

ETHICAL EXPLOITATION



ALEX FOOTMAN AND ERIC GLATT, UNPAID INTERNS ON DARREN ARONOFSKY'S *BLACK SWAN*, CLAIMED THAT FOX SEARCHLIGHT VIOLATED LABOR LAWS ON THE 2010 PRODUCTION

UNPAID INTERNS AND VOLUNTEERS ARE A NECESSARY EVIL IN INDIE MOVIE MAKING. JUST GO EASY ON THE "EVIL"

Can't get around the old minimum wage, Mortimer."—Louis Wintborpe III (*Trading Places*, 1983)

An internship is a wonderful thing in theory. Students learn from industry leaders before entering a workforce which demands experience. And companies are enriched by the feeling of "giving back," of passing on their wisdom.

However, over the years, the concept of internships has been bastardized by companies ranging from small one-off productions to media behemoths. Paying no heed to education, these companies see internships as labor loopholes, utilizing armies of unpaid workers to give them an edge over competition. The independent film world in particular has gravitated toward viewing unpaid interns as an economic necessity, for staffing workforces on tiny budgets and avoiding minimum wages and restrictive overtime rules.

While the definition of an intern has been in existence under interpretations of the federal Department of Labor ("DOL") and state equivalent agencies for decades, employ-

ers, workers and lawyers have begun to pay attention in recent years. In 2010 the DOL, in collaboration with assorted state agencies, engaged in a concerted effort to eliminate the widespread abuse of unpaid labor and violations of the wage and hour provisions of the Fair Labor Standards Act, particularly in the media industry. It is now more important than ever for producers to dispense with the industry-wide mutated definition of unpaid interns (and the related misused concept of unpaid volunteers), and understand the actual law governing these types of workers.

WHAT IS A BONA FIDE UNPAID INTERN?

Companies need to put genuine thought into creating a bona fide unpaid internship program. There is much more to the issue than whether school credit is offered or not. The DOL has a six-pronged test that must be met by a legitimate internship (States can have differing requirements—California's standards are the same as the DOL, whereas New York has additional standards):

(1) The internship has to be similar to the training an educational environment would provide.

(2) It must be for the benefit of the intern.

(3) It must not displace regular employees and must be under close supervision.

(4) The employer cannot receive any immediate advantage from the intern (and sometimes its operations might be impeded by the intern).

(5) The intern cannot be guaranteed or entitled to a job at the end of the internship as reward for working the unpaid period.

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

Prongs Five ("no guaranteed employment later in exchange for working for free now") and Six ("company and worker both agree internship is unpaid") are the easiest to comply with. It's illegal to say, "Work for free now, and I promise I'll hire you for pay later." Likewise, the internship arrangement should be documented in writing, with the intern acknowledging that he or she understands the true arrangement. Generally, prong Three ("non-displacement of paid staff") and Four ("no immediate advantage from the interns presence") present the greatest difficulty under government scrutiny.

IGNORING THE SIX-PRONGED TEST

If all you want is unpaid labor to meet your budget constraints, you run the real risk of paying out far more in legal claims brought after the production ends. During the filming of the feature *Black Swan*, two unpaid interns, disillusioned over the so-called educational rewards of emptying trash cans on set, brought suit in 2011 against Fox Searchlight, alleging assorted violations of federal and state law. In June 2013, a New York Federal Court held that the “unpaid interns” on *Black Swan* were in fact “employees,” and therefore subject to minimum wage and overtime requirements of the Fair Labor Standards Act, regardless of whether the interns received course credit. (They did.) Since this ruling, suits have been filed with similar claims against The Hearst Corporation, *The Charlie Rose Show* (settled for \$250,000), NBCUniversal (settled for \$6.4 mil), Conde Nast (settled for \$5.8 mil), and ICM (worked out in mediation late December 2014).

In light of the growing number of lawsuits, many media companies, including Conde Nast, have ended their unpaid intern programs.

A BONA FIDE INTERNSHIP IS POSSIBLE

A workable unpaid internship can be accomplished with proper planning and forethought. Of course, given the six rules, companies that have ongoing year-round operations, but use seasonal interns, will have an easier go of meeting the test than most one-off independent productions seeking to use interns as a substitute for paid PAs.

First, have your company committed to the notion that the unpaid internship program is the company’s way of developing the industry leaders of tomorrow. If the company only wants interns as a way of saving payroll costs, the program is bound to be susceptible to lawsuits by disgruntled interns looking to invoke their rights.

Next, the program should be tied to a university that offers school credit. This will help to ensure the program is educational with real tangible benefit for the intern. Each intern should also have one or a group of workers at the company who act as mentors or educational liaisons. These mentors should take time out of their day to explain operations to the interns and how tasks fit in to the overall picture. Regular weekly lunch lectures should also be established. Not approaching interns like free slave labor will ensure that arguments for showing prongs One (“educational in nature”) and Two (“benefits the intern”) exist.

An argument for prong four (“no immediate advantage/operations impeded”) exists where a company can show that busy employees are actually diverting their attention from their primary tasks for interns’ benefit. If you are an independent production company on a short production schedule, it may be difficult to find producers or department heads willing to take time out to adopt a scholarly lesson plan.

Independent productions with a fixed start and end date will have a harder time of establishing prong Three (“non-displacement of regular workers”) than a company with ongoing operations utilizing interns seasonally, as the latter will have statistics to show that interns are not actually displacing regular employees. A short-term indie production would need to show, for example, that its five paid PAs are more than enough to get the job done, and the additional interns shadowing a particular producer or department head are not displacing regular employees in that department. The problem is, how do you establish, on a single film shoot, that other PAs *wouldn’t* have been hired if the interns weren’t there? The reality is, most independent filmmakers don’t understand the rules, and have 100 percent of their PA work performed by unpaid interns.

THE PITFALL OF VOLUNTEERS

Another approach that “creative” productions on a shoestring budget take is using “volunteers.” Qualified volunteers are not considered employees and therefore are not subject to wage-hour laws. However, not every volunteer is an *actual* volunteer in the eyes of the law.

The DOL defines a bona fide “volunteer” as one who (1) intends to work without contemplation of any pay for his or her services, (2) is tied to political/public service, religious, or humanitarian objectives, and (3) must not be a regular employee of the political, religious, charitable, or similar non-profit corporation that receives the services. No matter how lofty the project, rarely are for-profit production companies engaged in public service, religious, or humanitarian objectives, and it is difficult for a private for-profit production company to lawfully use volunteers exempt from wage and hour laws.

Before giving up on your plan to enlist your neighbors to make your movie, remember that these laws exist to help those who feel wrongfully exploited and aggrieved. Although the DOL is looking to actively investigate claims of non-compliant internship programs, I am unaware of any situation

where the government, *on its own initiative*, came after an indie moviemaker for using friends and family without compensation. (This is not to say that the DOL will never adopt a different approach.) Regardless, I have regularly witnessed friendships ending with a “volunteer” contacting the DOL, bringing claims for minimum wage and overtime—and winning. So if you feel compelled to use volunteers, choose those volunteers wisely, and treat them with dignity, respect and appreciation at every turn.

Also remember that, if you *are* “unfriended” and a claim comes your way, laws are all about exceptions, particularly when decision-makers view the totality of the circumstances in fairness. If a group of students volunteer on a fellow student’s film (not intended for commercial use), that will likely fall in the realm of a legitimate volunteer endeavor. Likewise, arguments may exist if a group of moviemakers belong to an organization dedicated to helping one another in artistic production, where individuals put time into each others’ projects in a fair exchange. And you only have to worry about your *friends* turning on you—in most states, immediate family members are exempt from wage-hour laws when working directly for one another, and are free to volunteer services for the family business.

BE GOOD TO INTERNS AND VOLUNTEERS

While much publicity has arisen about unpaid interns bringing lawsuits for back wages, remember these basic common-sense tips:

- (1) If you can pay your crew, pay them.
- (2) If you can’t pay your crew, cut corners elsewhere. Or find more money somehow.
- (3) If you must resort to unpaid interns or volunteers, pick them wisely.
- (4) Make your internship program as compliant as possible.
- (5) Ensure that the intern is getting more out of the experience than you are—feed them well, teach them what you can, and balance shitty jobs with great, unique tasks.
- (6) Be courteous and nice—say “please” and “thank you,” and mean it.

The single biggest factor for why someone chooses to pursue a claim is bitterness. Bitterness gets producers sued. So if you have to go guerilla, do it with your eyes open to all risks, consult legal counsel, and don’t give your crew reason to resent you. **MM**

This article does not constitute legal advice. Moviemakers are encouraged to speak with counsel before implementing an internship program.

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