

There is Still No Such Thing as a Free Lunch

The Rise of Collective Action Claims for Wages by Unpaid Interns and Related Legislation

by **Randi W. Kochman and Jason R. Finkelstein**

Although the sluggish economy has shown signs of rebounding from the drastic setbacks of the 2008 financial collapse, employers continue to hold the balance of power when hiring employees. Fewer job openings are available to recent college and professional school graduates, who now compete with more experienced members of the workforce in the job market. This series of events has caused interns, who are often eager, college-aged individuals willing to work for free in exchange for first-hand experience and credentials, to take a greater place in the employment spotlight. Unpaid interns are generally not afforded the same rights and legal protections as their paid, employed colleagues.

New attention is now being paid to interns across the country and, specifically, in New Jersey. In fact, unpaid intern lawsuits have recently exploded. In these cases, unpaid interns typically assert their rights through putative collective and class action lawsuits, alleging that employers have misclassified them as unpaid interns in order to unlawfully avoid paying them wages. In addition to what is taking place in the courtroom, pending New Jersey legislation is directed at providing unpaid interns with new protections against unlawful discrimination, akin to those afforded to paid employees across the state. Employers are well advised to note these trends before engaging 'free' help.

The Growing Trend of Unpaid Intern Claims Seeking Wages

Interns are asserting their legal rights today in an unprecedented fashion. In fact, many groups of unpaid interns have started suing their 'employers' for wages. Such putative classes are asserting claims that, although they were hired under the guise of an unpaid internship, they were, in fact, functioning

as employees entitled to wages under the federal Fair Labor Standards Act (FLSA) and applicable state wage and hour laws.

The FLSA and New Jersey's wage and hour laws, in broad terms, define "employ" as causing to "suffer or permit to work."¹ All individuals who are so employed, including interns, must be compensated for the work they perform for their employers. Exemptions under the FLSA, however, apply to interns employed at for-profit companies who qualify as trainees, or individuals who receive internship training while on the job that furthers their own education. According to the United States Department of Labor (DOL), an intern qualifies under the trainee exception of the FLSA (which is set forth in DOL Fact Sheet #71) if, based upon a totality of the circumstances:

- the internship provides training similar to that obtained in a vocational school setting;
- the purpose of the internship is to benefit the intern;
- the intern does not displace a regular employee;
- the employer does not enjoy any immediate advantage from the intern's work;
- there is no entitlement to a job at the internship's conclusion; and
- both the employer and intern understand the intern is not entitled to wages.²

Similarly, pursuant to New Jersey law, trainees are assessed under a nine-factor test, and include those working in a program in which:

- the training is for the primary benefit of the trainee;
- the employment for which he or she is training requires some cognizable trainable skill;
- the training is not specific to the employer, that is, is not

exclusive to its needs, and may be applicable elsewhere for another employer or in another field of endeavor;

- the training, even though it includes actual operation of the facilities of the employer, is similar to that which may be given in a vocational school;
- the trainee does not displace a regular employee on a regular job or supplement a regular job, but trains under close tutorial observation;
- the employer derives no immediate benefit from the efforts of the trainee and, indeed, on occasion may find his or her regular operation impeded by the trainee;
- the trainee is not necessarily entitled to a job at the completion of training;
- the training program is sponsored by the employer, is outside regular work hours, the employee does no productive work while attending and the program is not directly related to the employee's present job (as distinguished from learning another job or additional skill); and
- the employer and the trainee share a basic understanding that regular employment wages are not due for the time spent in training, provided the trainee does not perform any productive work.³

Given the flexible, fact-specific intern trainee tests, it was only a matter of time before companies began facing lawsuits from unpaid interns contending they are entitled to compensation. Over the past several years, state and federal courts across the country have seen a substantial increase in the number of such unpaid wage lawsuits, including many filed against well-known entities. Even when the employer is not 'in the wrong,' interns asserting these claims can embroil their employers in costly litigation with substantial negative publicity.

The following cases are a representa-

tive sample of the high-profile unpaid intern wage lawsuits filed in recent years:

- *Glatt v. Fox Searchlight Pictures Inc.*, Case No. 11-cv-6784 (S.D.N.Y.): Several unpaid interns who worked on the production of the motion picture *Black Swan* sued under the FLSA and the New York labor law alleging, among other things, that Fox misclassified them as unpaid interns instead of employees entitled to wages. In applying the DOL trainee test, Judge William H. Pauley III determined the interns had effectively "displaced" regular workers for the benefit of the employer, and they were therefore entitled to compensation after having been improperly classified.⁴ Earlier that year (in 2013), in *Wang v. Hearst Corp.*, 12-cv-793 (S.D.N.Y.), a case similar to *Fox*, Judge Harold Baer Jr. rejected ex-interns' claims filed against The Hearst Corporation and denied their bid for class certification.⁵
- *Stokely v. Universal Music Group Inc.*, Case No. 14-cv-4409 (S.D.N.Y.): In a putative class action asserted against the parent company of Def Jam Recordings and Motown Records, former interns claimed violations of the FLSA and New York labor law for improperly classifying certain employees as interns and failing to pay minimum wage or overtime. These interns claim to have performed such services as creating press kits, running various errands, interviewing artists, and working record release parties.
- *O'Jeda v. Viacom, Inc., et al.*, 13-cv-5658 (S.D.N.Y.): Conditional collective certification was obtained in this case for a potential group of thousands of former unpaid interns at Viacom and MTV, after the lead claimant alleged he was misclassified and due wages for performing such tasks as operating and maintaining a mobile website on behalf of the

defendants during his internship.⁶

- *Tierney v. Sirius XM Radio Inc.*, Case No. 14-cv-2926 (S.D.N.Y.): A former Howard Stern Show intern filed a putative class action against Sirius XM Radio alleging non-payment of wages and misclassification as an unpaid intern. The intern alleged he worked hours and performed functions like paid employees (ordering breakfast, reviewing news clips, reporting to on-air personalities), while not receiving any academic or vocational training.
- *Campbell v. Coach Inc.*, Case No. 156453/2014 (N.Y. Supreme Court): Former unpaid interns employed by the high-end designer label Coach sued in New York state court for the designer allegedly misclassifying them as unpaid interns and failing to pay minimum wages for performing such work functions as creating trend boards, researching new trends and fabrics, working in company warehouses and performing other tasks similarly performed by paid employees.

Despite the large number of class cases filed on behalf of interns, the ultimate fate of these actions remains to be seen. The United States Court of Appeals for the Second Circuit is considering the *Fox* and *Hearst* cases in tandem, to decide the issue of whether and when unpaid interns qualify as employees entitled to wages for purposes of state and federal wages laws.

While the majority of the headline-grabbing unpaid intern lawsuits have been primarily venued in New York, New Jersey employers must appreciate the potentially steep financial ramifications of misclassifying interns as unpaid, whether intentionally or not. In addition to the financial penalties employers can face in such lawsuits, companies should also consider the incalculable reputational harm and stig-

ma to the companies' public image.

The Rise of Legislation Aimed at Protecting Unpaid Interns

The state of New Jersey is poised to become the next of a small but growing number of jurisdictions across the country to enact or amend legislation that protects unpaid interns against unlawful discrimination, harassment and retaliation. Entitled the New Jersey Intern Protection Act, the proposed legislation (S-539) is designed to amend the New Jersey Law Against Discrimination,⁷ the Conscientious Employee Protection Act (protecting against whistleblower retaliation by employers)⁸ and the Worker Freedom from Employer Intimidation Act (prohibiting the intimidation of employees based on religious and political beliefs).⁹ The law, as drafted, will provide New Jersey unpaid interns with rights to sue employers for violations of all three statutes, just like any paid employee. The legislation will afford unpaid interns with numerous protections against discrimination, retaliation and hostile work environments. After passing the Senate earlier this year, at the time of this writing the bill is pending a vote by the New Jersey Assembly Labor Committee.

In 2009, Washington, D.C. became the first jurisdiction in the United States to enact legislation specifically aimed at protecting interns. That legislative act followed on the heels of a controversial 2008 District of Columbia federal circuit court opinion in *Evans v. The Washington Center for Internships and Academic Seminars*, where the court was presented with an unpaid intern's complaints of a supervising chiropractor's alleged inappropriate sexual advances and physical contact.¹⁰ The *Evans* court dismissed the plaintiff's claims and ruled the scope of the District of Columbia Human Rights Act of 1977 did not encompass unpaid interns within the statute's definition of an employee.¹¹ Only months later, the

District of Columbia's Legislature responded by amending its Human Rights Act to protect unpaid interns against these unlawful activities.¹² This was the first instance in the United States where unpaid interns were legislatively provided with specific employment protections that put them on par with other employees. Four years later, Oregon became the next jurisdiction to extend employment discrimination protections to interns when it enacted legislation in June 2013.¹³

More recently, after the hot-button 2013 decision from the District Court for the Southern District of New York in *Wang v. Phoenix Satellite Television US, Inc.*, where an unpaid intern in New York was precluded from suing her employer after her supervisor allegedly engaged in sexually harassing misconduct,¹⁴ New York State and New York City each amended their respective human rights laws. The *Wang* court, like the court in *Evans* several years earlier, held that the applicable federal, state and city human rights laws did not apply to unpaid interns, and the plaintiff-intern therefore failed to state a cognizable claim.¹⁵ In response, New York City Mayor Bill De Blasio amended the New York City Human Rights Law in April 2014, and broadened its scope to allow interns to sue employers for discrimination and harassment in the same ways as paid employees.¹⁶ In July 2014, New York Governor Andrew Cuomo likewise amended the New York State Human Rights Law by extending anti-discrimination and harassment protections afforded to employees to unpaid interns.¹⁷ Soon after, in Sept. 2014, California amended the California Fair Employment and Housing Act, which protects employees against discrimination and retaliation, to apply to unpaid interns, and Illinois likewise amended its Human Rights Act to protect unpaid interns against sexual harassment.¹⁸

Best Practices for New Jersey Employers

In light of the New Jersey Intern Protection Act and the influx of high-profile class and collective action lawsuits commenced by interns around the country, New Jersey employers must be cognizant of their current, and likely future, legal responsibilities in order to avoid finding themselves on the wrong end of an intern's legal action. To best position themselves during this period of change, New Jersey employers should engage in the following self-assessments and practical proactive activities:

- **Continue company-wide anti-discrimination, retaliation and harassment protections:** By and large, the new protections envisioned under the New Jersey Intern Protection Act should, at least in theory, not change the way employers treat their interns (*i.e.*, protecting against discriminatory, harassing and retaliatory conduct). However, while New Jersey interns may not currently have recourse for such unlawful conduct, the pending legislation may require employers to become more attuned to concerns expressed by interns about any such misconduct.
- **Update employee handbooks:** This is an ideal time for New Jersey employers to review and consider updating their employee handbooks and policies to include references to interns, as necessary. While this is not required under the current state of the law, the expected passage of the New Jersey Intern Protection Act will quickly change what is required to be included in employee handbooks and company policies. This is also the perfect opportunity for employers to develop anti-discrimination, anti-harassment and anti-retaliation policies, to the extent they do not already have them, which include specific reference to interns.

• **Revisit unpaid internship programs:** Given the growing trend of intern rights lawsuits popping up across the country, New Jersey employers should assess any current unpaid internship programs and analyze them against DOL Fact Sheet #71 and New Jersey's regulations. Is the primary purpose of the program to benefit the company or the intern? Is the intern displacing the position of a paid employee? Does the company clearly inform the intern that he or she is not entitled to wages? Is the intern allowed to earn educational credits for the work performed? Companies are well advised to ask themselves these tough questions before hiring workers.

As noted, the notion of an intern as 'free labor' is increasingly becoming a thing of the past. New Jersey employers engaging in the noted self-auditing activities will help ensure compliance with the changing legal dynamic, and hopefully stave off challenges by unpaid interns. ☞

Randi W. Kochman is the chair of the employment law department of Cole, Schotz, Meisel, Forman & Leonard, P.A., where she counsels and represents management and executives in a wide variety of employment law and litigation matters.

Jason R. Finkelstein is an associate of the firm and a member of the employment law department.

ENDNOTES

1. 29 U.S.C. § 203(g); N.J.S.A. 34:11-56a1.
2. United States Department of Labor, Fact Sheet #71 (April 2010).
3. N.J.A.C. 12:56-2.1.
4. *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013). See posting of Jason R. Finkelstein to Employment Law Monitor, employmentlawmonitor.com/2013/06/articles/employment-policies-and-practi/employers-beware-unpaid-internships-may-result-in-labor-law-violations/ (June 25, 2013), for further analysis of the Fox decision.
5. *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013).

6. *O'Jeda v. Viacom, Inc.*, 2014 WL 1344604 (S.D.N.Y. April 4, 2014).
7. N.J.S.A. 10:5-12.
8. N.J.S.A. 34:19-1, *et seq.*
9. N.J.S.A. 34:19-9, *et seq.*
10. *Evans v. The Washington Center for Internships and Academic Seminars*, 587 F. Supp. 2d 148 (D.D.C. 2008).
11. *Id.* at 151.
12. D.C. Code § 2-1401.02.
13. Or. Rev. Stat. § 659A.350.
14. *Wang v. Phoenix Satellite Television US, Inc.*, 976 F. Supp. 2d 527 (S.D.N.Y. 2013).
15. *Id.* at 532-537.
16. N.Y.C. Admin. Code §§ 8-102, 8-107. For further analysis of the New York City Human Rights Law amendments, see posting of Randi W. Kochman and Jason R. Finkelstein to Employment Law Monitor, employmentlawmonitor.com/2014/06/articles/harassment-discrimination-and/684/ (June 12, 2014).
17. N.Y. Exec. Law § 296-c.
18. Cal. Gov't Code § 12940; 775 Ill. Comp. Stat. 5/2-102.