

## Today's unpaid intern could be tomorrow's plaintiff

By Lisa van der Pool  
lvanderpool@bizjournals.com

Employers, take note of that eager-to-please, yet unpaid, intern sitting next to the photo copier.

He or she could wind up costing your company a hefty pile of cash.

Two high-profile national lawsuits brought by disgruntled unpaid interns in recent months highlight the little-known fact that many companies do not follow specific federal guidelines that must be met in order to have unpaid interns kicking around the office doing everything from mundane data entry to helpful, entry-level tasks.

Local lawyers say that there are likely many local executives unwittingly exposing their companies to lawsuits when it comes to unpaid interns and there are plenty of plaintiffs attorneys sniffing around for their next big wage-and-hour case.

Firms must meet the six-part test from the **Department of Labor** to avoid liability for unpaid internships. For interns who aren't getting college credit for work, those criteria are: the internship must be similar to training received in an educational environment; the internship has to benefit the intern; the intern cannot displace regular staff and must work closely with staff; the employer can "derive no immediate advantage" from the work of the intern; the intern is not entitled to a job at the end of the internship; and both the employer and intern have to understand that the intern will not be paid.

"What I generally tell my for-profit companies is that because the intern's daily activities cannot benefit the company... that is usually the prong where the for-profit fails," said Sara Goldsmith Schwartz, managing partner of Andover-based law firm **Schwartz Hannum PC**. "The best way for companies to avoid legal liability with internships is to pay minimum wage."

In Massachusetts, companies are required to prove that the unpaid internship



Sara Goldsmith Schwartz of Hannum PC in Andover says she urges clients to pay minimum wage to avoid legal liability with interns.

W. MARC BERNSAU | BUSINESS JOURNAL

is part of an educational program. Companies that break the law could wind up paying treble damages, plus legal fees to the plaintiff's lawyers.

One of the lawsuits that has brought scrutiny to the issue was filed late last year by two former **Fox Searchlight** interns who worked on the production of the Oscar-nominated film "Black Swan." The interns, who were not paid for their work, are alleging that Fox Searchlight misclassified dozens of workers as unpaid interns, in an effort to keep production costs low.

"Unpaid interns are becoming the modern-day equivalent of entry-level employees. ... This practice runs afoul of basic wage-and-hour laws, which require that employers pay all of their employees — even those desperate for work — the minimum wage as well as overtime for hours over 40 in a workweek," stated the complaint in *Glatt v. Fox Searchlight*.

Gary Oberstein, managing partner and an employment partner at **Nixon Peabody LLP** in Boston, says "lots and lots"

of Boston-area companies are likely misclassifying workers as unpaid interns.

"I find this unpaid-intern issue to be yet another example of where the law runs directly counter to what's often in the mutual best interest of the employer and would-be interns," said Oberstein. "Many industries have a long, rich history of unpaid internships."

Lawyers say that first and foremost, employers should draw up detailed internship agreements that state exactly why the interns are not being paid.

"When people ask me, 'Should I worry about this?' I say yes, because there's potential liability," said Joshua Davis, an employment lawyer at **Ogletree Deakins** in Boston.

Mark Pomfret, an employment partner at **K&L Gates**, said that he's noticed in the slow economy that more companies are seeking interns for cheap labor. But that's a potentially disastrous strategy.

"Short of meeting that six-part test, the recommended course is to pay minimum wage," said Pomfret.

Reprinted for web use with permission from *Boston Business Journal*. ©2012, all rights reserved. Reprinted exclusively by Scoop ReprintSource 1-800-767-3263.



**SCHWARTZ HANNUM PC**

Labor and Employment Lawyers Guiding Management

www.shpclaw.com