

**Q&A:**

# ALAN KORAL ON INTERNSHIPS AND LABOR LAW



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**WITH SO MANY STUDENTS TRYING TO BREAK INTO THE PHOTO INDUSTRY, UNPAID INTERNSHIPS ARE COMMONPLACE AT PHOTO STUDIOS, AGENCIES, REP FIRMS, AND MAGAZINES. BUT EMPLOYERS ARE AT RISK WHEN THEY DON'T ADHERE TO STRICT LAWS COVERING INTERNSHIPS. TO FIND OUT WHAT THE RULES ARE, WE INTERVIEWED NEW YORK ATTORNEY ALAN KORAL, WHO RECENTLY CHAIRED THE NEW YORK STATE BAR ASSOCIATION LABOR AND EMPLOYMENT LAW SECTION. INTERVIEW BY DAVID WALKER**

**PDN:** Is it a mistake to think of interns as free labor?

**Alan Koral:** Yes, it is.

**PDN:** Why?

**A.K.:** Because of the Fair Labor Standards Act (FLSA) and related state laws, which require the payment of minimum wage and overtime for employment. Under the FLSA, to “employ” means “to permit to work.” Volunteerism is normally [employment] by that definition. For that not to be employment, it has to meet six specific criteria that are set out in regulations issued by the U.S. Department of Labor [see sidebar on page 8].

**PDN:** The third criterion stipulates that a trainee or student can't displace regular employees. Does that mean you can't use interns to make up for a staff shortage?

**A.K.:** Precisely. Because I think in this context, “displace” doesn't mean that the employer has fired someone and replaced him or her with interns. It simply means that they [interns] cannot take the place of a regular employee, who would otherwise be doing the tasks assigned to the intern.

**PDN:** The fourth requirement stipulates that the employer derives “no immediate advantage” from the activities of the intern. In practical terms, doesn't that mean the employer can give interns only “make” work—tasks that don't need to be done, or tasks that a paid employee has already done?

**A.K.:** That's basically correct. The concept of an internship is that the intern is there to learn, mostly by observation. Sometimes the intern may learn by doing certain tasks, but the short-term

benefit to the business must be minimal. Long term, the employer may benefit through good will, favorable publicity and the potential to hire a knowledgeable employee in the future, but in the short term the intern should not be used to increase production, for example, save on part-time help or cut down on employee overtime.

**PDN:** Can academic credit be considered a form of compensation in lieu of money?

**A.K.:** I wouldn't say it's compensation in lieu of money, but [academic credit] is a kind of benefit that the intern may receive. The other criteria remain in place, but I think where there's academic credit involved, the limitations on the kinds of tasks the intern may perform are a little less narrow. And it helps satisfy criteria numbers 1 and 2.

**PDN:** Does this mean you would advise people to hire interns only through accredited programs?

**A.K.:** I wouldn't say that at all. I think if the employer is willing to invest the time to make the internship a learning experience for the intern and the intern is getting training that is similar to what he or she might get in an academic or vocational instruction program, and if benefit to the employer is only incidental, then the employer can do this independently. In fact, it is possible to engage an intern who is not a student in an educational institution, such as someone who has completed his or her education but would like to change careers by learning a new business.

**PDN:** Interns seem unlikely to complain about someone they perceive as doing them a favor,

## STANDARDS FOR INTERNSHIPS

For an employer to legally employ unpaid interns, the work that the interns do must meet all of the following criteria, according to the U.S.

Department of Labor:

1. It must be educational in nature, similar to college or vocational courses.
2. It must primarily benefit the intern.
3. It must be done under close supervision of a manager, and cannot be work that would otherwise be done by a paid employee.
4. The employer can derive no immediate advantage or profit from it.
5. The employer cannot offer any promise of a paid job at the end of the internship, although employers are free to offer jobs afterward.
6. The intern and employer must agree—preferably in writing—that no wages are to be paid.

so how much enforcement is there?

**A.K.:** Interns don't complain until something goes wrong or they start feeling exploited. And then they complain. Or their mom or dad reads an article in, for example, your publication and says, "Hey wait a minute, you're really working and you should be getting paid!"

**PDN:** So employers still get into trouble?

**A.K.:** Yes. Big companies are aware of the guidelines, which are clear enough, so they stay out of trouble. There haven't been any big cases for a long time. But there are lots of cases [involving small employers]. And [photographers] might be the kind of employers who get in trouble.

**PDN:** What are the penalties typically for violations?

**A.K.:** The common remedies include back pay, with penalties, making up unpaid Social Security and other payroll taxes and withholdings, and sometimes an injunction. Employers should also keep in mind the applicability of protective laws, such as child labor laws and safety laws regarding the employment of minors in hazardous professions.

**PDN:** What are the little cases about? Are there common pitfalls that small employers frequently get caught by?

**A.K.:** The commonest pitfall is where the kid wants something for his resume and says, "I'll volunteer. I'll help out here" and he's not exactly replacing an employee, but he is doing work that benefits the employer. And the small employer may feel, "Well this is fair. I'm going to write this kid a great [recommendation] letter and this [experience] is really going to help him find a job."

**PDN:** So what's wrong with that? Why does the government object to it?

**A.K.:** I think the government wants to make sure that people—particularly young people—are not exploited. We don't want people to be "volunteering" their labor in a way that profits an employer. It's an easy avenue to exploitation, even easier where there's a suggestion that you'll get a job at the end of it. A second policy is not to have free labor—what used to be slave labor—replacing paid and tax-paying adult labor. Without these laws, a studio owner could decide to replace a paid studio manager with a few unpaid interns, and we don't want that: having someone drawing unemployment, or worse yet going on welfare, when he or she is willing to work.

**PDN:** We've seen ads placed by photographers asking for interns with a pretty high level of some specific skills. Does that raise red flags?

**A.K.:** What you're saying is that some ads are so clearly looking for free skilled labor that it would seem almost impossible to defend a case if the Labor Department were to question it. The more it sounds like a job, the less it sounds like an internship, and the ad could provide some damning evidence of what the intern was actually doing, regardless of what the employer (and maybe the intern) may say when there is a Labor Department investigation.

**PDN:** Is there a lot of variation in the regulation of internships from state to state?

**A.K.:** Most states follow the federal guidelines, though some states may be even more restrictive. The New York State student internship guidelines emphasize special rules for the employment of minors (anyone under age 18), including requirements for work permits and a

list of excluded professions, such as mining.

**PDN:** How about Workers' Compensation? Do you have to carry all the insurance for interns that you would have to carry for employees?

**A.K.:** Under most state laws, interns must be covered by the employer's workers' compensation policy. Even though the intern does not earn wages, the medical benefits provided by these policies can be significant if the intern is injured. Employers who use interns should be sure to check with their carriers to make sure that the interns are covered.

**PDN:** It almost sounds like hiring an unpaid intern isn't worth all the red tape. Is it easier to just pay minimum wage, so you don't have to worry about meeting all the labor guidelines for unpaid interns?

**A.K.:** That's a good question. In some cases, if the employer is really looking for an assistant, say, then of course the "intern" should be hired as an employee and paid a wage that is at least the minimum wage. But the "red tape" isn't really all that burdensome, the guidelines pretty much conform to common sense and there are many benefits to having an intern program. There is a lot of bookkeeping involved in having a paid employee, there are consequences such as unemployment claims if the employee is let go, there is the potential for other claims (such as discrimination) from employees and ex-employees that would be very unlikely to occur in an intern situation. . .so the bottom line is, if what you want is an intern, then get an intern. If you're looking for cheap labor, hire cheap labor.

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