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Your Grandmother Doesn't Work for Free: Volunteer and Intern Positions Under Closer Scrutiny

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Rhea Lana Riner, owner of children's clothing consignment franchise Rhea Lana's, has sued the U.S. Department of Labor (DOL), alleging that the department harmed her consignment franchise business when it arbitrarily classified her volunteers as employees under the Fair Labor Standards Act (FLSA). Her suit has put the minimum wage debate front and center.

According to Bloomberg News, the DOL opened an investigation into Rhea Lana's volunteer policy in January 2013, after the Arkansas Department of Labor took a similar action. In August, the federal government jumped in to inform the franchise company that it was in violation of minimum wage laws for not fairly compensating its volunteers. The volunteers are mostly stay-at-home moms and retired grandmothers who help staff Rhea Lana's consignment sales all over the country through franchisees. Instead of getting paid, the volunteers are given an opportunity to shop early at the consignment sales, giving them the opportunity to get the best used toys and clothes for themselves.

The DOL contacted the volunteers and told them that they have the right to sue the franchisor for back wages. The DOL found Riner's company to be in violation of the FLSA, concluding that moms and families who volunteer up to 15 hours for an early shopping pass are classified as employees and should be paid minimum wage.

Riner's lawyer claims that the entire consignment industry, including Riner's franchise, would be affected negatively by this ruling. The ruling may also have an impact on unpaid internships, which have been more closely scrutinized after a judge found that two Fox Searchlight production interns were not compensated legally. Countless companies, large and small, open the doors to their offices, welcoming interns eager to add experience to their resumes for little or no pay. But as a result of the multitude of new lawsuits challenging the practice, the unpaid internship is under assault.

The State of New York is leading the way, with employment lawyers filing lawsuit after lawsuit against media companies over unpaid internships. On June 11, 2013, the U.S. District Court for the Southern District of New York ruled in favor of interns Eric Glatt and Alexander Footman finding that they did not fall within the FLSA's unpaid "trainee" exception.

Judge William H. Pauley, applying the DOL criteria, found the interns did not receive training similar to that in an educational environment, as they performed routine tasks that otherwise would have been performed by paid employees. The court also held that Fox Searchlight was the "primary" beneficiary of the internships. Although both Glatt and Footman understood that their internships would be unpaid, the court reiterated that FLSA "does not allow employees to waive their entitlement to wages."

On the heels of the victory in *Fox Searchlight*, plaintiffs' firms have filed suit against companies such as NBC Universal, Warner Music Group Corp. and Gawker Media LLC with the same or similar allegations related to unpaid interns.

The threat of multi-plaintiff/class litigation is not just a problem for employers operating in New York state, as the FLSA is federal law and applies nationwide. Unpaid intern plaintiffs have also been winning significant battles on critical issues such as classification and class action status, thus creating new federal law, which can be a persuasive authority in the jurisdictions in which a business operates.

Many employers may not be aware that it is fairly difficult to meet all of the legal requirements for an unpaid internship. According to the DOL, an unpaid internship is only lawful in the context of an educational training program, when the interns do not perform productive work and the employer derives no benefit. Boiled down, there are six criteria handed down from the DOL, all of which an unpaid internship must meet in order to be legal:

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 the intern understand that the intern is not entitled to wages for the time spent in the internship.

In recent years, a wave of lawsuits brought by unpaid interns seeking compensation for their work has spurred businesses to take a hard look at their internship programs to ensure they are compliant with federal and state wage and hour laws. Some large employers, such as publishing company Conde Nast, have already made the decision to eliminate their intern programs altogether in the face of such suits. However, the question of whether an intern is in fact an employee – and thus entitled to minimum wage and overtime – has not been an easy one to answer. Courts have applied both the six-factor test promulgated by the DOL, as well as a more general test that asks simply whether the internship program benefits the employer or the intern, in resolving this question. Because courts have not approached the issue in a consistent manner, the law remains unclear.

However, that may soon be changing. On November 27, 2013, the Second Circuit Court of Appeals granted petitions for interlocutory appeal in two intern cases, *Glatt v. Fox Searchlight Pictures, Inc.* and *Wang v. The Hearst Corp*. By doing so, the Second Circuit will likely be the first court of appeals since the recent wave of suits began to consider how these cases should be evaluated.

The *Fox Searchlight* case involves two unpaid interns who worked on the film set of "Black Swan." U.S. District Judge Pauley held that the interns, who allegedly ran errands, photocopied documents and made coffee, among other menial tasks, should have been classified as employees under the FLSA. He also certified under state law a class of interns who worked in five Fox Entertainment Group units in New York, and granted conditional certification to a national class of interns from the five units under the FLSA. In *Hearst*, U.S. District Judge Harold Baer denied certification of a class of former Hearst interns who sought to bring claims under state wage law. The Court of Appeals will hear both cases together.

All employers should be aware of these recent rulings when considering whether an unpaid intern program is right for their organizations.