

# PUBLICATION

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## Gawker FLSA Ruling Leaves Interns Gawking

April 14, 2016

Where's the line between an intern and an employee? If you think that's an easy question, consider this: the Fair Labor Standards Act (FLSA) defines "employ" broadly as to "suffer or permit to work." So, who's to say that interns who answer the phone, make copies, organize files, or as in the case of digital media company Gawker Media LLC, write media content, aren't "employed" and entitled to compensation? Many interns would argue that all that work merits a paycheck.

Not so, said a New York federal judge. In a win for employers, on March 29, 2016, U.S. District Judge Alison J. Nathan dismissed a proposed class action in which interns claimed Gawker violated the FLSA by refusing to pay them. In that case, the named plaintiff – a journalism student – argued that his work researching and writing for Gawker (including 34 published blog posts) was central to the media company's business in internet publishing. The court, however, held that the significant vocational and educational benefits the plaintiff received from his three-month internship outweighed those received by Gawker. Further, the court noted that although the intern did similar work as paid employees, no evidence showed Gawker displaced paid employees with interns.

The case gained attention previously for the court's order approving of plaintiffs' plan to notify potential class members via social media by sending them direct messages on Twitter and LinkedIn. In that order, however, the court stated that "friending" potential class members on Facebook went too far because it might create the impression of an inappropriate relationship between the individual and plaintiffs' counsel.

If you're finding this distinction between intern and employee a little confusing, you're not alone. In fact, the Department of Labor Wage and Hour Division has guidance which specifically addresses when individuals who participate in "for-profit" private sector internships or training programs may do so without compensation. If you use interns regularly or are considering instituting an internship program, you should consider the following factors when determining whether interns must be compensated:

1. Does the internship involve educational opportunities that are similar to those provided in an educational environment?
2. Does the internship provide a benefit to the interns? As seen in the Gawker case, the greater the benefit provided to interns, the less likely the interns need to be paid.
3. Be cautious about displacing current staff to make room for interns. Interns who displace existing staff are much more likely to be viewed as employees.
4. Consider the extent of the advantages you receive from the interns' work.
5. Will interns automatically receive an offer of employment at the end of the internship? A guarantee of employment could make your program look less like an internship and more like a probationary work period.
6. Did you make it clear that interns are not entitled to wages for participating in the internship program?

While the DOL evaluates internship programs on a case-by-case basis, careful consideration of these factors is a good start to ensuring your unpaid internship program is legitimate.