

Paid vs. unpaid interns

Unpaid interns could be costly, if you're doing it wrong

INTERVIEWED BY JAYNE GEST

In June, a New York federal court decided a case — known as the “Black Swan” case — that should make employers think hard about how to structure internship programs.

The court found that a major movie studio should have paid its interns, and several other companies using unpaid interns are now facing similar lawsuits.

“We’re going to see a lot of people reconsidering their internship programs in light of these cases,” says Gabrielle Sellei, a member at Semanoff Ormsby Greenberg & Torchia, LLC. “Those who decide to stick with it will think about how to structure an internship program to avoid risk.”

Smart Business spoke with Sellei about how employers should structure unpaid internship programs.

What are the guidelines for unpaid internships?

There is no definition of ‘intern’ in the Fair Labor Standards Act (FLSA), but there is a long-standing exception for ‘trainees’ to the general rule that workers must be paid. More recently, the Department of Labor issued a fact sheet listing six criteria to help employers determine whether an intern can be considered a trainee under the FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
2. The experience must be for the benefit of the intern, not the company.
3. The intern must not displace regular employees, but must work under the close supervision of the existing staff.
4. The employer providing training derives no immediate advantage from the intern’s activities, and on occasion its operations may actually be impeded.

GABRIELLE SELLEI
Member
Semanoff Ormsby Greenberg & Torchia, LLC

(215) 887-0200
gsellei@sogtlaw.com

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5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

However, even compliance with all of these factors is not an absolute safe harbor; employers should consult an attorney familiar with this area of the law to review their internship programs.

What’s your advice for employers deciding whether to pay interns?

Employers contemplating an unpaid internship program should do a quick gut check, asking: ‘Who will benefit?’ If the honest answer is ‘the company,’ you’ll want to think again. Alternatively, you can always pay your interns — just be aware of minimum wage and child labor laws.

If you decide to use unpaid interns, what can you do to protect your business?

For starters, consider the selection process. It should not look like a hiring process, but a component of somebody’s education that just happens to be at a company. In other words, specific skills are irrelevant, a demonstrable interest in the industry or a compatible educational path are not.

Then, put your internship program in

writing, emphasizing what the interns will learn and how tasks will be geared to learning. The program should have a purely educational component, such as seminars, instructive lunches with senior staff or speakers, or maybe even a retreat. If possible, one-on-one mentoring with senior managers would be terrific programming.

Operationally, make sure that interns are not providing services that employees would normally provide, and that you are not using interns to reduce your (paid) headcount; this would constitute a clear benefit to the employer.

Finally, a written internship agreement, signed by the intern, should state that the internship is unpaid and that there is no guarantee of a job at its conclusion.

If the guidelines are so strict, why bother having unpaid interns?

In this economy, internships are popular with employers and interns. Students who anticipate entering the workforce want as much experience as they can get — paid or not. And even though unpaid internships don’t directly benefit the employer, they can be valuable as community relations tools and to expose a new generation to an industry. An internship program that leads to a lawsuit is going to have the opposite effect, so it’s important to get it right. ●