MANAGEMENT COUNSEL
*Employment and Labour Law Update*

SHERRARD KUZZ LLP
Employment & Labour Lawyers

# Unpaid Interns and Trainees:

**What may seem like a good idea has its risks to employers…**

Throughout the past decade, the issue of *employee misclassification* has garnered much publicity. In the past, Sherrard Kuzz has written about the "manager" vs. "employee" distinction within the context of overtime class-actions, and the "employee" vs. "independent contractor" distinction in pay for services arrangements.

Recently a new classification battleground has emerged, focussed on the "unpaid intern or trainee" and the extent to which the law permits the existence of these roles. Although not restricted to the summer months, unpaid interns and trainees are especially prevalent when school is out and students are looking for a summer workplace experience. But what may seem like a good idea, benefitting both intern/trainee and organization, may create undue risk for the organization.

## Unpaid Positions – What's the fuss?

Historically, an unpaid internship represented a legitimate and highly sought after training opportunity *en route* to paid employment. Benefitting both intern and organization, internships traditionally, though not exclusively, were associated with industries such as journalism, broadcasting or fashion.

*Stephen Colbert used the euphemism "cotton intern" as a commentary on the exploitative aspects of modern internships. While this analogy is at best unhelpful (it ignores the element of free choice to accept or not accept an internship), it demonstrates the spotlight being put on the issue.*

However, in the current economic climate, the prevalence of unpaid internships has greatly increased and their character changed. This has caused some to argue that the modern internship represents little more than corporatized slavery. In his provocative style, television satirist Stephen Colbert used the euphemism "cotton intern" as a commentary on the exploitative aspects of modern internships. While this analogy is at best unhelpful (it ignores the element of free choice to accept or not accept an internship), it demonstrates the spotlight being put on the issue.

Closer to home, the issue of unpaid work has recently received some high profile scrutiny. In April of 2013, the University of Toronto

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Students' Union alleged the existence of more than 300,000 unpaid positions in Canada and demanded action from the Ontario Ministry of Labour. Soon after, Toronto City Councillor, Ana Bailao, removed a posting on her Facebook page which solicited an unpaid intern to assist in her constituency office.

*The **legal** risk to an organization of an unpaid internship is a claim under applicable employment standards legislation for unpaid wages. The **public relations** risk to an organization can be equally if not more damaging.*

The *legal* risk to an organization of an unpaid internship is a claim under applicable employment standards legislation for unpaid wages. The *public relations* risk to an organization can be equally if not more damaging.

How, then, can an organization protect itself from being on the receiving end of one of these claims? What are an organization's obligations with respect to the use of interns and trainees?

## Who is an "employee" under the *Employment Standards Act*?

There is no definition of "intern" or "trainee" under the Ontario *Employment Standards Act* (the "*Act*"). However, an "employee" is defined as including an individual who "receives training from a person who is an employer"; and an "employee" is entitled to be paid for work done. All of which means, as a general rule, an intern or trainee cannot legally provide services for free.

## Can an intern/trainee *ever* be without pay?

There are limited exemptions under the *Act* which carve out unpaid internships, such as a secondary student performing work under a work experience program authorized by a school board and an individual who performs work under a program approved by a college of applied arts and technology or a university. Apart from these statutory exemptions, there are circumstances in which an intern/trainee can be "trained" without an organization incurring an obligation to pay wages. In these cases the experience for the intern/trainee must provide little, if any, workplace benefit to the organization and cannot be a stepping stone toward the intern's future paid-employment with the organization. More specifically, each of the following six (6) criteria must be met:

1. The training is similar to that which is given in a vocation school.
2. The training is for the benefit of the individual.
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.
4. The individual does not displace employees of the person providing the training.
5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time he or she spends in training.

## Best practices for employers

Aside from putting every intern and trainee on the payroll, there is no guaranteed way to avoid the risk associated with these unpaid positions. At the very least, organizations seeking to host interns and trainees should consider the following proactive steps:

1. **Perform a workplace self-audit:** Identify positions from which the organization derives benefit or has services performed by unpaid interns or trainees.
2. **Ensure compliance:** Consider the six criteria listed above and ensure your workplace is compliant with the law. If in doubt, consult with experienced employment counsel who can help identify issues and suggest solutions.
3. **Use written agreements:** Ensure every unpaid internship/trainee is the subject of a written agreement that identifies and addresses the six criteria noted above, and expressly states that the unpaid individual has no expectation of future employment or compensation.

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One final note: Even in the case of a properly structured unpaid intern/trainee, keep in mind that whether or not an individual is paid or provides services for free does not necessarily affect the applicability of other employment-related legislation, such as human rights and occupational health and safety legislation. When in doubt please check with experienced employment counsel.

*To learn more and/or for assistance preparing for unpaid interns or trainees in your workplace, contact a member of Sherrard Kuzz LLP.*

# DID YOU KNOW?

Although the Ontario *Employment Standards Act* contemplates lay-offs of non-unionized employees, without an express contractual right in an agreement with the employee, an employer may trigger a constructive dismissal by placing a non-unionized employee on temporary lay-off.

To learn more, contact a member of Sherrard Kuzz LLP.

# Tracking the state of the law on GPS surveillance

There is no greater test of a parent's trust than when they first allow their newly-licensed, teenage child to take the car out on their own. Not only are parents left to worry about the safety of their child and the physical integrity of their vehicle, but they must also consider the potential liability of having their child share the streets with other motorists and pedestrians.

Employers experience similar reservations entrusting a company vehicle to an employee, particularly where the employee is new and untested and may spend the majority of their working day driving with little to no supervision.

To address this issue, many employers have turned to a Global Positioning System (GPS), as a means of confirming company vehicles are being driven safely, and employees are where they should be. As a general rule, deployment of a GPS in a company vehicle is not illegal. Still, the use of GPS is not without controversy and some employee advocates argue its implementation represents a breach of employee privacy rights.

## GPS and employee privacy – what's the issue?

A recent British Columbia decision sheds light on this issue in the context of that province's *Personal Information Protection Act* ("PIPA"), which regulates the collection, use and disclosure of personal information in the private sector. In *Schindler Elevator Corporation*, the British Columbia Information and Privacy Commissioner addressed the question of whether an employer's installation of GPS and engine monitoring technology in company vehicles violated the privacy rights of its mechanic drivers.

The system in question tracked two different types of data: real-time information about the location and movements of a service vehicle; and information relating to engine status and vehicle operation. This second category included data regarding distance travelled, speed of the vehicle, harsh braking, sharp acceleration and idling, as well as the time at which the vehicle's ignition turned on and off (the "GPS System").

The information generated by the GPS System was only viewed by the employer in accordance with its GPS Policy. Under the GPS Policy, data was not constantly monitored, but rather viewed only when the operation of a vehicle deviated from accepted standards.

The International Union of Elevator Constructors, Local 82 (the "Union"), filed a complaint with the Privacy Commissioner alleging the employer's GPS Policy violated its members privacy rights. In response to the complaint, the employer argued that: (i) the GPS System collected 'vehicle information', not 'personal information', and was therefore not subject to scrutiny under PIPA; and (ii) the GPS System provided a number of legitimate benefits, including improved planning of route assignments, enhanced safety and security by proactively identifying unsafe driving practices (rather than waiting for complaints from the public or charges under the *Highway Traffic Act*), more efficient scheduling of vehicle maintenance, and the reduction of "time theft" by validating the hours a vehicle is in operation.

The Privacy Commissioner agreed with the Union that the information collected was "personal". According to the Commissioner, the information did not need to be "about an identifiable individual in some 'personal' or 'private' way" so long as it could be used to identify the driver of a specific vehicle at a given time.

The Privacy Commissioner then considered whether the information was "employee personal information", in which case different rules would apply to its collection, use and disclosure. This involved consideration of whether the information was collected, used or disclosed "solely for the purposes reasonably required to establish, manage or terminate an employment relationship". The Privacy Commissioner answered this question in the affirmative, noting that the GPS System and Policy were for "legitimate, reasonable, business purposes".

In light of her finding the information was "employee personal information", the Privacy Commissioner then had to determine whether PIPA had been complied with. This involved a consideration of the following questions:

- ***Is the information collected and used of a sensitive nature? Is more information collected than is reasonably required for the employer's purposes?***

  The Privacy Commissioner concluded the information was not especially sensitive since the information arose, overwhelmingly, in the context of work-day activities.
- ***Is the collection, use or disclosure of the information likely to be effective in fulfilling the company's objectives?***

  The Privacy Commissioner noted the employer had reported a 30% drop in accident costs since it implemented the GPS System. This was a good indication the GPS System was effective, at least insofar as it related to promoting safe driving habits.
- ***Are there reasonable alternatives that ought to have been considered?***

  The Privacy Commissioner found that self-reporting by drivers appeared to be the only alternative and this was not as effective.
- ***Has the information been collected covertly?***

  The Privacy Commissioner noted the employees were well aware of the GPS System and Policy.

On this basis, the Privacy Commissioner concluded there had been no breach of the employees' privacy rights under PIPA.

## What the *Schindler* decision means for employers

The decision in *Schindler Elevator Corporation* was made under the British Columbia privacy regime, one of four jurisdictions in Canada to specifically legislate protections for employee personal information (other than health information) in the private sector (the others being Alberta, Quebec and the Federal level). Nevertheless, the decision provides invaluable insight as to the best practices available to employers to reduce the risk of having their workplace surveillance policies successfully challenged.

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When contemplating the implementation of a surveillance policy, consider the following factors:

- Is the information collected and used of a sensitive nature or within the normal context of work-day activities?
- Is more information collected than is reasonably required for the employer's purposes?
- Is the collection, use or disclosure of the information likely to be effective in fulfilling the company's objectives?
- Are there reasonable alternatives that ought to be considered?
- Is the employer's policy and practice clear and understandable to employees?
- Have employees been made aware of the policy and practice?

*To learn more and/or for assistance designing and implementing a surveillance policy tailored to your workplace, please contact a member of Sherrard Kuzz LLP.*

## HReview Seminar Series

***Please join us at our next HReview Breakfast Seminar:***

# Discipline in the Workplace - An overview of best practices and pitfalls

**What procedures should be followed prior to imposing discipline?**

- Best practices for an investigation
- What if an employee won't co-operate?
- Record keeping and collection of evidence

**What is the appropriate discipline?**

- Factors to consider, including the impact of remorse and other mitigating factors.
- Consequences of imposing excessive or disproportionate discipline
- When to use a "last chance agreement"

**How does discipline in a unionized workplace differ from a non-union workplace?**

- Timeliness of an investigation and resulting discipline
- Role of a union representative
- What is a "sunset clause" and how does it work?

**DATE:** **Tuesday September 17, 2013; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

**VENUE:** **Mississauga Convention Centre,** 75 Derry Rd West, Mississauga ON L5W1G3

**COST:** Please be our guest

**RSVP:** **By Friday September 6, 2013 at www.sherrardkuzz.com/seminars.php** or to 416.603.0700
(for emergencies our 24 Hour Line is 416.420.0738)

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**HRPAO CHRP** designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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