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Can Interns Who Agreed To Work For Free Sue For Wages?

Like ugly ducklings, will unpaid interns emerge as (Black) Swans? A series of lawsuits–including one by interns who worked on the Black Swan movie–is set to answer the question whether unpaid interns are ***really*** employees. It's not just about titles, and not every case is the same. But no matter what you call employees, the law says they are entitled to wages under various employment laws.

(Photo credit: Wikipedia)

By definition, though, unpaid interns ***agreed*** to that status when they signed on. Isn't later suing for wages going back on the deal? Yes and no. The most publicized case involves 100 or so interns who worked on the Black Swan movie. The defendants are Fox Searchlight and Fox Entertainment Group.

The interns say labor laws require companies using unpaid interns to provide training. They didn't get it, they claim, so the deal is off and they want back pay. After a trial court ruling in favor of interns here, the Second Circuit

Court of Appeals will hear the case and could make a key ruling. See Fox Searchlight Granted Fast Appeal In 'Black Swan' Intern Lawsuit.

One big question is what legal standard applies to determining if an intern is actually an employee and entitled to wages. Fox Searchlight isn't the only company concerned. Intern suits are percolating elsewhere, including claims against Hearst, Conde Nast and Warner Music. See Searchlight Scores Partial Win In 'Black Swan' Intern Suit. In many ways, these suits are extensions of the suits by independent contractors for the benefits of employee status.

Even if independent contractors signed agreements saying they are ***not*** employees, such suits claim, they are really employees and entitled to pay. And the law is on the side of the independent contractors ***if*** they were really mischaracterized and treated like employees. After all, taxing agencies that come after employers for unfairly not paying payroll taxes on improperly classified "independent contractors" do the same thing.

In each such situation, the true relationship of the parties controls. That can make planning difficult, especially where the line between independent contractor and employee is so fact-intensive and often difficult to discern. In that sense, the intern relationship is arguably different. Indeed, it is invariably short-term and supposed to be for experience.

Yet even the U.S. Supreme Court has addressed this question. *Walling v. Portland Terminal Co.* enumerates six requirements companies must satisfy to use pay-free interns:

1. Even though the internship includes the employer's actual business operations, it must be similar to training in an educational environment;

2. The experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under the close supervision of existing staff;

4. The employer derives no immediate advantage from the intern's activities, and its operations may sometimes be impeded;

5. The intern is not necessarily entitled to a job after the internship; and

6. The employer and intern understand that the intern is not entitled to wages.

No matter how simple this may sound, some of these conditions could be debated about many internships. The same is true for independent contractor vs. employee issues. See New Crackdown On Using Independent

Contractors. And today, even franchise arrangements can be attacked as importing liability. See $32M Domino's Delivery Verdict Says You Should Know Who's Delivering Your Pizza and Can Franchisees Be Recast as Employees?

No matter what happens in the intern cases, the path for employers can be a perilous one.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.