

Scrutinize that internship program

Companies may be affected by a recent legal decision at the federal level and a new Oregon law

Legal issues swirling around interns have abounded this month.

On June 11, a federal court in New York found that unpaid interns who worked during the production of Fox Searchlight Pictures' film "Black Swan" were actually employees entitled to the wage and hour protections of state and federal law. Then on June 13, Oregon Gov. John Kitzhaber signed into law a bill that extends workplace protections to interns.

Accordingly, all employers that offer internships are advised to review and update their programs and policies.

"Black Swan" unpaid interns deemed employees

The "Black Swan" case, the first of several to consider whether unpaid interns are actually employees under wage and hour laws, showcases how critical it is for employers to properly classify interns.

The Fair Labor Standards Act (and Oregon law) includes an exception to the definition of employee for unpaid interns or trainees. Interns who do not fall within the exception are entitled to minimum wage and overtime pay as well as other workplace protections for employees. Accordingly, it is crucial for employers to understand whether an intern is truly an intern and not an employee.

Pursuant to guidance issued by the U.S. Department of Labor, to be an unpaid intern or trainee, ALL of the following criteria must be met.

1. The internship must be similar to training that would be given in a vocational school or in an educational environment.
2. The internship experience must be for the intern's benefit.
3. The intern must not displace regular employees, but must work under the close supervision of existing staff.
4. The employer that provides the training must derive no immediate advantage from the intern's activities and on occasion the employer's operations may actually be impeded.
5. The intern must not be entitled to a job at the



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conclusion of internship.

6. The employer and the intern must understand that the intern is not entitled to wages for the time spent in the internship.

In the "Black Swan" case, the court found that the interns did not receive training similar to that in an educational environment and that they performed routine tasks that otherwise would have been performed by paid employees – not surprisingly, fetching coffee and performing other administrative tasks not educational in nature. Additionally, the "primary" beneficiary of the internships was the production company and not the interns. Although the interns understood that they would not be paid, the court pointed out that the FLSA does not allow employees to waive their entitlement to wages.

The lesson for all employers that offer internships is that careful scrutiny of the program is needed to ensure that any unpaid (or underpaid) interns meet the statutory requirements. Just because interns are receiving school credit does not mean they are interns under wage and hour law. Rather, all six criteria must be met. When in doubt, it is safer to pay the intern at least minimum wage plus overtime.

The new law exposes employers to additional risks when hiring an intern, and companies hiring interns should review whether a discrimination lawsuit by an intern will be covered by existing employment practices liability insurance policies.

Oregon extends workplace protections to interns

Individuals who truly are unpaid interns in Oregon now enjoy certain state workplace protections previously afforded only to paid employees.

House Bill 2669 was signed into law on June 13. Effective immediately, interns are "considered to be in an employment relationship with an employer" for purposes of Oregon's employee protections against certain unlawful employment practices including:

- sexual harassment;
- discrimination based on race, color, religion, gender, sexual orientation, national origin, marital status or age;
- discrimination based on service in the uniformed services;
- disability discrimination and impermissible medical inquiries or examinations;
- whistleblower retaliation;
- requiring Breathalyzer, polygraph, psychological stress or brain-wave test;
- obtaining or using genetic information; and
- discrimination based on tobacco use during non-work hours.

HB 2669 adopts a definition of "intern" in line with existing federal and Oregon wage and hour law.

Previously, interns did not have a legal right to bring claims of employment discrimination or retaliation. Nor did the Oregon Bureau of Labor and Industries have authority to investigate workplace complaints brought by interns. HB 2669 changes that landscape. Interns will now be entitled to have those complaints heard just as any other employee would.

HB 2669 does not, however, extend all employment protections to interns. For example, employee protections for violations of wage and hour,

occupational safety and health, workers' compensation, and unemployment insurance laws remain unchanged by the statute.

Additionally, interns are not eligible for leave pursuant to the Oregon Family Leave Act.

For employers, in theory, compliance with Oregon's new law will simply require that they revise their existing policies against discrimination, retaliation or harassment of employees to cover interns.

However, in practice, the new law exposes employers to additional risks when hiring an intern, and companies hiring interns should review whether a discrimination lawsuit by an intern will be covered by existing employment practices liability insurance policies.

Amy Angel, a partner at Barran Liebman LLP, handles employment litigation in state and federal courts, and provides employer advice and solutions. Contact her at 503-228-0500 or at aangel@barran.com.

SUB-BIDS REQUESTED

INLINE

COMMERCIAL CONSTRUCTION INC

**Portland Community College
Swan Island Trade Center**

New Bid Date: Tuesday, July 2, 2013 at 12:00 PM

Bid documents are available at: www.inline-cc.com

Bob Patterson, Project Manager, bobp@inline-cc.com

We encourage MWESB companies to submit bids on all projects.

INLINE Commercial Construction Inc.
CCB #51880, MBE/DBE #714 www.inline-cc.com
Phone: (503) 642-5117 Fax: (503) 649-3301

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SUB-BIDS REQUESTED

**Villa Sport
Athletic Club and Spa**
Beaverton, Oregon

Bid Date: July 2, 2013 at 2:00 PM PT



P&C Construction
2133 NW York Street, Portland, OR 97210
(503) 665-0165 FAX (503) 667-2565

P&C Construction is actively seeking quotations from M/W/ESB/DBE firms and is available to discuss scope of work, bonding, insurance, and schedule with all firms.

10341796

CCB # 38619

SUB-BIDS REQUESTED

N Fork Lewis River Bridge NB and SB Painting
Bidding July 3, 2013 Please FAX Scope Sheets to (541) 864-1631
WA State DOT F.A. No. NHPP-0051 (288) (289)

Bid Items include: Traffic Control, Removing Plastic Line, Bridge Transverse Joint Seal, High Visibility Fence, Temporary Concrete Barriers, Temporary Impact Attenuator, Transportable Attenuator, Paint Traffic Line, Pavement Markers, Signage, Placement and moving of QMB (Quick Change Movable Barrier)

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F. D. Thomas Inc. is a union signatory contractor. Subcontractors must possess a current contractor's license, insurance coverage and worker's compensation for the entire length of the contract. All subcontractors will be required to sign our standard Subcontract Agreement. 100% payment and performance bonds may be required. Please call if you need assistance in obtaining insurance, bonding, equipment, materials and/or supplies. Plans and specifications can be viewed at our office or at BXWA. Call 541-864-1619 for any additional needed project information. F. D. Thomas Inc. intends to work cooperatively with all qualified firms seeking work on this project. We are an equal opportunity employer and will work with any interested subcontractor to identify opportunities to break items into economically feasible packages.



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