two months in the summer of 2011, immediately before her internship for Hearst Corporation at *Harper’s Bazaar*. Wang alleges the same wage claims raised in her lawsuit against Hearst Corporation.

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<sup>1</sup> Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. Times, Apr. 3, 2011, at WK11 (nothing that according to the College Employment Research Institute, “[t]hree-quarters of the 10 million students enrolled in America’s four-year colleges and universities will work as interns at least once before graduating . . . .”); see also Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. Times, Apr. 2, 2010, at B1 (observing that “in 2008, the National Association of Colleges and Employers found that 50 percent of graduating students had held internships, up from the 17 percent shown in a 1992 study by Northwestern University”); see also David C. Yamada, *The Employment Law Rights of Student Interns*, 35 Conn. L. Rev. 215, 217-18 (2002) (“[i]nternship experience has become a virtual requirement in the scramble to get a foot in the door of many sectors of the labor market”).

If this recent rash of lawsuits by interns claiming to be misclassified doesn't breed a new trend in wage and hour litigation, it should still prompt employers to review their own policies and practices in regards to their internship programs in an effort to protect themselves against the risk of future wage and hour liability under both federal and state laws. Indeed, given the potential consequences of misclassifying workers, it is critical to determine whether individuals who participate in a "for-profit" private sector internship or training program without compensation are interns as opposed to employees.<sup>2</sup>

### **The Test for Unpaid Interns**

So, what are the criteria applied in making this determination?

The DOL has identified the following six criteria that must be met for an individual to qualify as an intern (trainee) and, thus, be eligible for an unpaid internship with a for-profit company:

1. 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;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. 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;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

<sup>2</sup> Both federal and California state law permit the non-payment of volunteers. 29 C.F.R. § 553.101; Cal. Lab. Code § 1720.4. A "volunteer" is a person who performs work for civic, charitable, or humanitarian reasons for a public (or, also under state law, non-profit) entity, without promise, expectation or receipt of compensation for that work. 29 C.F.R. § 553.101(a); Cal. Lab. Code § 1720.4(a)(1). Whether a person is properly classified as an employee or a volunteer with a public or not-for-profit entity is determined by the parties' intent. 29 C.F.R. § 553.101(a), (c); Cal. Lab. Code § 1720.4(a)(1)(A); DLSE Opinion Letter 1988.10.27 (Oct. 27, 1988) available at <http://www.dir.ca.gov/dlse/opinions/1988-10-27.pdf>; *DLSE Enforcement Policies and Interpretations Manual* § 43.6.7, available at [http://www.dir.ca.gov/dlse/DLSEManual/dlse\\_enfmanual.pdf](http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf).

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>3</sup>

California, which has no statute or regulation that expressly exempts persons participating in an internship from wage and hour requirements, applies the same six factor test in determining exemption from state minimum wage coverage for interns/trainees.<sup>4</sup>

If these conditions are met, an employment relationship does not exist, and the federal and California state minimum wage and overtime provisions do not apply to the intern. Note, however, the DOL warns that "this exclusion from the definition of employment is necessarily quite narrow" because the definition of "employ" is very broad."<sup>5</sup>

### **Practical Application of the Requisite Criteria for Unpaid Interns**

What do these criteria mean in practical terms for a private-sector employer interested in developing or continuing to run an unpaid<sup>6</sup> internship program that is compliant with federal and California wage and hour law?

### **The Focus of the Internship Program Must Be on the Intern**

**The primary beneficiary of the internship program should be the intern, not the employer.**

Not surprisingly, courts most often believe the distinction between employee and intern status turns on who – the employer or the intern – is the primary beneficiary of the relationship. Employers wanting to offer unpaid

<sup>3</sup> U.S. Dep't. of Labor, *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* (Apr. 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

<sup>4</sup> DLSE Opinion Letter 2010.04.07 (Apr. 7, 2010), available at: <http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf>.

<sup>5</sup> U.S. Dep't. of Labor, *Fact Sheet #71*, *supra* note 3.

<sup>6</sup> This article assumes the internship program at issue is intended to be unpaid. It also assumes that the program will include only adult participants. Persons under the age of majority, per federal and state wage and hour laws, receive special treatment under child labor laws. If planning to hire these individuals as interns, employers must adhere to special rules governing the types of occupations and the number of hours of work per day. Employers also must complete the necessary applications and obtain certain permits to hire children. This article does not address child labor laws and their potential impact on internship programs.

internships should take extra care to ensure their interns do not perform work that primarily benefits the employer. Work is seen as primarily benefiting the employer most often in cases where the employer merely uses interns in lieu of hiring (and compensating) employees, and where the employer does not help the intern learn and apply relevant transferable skills.

- **Successful learning experience** - Employers should develop intern projects with the goal of providing their interns with a successful learning experience.
- **Transferable skills** - Employers should assign interns tasks that help the interns acquire transferable skills unique to a specific profession or area of study. In the case of a human resources internship, for example, the employer should ensure interns learn skills necessary to perform the functions of human resources professionals. If the employer merely assigns tasks such as filing documents, making copies and sorting mail, regulatory agencies are unlikely to view the experience as being beneficial to the interns and, instead, would likely view the interns as replacements for clerical employees.
- **Aligned with training** - Employers should align intern projects with specific learning objectives identified in the training component of the internship program.
- **Manageable projects** - Employers should assign interns smaller, discrete projects that have identifiable outputs and manageable timelines. Doing so will help facilitate the learning process and make it easier to evaluate intern performance.
- **Split time between supervised work and training** - A good rule of thumb is that interns should spend no more than half of their time on supervised, work-related projects that employees are likely to perform (but not with the purpose or result of filling in for, or otherwise displacing or replacing, employees). The remaining time should be spent learning, which includes training, shadowing, and networking with other employees.
- **No employee displacement** - Employers must not use interns to displace employees. Similarly, employers must not use interns as a way to fill vacant positions.
- **Indirect benefit to employer is okay** - Internship programs that primarily benefit interns may indirectly benefit employers as well. "Who benefits" is not an all-or-nothing test, rather, it requires balancing. If the primary aim of the internship program

is to give interns a learning experience, the fact that the employer benefits by advancing recruiting efforts, for example, will not automatically convert the intern to employee status. The specific facts and circumstances of the program will influence this determination.

### **Training, Training, and More Training**

**Employers have a responsibility to provide training that is similar and complementary to what is offered in academic programs.**

Training that is similar and complimentary to what is offered in academic programs helps interns develop transferable skills within a particular industry or profession. To be transferable, the skills the interns acquire must be general in nature and capable of being applied to similar functions in other companies or organizations. In other words, the skills taught in the training program should not be so employer-specific that they are only applicable to the employer's business.

- **Academic model** - Employers might model the training curriculum of the internship program on academic curricula developed in college-level courses designed to teach students general skills in a specific substantive area. For example, a marketing internship might allow interns to observe and participate in the practical application of concepts learned in courses focusing on areas such as advertising, pricing, product placement, and brand management. A good place to start is to research reputable academic programs that offer degrees or concentrations in a relevant study area.
- **Syllabus** - Employers should create a syllabus that covers specific learning objectives.
- **Diverse curriculum** - The curriculum should incorporate various modes of instruction including written materials, shadowing experiences, and experiential learning opportunities.
- **Projects alignment** - Employers might align any actual supervised work projects to the training curriculum.
- **University partnerships** - Employers should partner with career placement professionals and faculty at colleges and universities. Using these professionals as advisors during the development phase of the internship program is a great way to ensure the training curriculum adequately complements students' classroom instruction. It is also an excellent way to identify a steady pool of qualified interns. Colleges and universities are increasingly

looking for ways to help their students get hands-on experience and gain a competitive edge in recruiting. Many schools have staff members dedicated to coordinating internship placements with employers. Partnering with these institutions can help employers advertise their internship positions to a wide pool of candidates and can increase the chances of finding the most qualified candidates for the program. Finally, working directly with college faculty and registrars can be an effective way to establish appropriate levels of academic credit for internship participants. While course credit can be quite valuable to all internship participants, it is especially important for employers that plan to offer unpaid internships.

- **Orientation** - The first type of training generally offered to interns is an orientation to the employer's business and internship program. During this initial orientation, employers should provide information about the company and department; discuss expectations and review internship goals; discuss office policies and procedures (e.g., security, dress code, work hours, technology and phone systems, etc.); finalize any necessary paperwork; give a tour of the office or workspace; and introduce interns to key people in the company/department and internship program.
- **Be creative** - The training requirement does not prohibit the employer from being creative in developing the training curriculum, nor does this requirement prohibit the employer from discussing or emphasizing its own policies and procedures in the training curriculum. It does, however, require that the scope of the training be generic enough to prepare the students to perform the same type of work for other employers.

#### Assign Intern Supervisors to the Interns

**It is important to provide adequate supervision and train supervisors to work with interns.**

Employers should pair each intern with at least one supervising employee to be a resource for the intern for the duration of the internship. Having this one-on-one relationship with the intern is a great way to ensure the intern receives the proper level of training and learns the requisite transferable skills.

- **Primary responsibilities** - Supervising employees in the internship program should be capable and prepared to give instruction related to specific assignments; assist the intern with specific tasks; answer questions related to the assignment; provide feedback and evaluation on work product. The

supervising employee should also actively seek opportunities for the intern to shadow the supervisor on various assignments.

- **Compliance** - Another benefit to having employees supervise the work of interns is that doing so lessens the likelihood that interns will be perceived as having the level of autonomy that would threaten their intern status. If internship programs do not provide sufficient supervision and interns are assigned tasks that would normally be completed by an employee, regulatory agencies are more likely to view this as evidence supporting employee rather than intern status.
- **Experience** - Supervisors should be experienced employees capable of fulfilling their role as supervisors in the internship program. Since it is important for supervising employees to be able to help integrate the intern into the company or department and provide feedback on work assignments, employers should shy away from assigning newly hired employees as supervisors in the internship program.
- **Availability** - Supervising employees should have the time available time to fulfill their responsibilities for the internship program.
- **Mentoring** - Mentors generally provide guidance on professionalism and workplace culture, and make sure that interns have everything they need to be successful. Mentors also help the intern answer any questions or resolve any issues that may arise. Some employers ask the supervising employee to fulfill the role of a mentor. Others prefer to have different employees fulfill each role.

#### Identify an Internship Program Coordinator

**It is important to have someone coordinate the internship program.**

It takes a lot of preparation and work to develop, implement and administer an effective and compliant internship program. This is especially true the larger the organization. As such, employers should identify someone in the organization whose responsibility is to coordinate all of the tasks necessary to effectuate a successful internship program.

- **Primary responsibilities** - The internship coordinator should manage the overall internship program. Responsibilities include coordinating the internship program with colleges and universities; serving as a single point of contact for all internship program issues; making sure interns are placed with appropriate supervisors and

mentors; and making sure all program participants are meeting deadlines and fulfilling their responsibilities as it relates to the internship program.

- **Continuous improvement** - The internship coordinator should work with others in the organization to evaluate and make improvements to the internship program on an ongoing basis.
- **Consistency** - Having a central person in this role is a great way to ensure the program is being administered consistently throughout the organization.
- **Compliance** - Having an internship coordinator is also an effective way to ensure the internship program complies with legal requirements.

#### **Create Program Materials for the Interns**

**Successful internship programs have detailed and effective program materials.**

Developing program materials such as an internship brochure, an internship program manual, training course materials, and intern evaluations helps to effectively communicate information and can be useful in making sure interns, employers and participating employees understand their roles and responsibilities.

- **Disclaimer** - All materials referencing the internship program, particularly internship announcements, should clearly indicate the internship is a learning experience, not an offer of temporary or permanent employment.
- **Internship announcement** - The internship announcement or internship brochure will likely be the first “contact” a prospective intern has with the employer’s internship program. The announcement should include general information about the employer’s business, the internship program and the application process.<sup>7</sup>
- **Internship program manual** - Employers should create an internship program manual to be given to all interns at the beginning of the internship or

during the internship orientation. This manual should contain detailed information about the internship program including information about the company such as organization charts; the training course syllabus and training materials; contact information for the internship coordinator, supervising employees, other interns, and other key employees; examples of work product; and evaluation criteria and forms.

#### **Get It In Writing**

**Employers should communicate the expectations of the internship program with the interns and get written confirmation that the interns understand the expectations.**

- **Signed disclaimer** - Two of the key criteria for trainee/intern status are (1) interns are not entitled to a job at the conclusion of the internship program, and (2) all parties understand the interns are not entitled to wages for the time spent in training. To prevent misunderstandings, employers should create a document explaining these points. In addition, the internship should be for a fixed duration, defined in the document. The document should require two signatures: one for the employer to confirm the disclaimer was explained to the intern, and the other for the intern to acknowledge she or he understands these expectations.
- **Clear expectations** - This type of acknowledgment does not prohibit the employer from hiring the intern at any point after the internship is over. It also does not prohibit the employer from paying wages to the intern. It does, however, ensure that both the employer and intern are clear about the expectations, whatever they may be.

#### **Intern Selection Process**

**Employers should have a clear intern selection process that emphasizes the learning nature of the internship position.**

Having an intern selection process that is substantially similar to the hiring process for employees may threaten intern status. As such, the selection process for the internship program should not necessarily mirror the selection process for permanent employees. Rather, the intern selection process should focus on the learning nature of the internship program. Employers should seek interns based on their demonstrated ability and willingness to learn, and not on the acquisition of specific work skills.

<sup>7</sup> Typical internship program announcements include the following information: a brief overview of the employer’s business; position descriptions that describe the major tasks the intern will be expected to perform; a list of the necessary qualifications the intern should possess, with a reference to desirable academic coursework; the learning objectives of the internship; the length of the program; the number of hours per week the intern is expected to work; compensation or lack thereof; whether academic credit is offered; application requirements and deadlines; and contact information in case the applicant has any questions.

### **Putting It All Together**

Internships – paid or unpaid – can serve as valuable opportunities for people looking to fulfill requirements for certification, licensing or college graduation; for obtaining jobs that require work experience; for testing one’s interest in a particular field or job; for gaining experience prior to changing careers; and for experiencing real work in a real job. However, unless an internship meets very strict criteria for unpaid work in for-profit companies, both federal and California state wage and hour laws require employers to pay their interns. Compliance with these criteria requires careful and thoughtful planning in order to avoid liability for misclassification of unpaid workers.

An unpaid internship program must be similar to training that would be given in an educational environment, must be for the benefit of the intern, must not displace regular employees, must provide close supervision of the intern by existing staff, and must give the employer “no immediate advantage” from the intern’s activities. In addition, the intern should not necessarily be entitled to a job at the internship’s conclusion, and both the employer and the intern must understand that

the intern is not entitled to wages for the time spent in the internship. The employer would be wise to describe the terms of the internship in a writing provided to the intern, signed by both the employer and intern prior to the commencement of the internship. It would also be advantageous if the program is done in conjunction with an educational institution.

Given the frustration with the current economic environment, unpaid internship programs may be particularly tempting to interns, current and former, to challenge. In order to avoid or, if necessary, defend any such attack, employers with unpaid interns should be mindful of the DOL’s and California’s criteria for unpaid internships and ensure their compliance with same.

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