



Are unpaid internship programs lawful?

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The Fair Labor Standards Act (“FLSA”) sets a federally mandated floor on the hourly wages of employees that are employed by for-profit employers. It also governs the maximum number of hours that an employee may work in a single week without receiving overtime pay. The number of employers that have allegedly violated the FLSA by improperly maintaining unpaid internship programs continues to grow.

1. [Fox Searchlight Pictures Inc. Lawsuit](#)– September 28, 2011

- (a) Film Production
- (b) Former interns that worked on movie sets sue.

2. [Hearst Corporation Lawsuit](#) – September 11, 2012

- (a) Magazine Publisher
- (b) Former Harper Baazar intern sues. Plaintiff seek class certification.

3. [Gawker Media LLC Lawsuit](#)– June 21, 2013

- (a) Online media content producer
- (b) Sued by former interns shortly after Fox Searchlight ruling announced.

4. [Charlie Rose Lawsuit](#)– June 28, 2013

- (a) Television program
- (b) Former interns sue talk show host individually
- (c) Case settled for \$250,000

5. [Condé Nast Lawsuit](#)– October 23, 2013

- (a) Magazine publisher
- (b) Two former interns sue. Plaintiffs seek class certification.
- (c) Condé Nast discontinues internship program in response.

6. [NBC Universal Lawsuit](#)– July 3, 2013

- (a) Media development, production and marketing company.
- (b) Two former Saturday Night Live (“SNL”) and MSNBC interns sue
- (c) Plaintiffs seek class certification

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7. [Elite Model Management Corporation Lawsuit](#)-January 15, 2014

- (a) Modeling agency with offices in New York, Los Angeles and Miami
- (b) Settles class action brought by unpaid interns for \$450,000

8. [New York Legislature Passes Law Protecting Interns from Harassment/Discrimination](#)– April 15, 2014

- (a) Becomes effective in June of 2014.
- (b) Interns are now employees for the purposes of NY Civil Rights Laws.
- (c) But not all unpaid interns will qualify for protected status under statute.

9. [Sirius XM Lawsuit](#) – April 29, 2014

- (a) Satellite Radio Station
- (b) Former intern on Howard Stern show sues.

The key legal question is whether unpaid interns are “employees” as defined by the FLSA. Surprisingly, the relevant legal authorities do not clearly resolve when an intern qualifies as an employee. The actual text of the FLSA is so broad that it provides little, if any, guidance. Employee is defined as “any individual employed by the employer.” 29 U.S.C.A. § 203(e)(1) (2014). To employ is defined as “to suffer or permit to work.” 29 U.S.C.A. § 203(g)(2014). This language seems to suggest that all interns must be paid. Interns work for companies who either require or permit them to do work. Therefore, companies “employ” interns and interns are employees under the FLSA. But the Supreme Court complicated the rather straight forward textual analysis by creating an implied **trainee exception** to the FLSA’s broad statutory definitions.

“The definition of ‘employ’ and ‘employee’ are broad enough to [ensure that every person whose employment contemplated compensation will not be compelled to sell their services for less than the prescribed minimum wage]. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.” *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (holding that prospective brakemen who were required to undergo unpaid training before being considered for employment by a railroad did not qualify as employees under the FLSA). The *Walling* decision complicates matters further by suggesting that, notwithstanding its creation of the trainee exception, certain trainee arrangements may violate the FLSA. “We have not ignored the argument that such a holding may open up a way for evasion of the law. But there are neither findings nor charges here that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law.” *Id.* at 153.

The Department of Labor attempted to clarify the implications of *Walling* in the unpaid intern context by adopting a six factor totality-of-the-circumstances balancing test. See [DOL FACT SHEET #71](#) (April 2010). If all the following factors predominate the interns’ work experience then they are not considered employees for FLSA purposes and do not have to be paid minimum wages:

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.

6. The employer and intern understand that the intern is not entitled to wages for the time spent in the internship.

Therefore, the key question appears to be this: Does the working relationship solely benefit the unpaid intern? The more a company directly benefits from the intern's activities the more likely it is that the intern qualifies as an employee under the FLSA and must be paid minimum wages.

So far, unpaid intern claims are most prevalent in the entertainment industry. But if the plaintiffs in the entertainment cases are successful then it is highly likely that unpaid intern cases will be brought against other types of employers. For example, for-profit organizations that rely heavily on the work and contributions of unpaid volunteers could be next. South by South West ("SXSW") – the annual music, technology and film festival in Austin, TX – has seventy five paid employees but also relies on an "army of global volunteers." See [SXSW's Unpaid Labor Problem: Why Its Risking A Class Action Lawsuit](#). Do those volunteers technically qualify as employees under the FLSA? Should they qualify? The answer is unclear.

The FLSA and its regulations need to be updated to reflect the increasing importance of unpaid interns in the modern workplace. Until the rules are clarified it will be very difficult, if not impossible, to prospectively determine whether an unpaid internship program is lawful.