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Unpaid Intern Rules Turned Upside Down - Again

09.01.15 | Linda J. Rosenthal, JD

There's an important update to the rules about unpaid internships that we discussed last year in "The Crackdown on Unpaid Internships: Do Nonprofits Have to Worry?"

Our answer to this question was "yes." For the last few years, internships have been a hot topic in the media.

In 2013, a high-profile lawsuit by unpaid interns was brought against Fox Searchlight Pictures (the *Black Swan* case), alleging that the so-called internships were not educational at all, but were just a cover for having young people around movie sets to do grunt work like getting coffee and picking up dry-cleaning. A New York federal judge agreed, basing his opinion on a six-prong test developed by the federal Department of Labor Guidelines about when internships were educational enough to be exempted from federal and state minimum wage laws.

Following this ruling that these so-called interns were really employees – entitled to minimum wage pay – there was a flurry of class-action lawsuits by former interns against media conglomerates including Conde Nast, NBC Universal, and Viacom. Seeing the writing on the wall, these huge companies settled these cases for millions of dollars and retreated from the use of (unpaid) interns. "For a while, it seemed that unpaid internships were about to become relics of history."

New Development

On July 2, 2015, the U.S. Court of Appeals for the Second Circuit issued a surprise ruling, reversing the lower-court's ruling in the *Black Swan* case as well as the decision in a similar case involving magazine publisher Hearst. The appeals court rejected the Department of Labor's 6-prong test as too strict, and substituted its own, much more lenient, standard that allows unpaid internships if they are "educational enough." "Should the ruling stand, it may be all but impossible for former interns to sue their ex-bosses in the

future."
This new decision directly affects employers in the Second Circuit (New York, Connecticut, Vermont), but not necessarily anywhere else – at least for now.

Effect on California Nonprofits
For California employers, including nonprofits, state law doesn't depend on the Department of Labor six-prong standard. California has an *eleven-point* test: it approves and incorporates the DOL's 6 prongs, and adds another 5 on top of that. The stricter, California, 11-point test remains in force for employers in this state.

Conclusion
We'll watch for (and report on) any further developments.