

Beware The Unpaid Intern – He/She May Be Eligible For Pay



The issue of unpaid internships is becoming a growing concern for both employers and Ministry of Labour Inspectors. Recently, the publisher of magazines Toronto Life and The Walrus announced that they were pulling the plug on their unpaid internships following a Ministry of Labour inspection. Rogers has subsequently followed suit, with a company spokesperson announcing that the company wants all internships to be associated with an educational institution or to be paid.

Provincial employment standards legislation in Canada generally requires that all “employees” receive minimum wage and that the employer meets other minimum standards. The legislation does, however, recognize that there is a benefit to allowing unpaid internships, while at the same time ensuring that certain requirements are met in order to prevent an employer from characterizing vulnerable workers as “interns” to avoid the obligation to provide the minimum standards.

The employment standards requirements for retaining unpaid interns vary significantly across Canada. This blog will examine the requirements in Ontario and Québec.

Ontario Requirements

Internships in the School Context

An individual can work and not be subject to the Employment Standards Act, 2000 (the “ESA”) in either of the following circumstances:

- he/she is a secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled; or
- he/she performs work pursuant to a program approved by a college of applied arts and technology or a university.

If either of these exemptions applies, the individual can be retained without the organization meeting the requirements of the ESA.

Internships Outside of the School Context

If the internship program is not affiliated with a college of applied arts and technology or a university, an individual receiving training in skills similar to those used by the organization's employees is an "employee" and is entitled to the minimum requirements of the ESA (including minimum wage), unless all of the following conditions are met:

- The training is similar to that which is given in a vocational school;
- The training is for the benefit of the individual;
- The organization providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained;
- The individual does not displace employees of the organization providing the training;
- The individual is not accorded a right to become an employee of the organization providing the training; and
- The individual is advised that he or she will receive no remuneration for the time that he or she spends in training.

Only if all of these requirements are met is the person exempt from the ESA. If even one of these conditions is not satisfied, the individual would be entitled to the minimum standards of the ESA.

Québec Requirements

Internships in the School Context

Section 3(5) of Québec's Act respecting Labour Standards (the "ALS") provides that the ALS does not apply to a student who works during the school year in an establishment selected by an educational institution pursuant to a job induction program approved by the Ministère de l'Éducation, du Loisir et du Sport (the Ministry of Education). The fact that the ALS does not apply to such students implies that an employer may not be required to pay them.

However, each of the conditions mentioned in this provision must be present in order for the exception to apply. To be excluded from the application of the ALS, the individual must meet all of the following four conditions, namely:

- be a student;
- who works during the school year;
- in an establishment chosen by an educational institution;
- pursuant to a job induction program approved by the Ministère de l'Éducation, du Loisir et du Sport.

Internships Outside of the School Context

In Québec, whenever an "internship" takes place outside of the school/student context such that the above exception is not applicable, the Regulation adopted under the Act respecting Labour Standards ("RLS") provides that the minimum wage requirement does not exist for "trainees" or "students" such as:

- a student employed in a non-profit organization having social or community

- purposes, such as a vacation camp or a recreational organization;
- a trainee under a program of vocational training recognized by law (this law must provide for the nature and duration of the vocational training, i.e. internship in a law firm after Bar school); or
- a trainee under a program of vocational integration under section 61 of the Act to secure the handicapped in the exercise of their rights.

The mere fact that trainees fall within any of the three above exceptions does not mean that they should not be paid at all during the internship, but rather means that the employer is not bound by the minimum wage rate requirement. However, where an employer chooses not to pay such trainees at all, the trainees do not have recourse pursuant to the ALS.

Whether in Ontario, Québec or elsewhere in Canada, we recommend that if an employer is contemplating retaining unpaid interns, legal advice be sought to ensure that the program meets the applicable provincial criteria. In addition, there should always be written documentation (such as an offer letter) making clear that the position is unpaid because the person is a student, trainee or an intern, to avoid later disputes that the individual did not understand the nature of the opportunity or the fact that he/she would not be paid.

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