

The 'Black Swan' Case: Death of the Unpaid Internship?



If your organization uses interns—or plans to do so—take note of this month’s ruling in the closely watched “Black Swan” case. A federal court in New York said Fox Searchlight Pictures violated wage-and-hour laws by failing to pay interns who did menial tasks during production of the Oscar-nominated movie “Black Swan.”

Plus, the court gave the green light for a class-action lawsuit covering everyone who worked unpaid internships for Fox Searchlight from 2008 to 2010. ([Glatt, et al. v. Fox Searchlight Pictures](#), SD NY, No. 11-Civ.-6784)

This case is a timely reminder that, in almost all cases, employers must pay interns at least the minimum wage, no matter how basic their work is.

As Michael Cohen, an attorney with Duane Morris in Philadelphia, said at this week's [SHRM](#) conference in Chicago: “Many of the interns you’re using this summer are not really interns; they’re employees ... and intern and volunteer claims are happening over and over these days ... Employers need to ask themselves, ‘Is this something we’d normally hire someone to do?’”

The DOL 6-point test

This case serves as the first real court test of the [unpaid-internship guidance issued in 2010](#) by the U.S. Department of Labor. The guidance says that, to comply with the Fair Labor Standards Act (FLSA), an unpaid intern program must meet *all six* of these strict criteria:

1. The internship resembles training offered by an educational institution.
2. It exists to benefit the intern.
3. The intern doesn’t displace a regular employee, and works under close supervision of existing staff.
4. The employer derives no immediate advantage from the activities of the intern. Sometimes, its operations may actually be impeded.
5. The intern isn’t necessarily entitled to a job after the internship ends.
6. The employer and intern understand the internship is unpaid.

If the internship fails to meet any of those tests, the DOL says interns must be paid at least the minimum wage.

It’s rare for internships to meet this strict criteria. As the DOL guidance says, “This exclusion from the definition of employment is necessarily quite narrow because the FLSA’s definition of ‘employ’ is very broad.”

The case: Several unpaid interns who worked as production assistants, bookkeepers, secretaries and janitors during the movie's New York filming sued, claiming failure to pay them violated the FLSA.

The court agreed, focusing primarily on the second and third DOL criteria. As the court wrote, "Searchlight received benefits from their unpaid work, which otherwise would have required paid employees. The fact that they were beginners is irrelevant."

Also irrelevant, according to the court: Whether any of the interns received academic credit for their internships. It said that course credit is an issue that's between students and their colleges.

The court ruled that the interns were, in fact, employees and are entitled to back pay. A separate class-action case will determine if more than 40 other studio interns will also get back pay.

Advice: Have your attorney review your internship arrangements in light of this decision, which could prompt courts nationwide to apply the DOL criteria. That could spell the end of unpaid internships.

Still insist on not paying interns?

If you still plan on going the unpaid intern route (a risky strategy), take these steps to minimize liability under the Fair Labor Standards Act.

- Know what work your interns are doing.
- Make sure HR approves all internships in advance, insisting on clearly delineated duties to ensure they comply with state and federal law.
- Require interns to sign a document acknowledging that they won't be paid.
- Never use interns in place of workers.
- Make sure the internship has an academic component. Consult with college internship coordinators to ensure the intern is getting academic credit in return for providing some evidence of learning, such as writing a paper about the experience.