



Employment Update

EMPLOYMENT AND LABOUR GROUP:

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“The fact that a person is called an intern is irrelevant from a legal perspective. The analysis is based on the type of services the intern provides.”

WHEN FREE LABOUR BECOMES VERY EXPENSIVE: NOT EVERY INTERN IS AN UNPAID INTERN

David Greenwood

Many businesses offer unpaid internships. Some do it for the right reason, to help further a person's education and vocational training. Other less scrupulous businesses offer unpaid internships to reduce labour costs. The problem is: no matter the reason, it may be a costly endeavour.

Not all interns are created equal. Some “interns” may actually be employees in disguise. The fact that a person is called an intern is irrelevant from a legal perspective. The analysis is based on the type of services the intern provides. If an intern is properly classified as an employee, that intern must be paid for the services they provide. This can create an unexpected liability for businesses that use interns. For example, just look to the United States where class action lawsuits have been launched by former interns at Warner Music Group, Hearst Magazines, Conde Nast and Elite Model Management.

If you are an employer who uses interns, be sure that you are using them correctly. Conversely, if you are an intern, make sure that you are not being exploited. The Ontario Ministry of Labour has developed guidelines to assist in determining

whether or not a person must be compensated for the services they provide. The guideline states:

One such circumstance where a person can work as an intern for no pay concerns a person receiving training, but it has very restrictive conditions. If an employer provides an intern with training in skills that are used by the employer's employees, the intern will generally also be considered to be an employee for purposes of the ESA unless all of the conditions below are met:

1. The training is similar to that which is given in a vocational school.
2. The training is for the benefit of the intern. You receive some benefit from the training, such as new knowledge or skills.
3. The employer derives little, if any, benefit from the activity of the intern while he or she is being trained.
4. Your training doesn't take someone else's job.
5. Your employer isn't promising you a job at the end of your training.
6. You have been told that you will not be paid for your time.

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David Greenwood has represented clients in files involving wrongful dismissals, constructive dismissals, human rights complaints, pension issues, disability claims, allegations of employee fraud, theft of confidential and proprietary information, breach of fiduciary duties and misappropriation of corporate opportunities. Additionally, David is frequently consulted in respect of reorganizations and mass terminations and is routinely retained to draft or to negotiate employment agreements, employee policy manuals and other employment related contracts.

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If these conditions are not met, the position is not a true internship and the person is deemed to be an employee and entitled to the minimum wage and other protections provided by the *Employment Standards Act, 2000* (“ESA”). The ESA does not apply to an individual who performs work under a program approved by a college of applied arts and technology or a university. This exception exists to encourage employers to provide students enrolled in a college or university program with practical training to complement their classroom learning.

The Ministry of Labour guidelines only apply to employers who are provincially regulated. The policy has no application to businesses that are federally regulated and who fall under the Canada Labour Code.

Before offering an unpaid internship, employers need to give thought as to the role of the intern and the services he or she will provide. It may be helpful to contact a legal professional for guidance on this issue. As the saying goes, an ounce of prevention is worth a pound of cure. ■

Employment Update is a publication of the Employment and Labour Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

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