PRESENTATION

Unpaid Interns or Paid Employees?
How to Present the Legal Options to Your C-Suite

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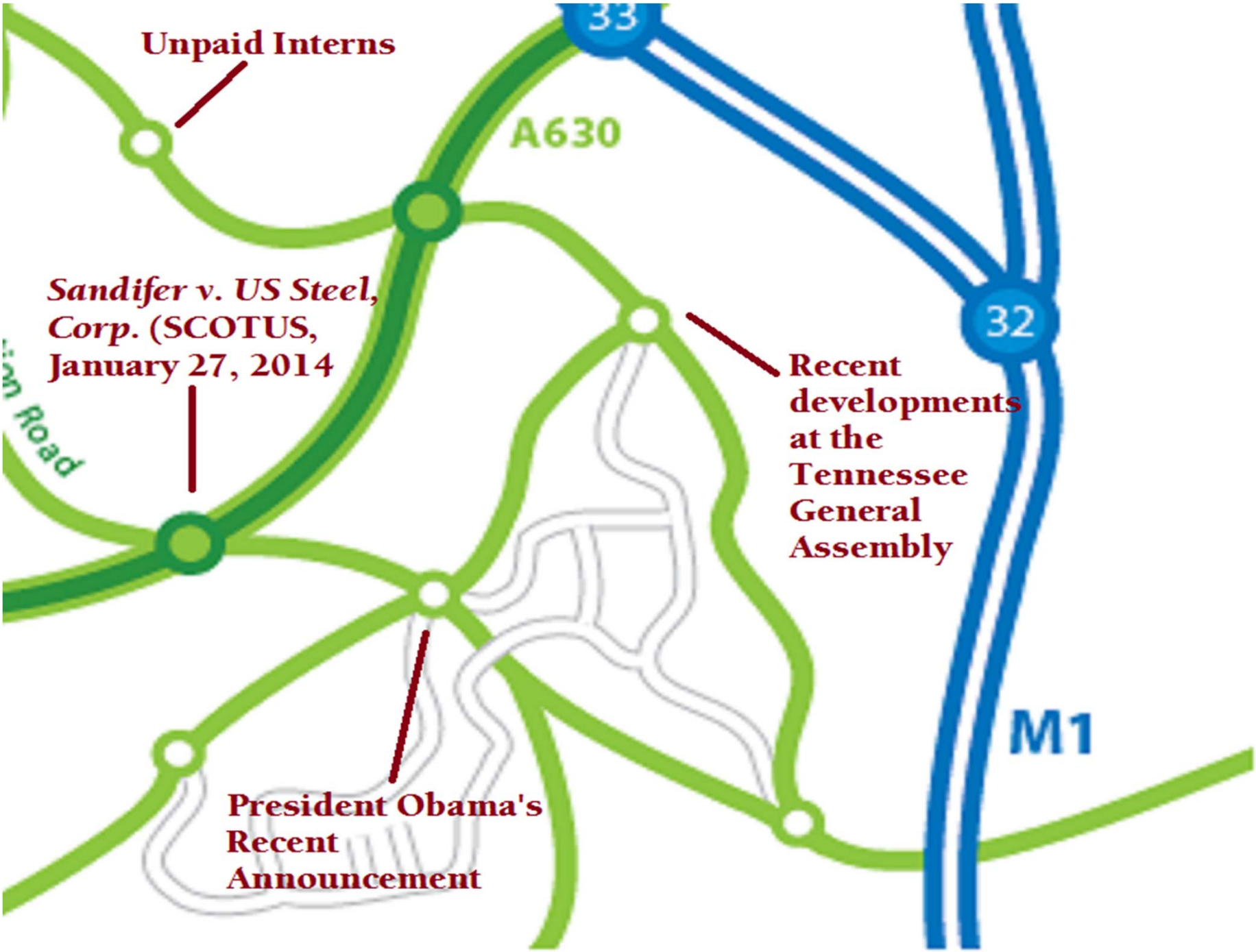
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The *Black Swan* Meets the 24-Hour News Cycle

- On June 11, 2013, a federal district court in New York ruled that Fox Searchlight Pictures violated federal wage and hour law when it employed two unpaid interns on the set for the film *Black Swan*

- The story exploded in the national media, with immediate coverage in industry publications and full-blown national media coverage by the major networks, CNN, FOX, etc.

- Local media followed: To Pay or Not to Pay? The Test for Unpaid Internships, Nashville Business Journal, June 28, 2013

The Story Has a Life of Its Own …

- Today, a Google search for news stories about unpaid interns returns over 3,000 hits

- The story has even devolved into a feud between FOX News and the NY Times:

"NY Times Still Crusading Against Unpaid Interns While It Keeps Using Unpaid Interns"
Fox News (Blog) - March 16, 2014

The Lawsuits Keep Coming

- In January 2014, a New York federal district judge approved a class action settlement in which Elite Model Management agreed to pay $450,000 to settle a class action filed by a former Fashion Week intern

- The settlement fund was created to pay more than 100 former interns between $700 and $1,750 each for the time that Elite employed them without pay

So Why All The Noise?

- It's a sexy topic. Unpaid interns are common in TV and movie production companies, sports franchises, the music business, the fashion industry, etc.

- Many employers are not in compliance

- More plaintiffs' lawyers are taking wage & hour cases than ever before

So Why All The Noise? (Cont.)

- Millennials are under-employed, angry and plugged-in

Lawyers Are Poised to Take Advantage …

- Google the words “unpaid internship” and the first result is: http://www.unpaidinternslawsuit.com/, a website hosted by a plaintiffs’ law firm:

> Unpaid interns are becoming the modern-day equivalent of entry-level employees, except that employers are not paying them for the many hours they work. The practice of classifying employees as “interns” to avoid paying wages runs afoul of federal and state wage and hour laws, which require employers to pay all workers whom they “suffer or permit” the minimum wage and overtime. Employers’ failure to compensate interns for their work, and the prevalence of the practice nationwide, curtails opportunities for employment, fosters class divisions between those who can afford to work for no wage and those who cannot, and indirectly contributes to rising unemployment.

The U.S. DOL's Six-Part Test:

1. The internship is similar to training that would be given in an educational environment;

2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff …;

The U.S. DOL's Six-Part Test (Cont):

4. The employer derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impaired;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

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

The U.S. DOL's Six-Part Test (Cont.)

- The DOL test applies to all for-profit employers (government employers and non-profit, charitable organizations are exempt)
- A for-profit company's unpaid internship program must comply with all 6 prongs of the DOL test
- The DOL test is nothing new: The 6-part test is derived from a SCOTUS opinion from 1947, *Walling v. Portland Terminal Co*., 330 U.S. 148 (1947)

Sandifer v. US Steel, Corp., (SCOTUS, 2014)

- "Section (o)" of the FLSA provides an exception to the rules that require employers to pay employees for certain pre- and post-shift activities by permitting collective bargaining agreements to define whether time spent "changing clothes" is compensable
- US Steel's employees argued the Section (o) exception was limited to actual clothing and did not apply to time spent donning and doffing protective gear
- US Steel argued that "changing clothes" should be interpreted broadly, to include protective gear if the majority of items employees change into and out of are articles of clothing

The Court Holds …

- The time that US Steel's employees spend donning and doffing their protective gear is not compensable due to the plain language of 29 U.S.C. 203(o), which permits employers and employees to collectively bargain over whether time spent "changing clothes" at the beginning or end of each workday must be compensated

…..Sounds like an employer win, right?

Well…. Not So Fast.

- First, the Court's holding is limited to cases in which Section (o) applies, i.e., employers that are unionized
- Second, in explaining the Court's decision, Justice Scalia made two surprising statements:
  - Pre- and post-shift donning and doffing activities are generally compensable; and
  - The *de minimis* defense is unavailable to employers in the context of "this statute"
- By "this statute," did he mean Section (o), the Portal Act, or the entire FLSA (surely the former)

Where Does This Leave Us?

- Even more donning and doffing litigation
- Creative plaintiffs' lawyers will continue to find new ways to sue employers for uncompensated activities

Friekin v. Apple, Inc., No. 3:13-cv-03451 (USDC, N.D. Cal)

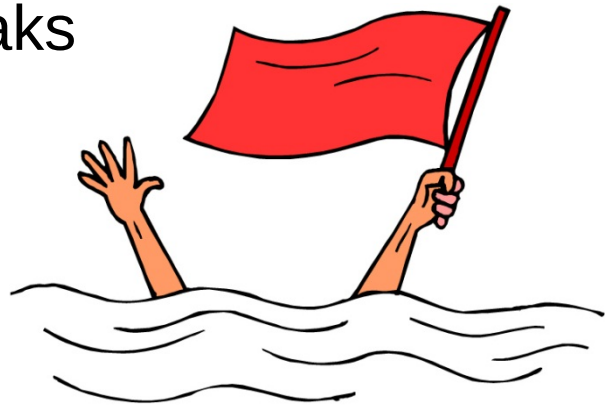
- FLSA collective action by workers at Apple retail stores
- Plaintiffs are seeking nationwide class of potentially tens of thousands of plaintiffs
- The issue: Should Apple have paid its retail store workers for the time they spent submitting to mandatory bag checks after clocking out at shift end and before breaks?

The Core Question …

- Every employer in today's climate must review and monitor whether its hourly employees are required to perform work-related activities:
  - Before their paid time starts,
  - During unpaid breaks, or
  - After their paid time ends

Recognizing the Red Flags

- Set shift-start and shift-end times that are not tied to clocking in or clocking out
- Clock-in/clock-out procedures that don't account for all work-related tasks
- Pre-shift meetings before paid time
- Supervisors who "recommend" early arrivals
- *Required work-related* activities performed *with regularity* pre-shift, post-shift or during breaks



The Tennessee General Assembly: 'We Really Do Care About More Than Guns'

- In 2012, the General Assembly passed a law that permits tipped food and beverage employees to waive their right to a 30-minute meal break if done voluntarily and in writing – TCA 50-2-103 (h)
- This term, a new bill was introduced that would have expanded this option to all Tennessee employers
- After much comment, the bill was taken "off notice" by its sponsor (Debra Moody, Covington) and will not be passed this term, but a revised version could be introduced next session

President Obama's Memorandum to the Secretary of Labor – March 13, 2014

- The President has asked the Department of Labor to "modernize" and "simplify" the white collar exemption regulations
- The President believes that the executive, administrative and professional exemptions "have not kept up with our modern economy."
- The announcement was short on specifics, but many commentators have started to weigh in …

President Obama's Memorandum to the Secretary of Labor – March 13, 2014 (cont.)

- Almost everyone expects a dramatic increase in the salary threshold of $455 per week ($23,660/year) – maybe even doubling to $910 per week ($47,320/year)
- Others predict significant changes to the definition of "primary duty" – major changes in the area of "working managers," for example
- The DOL will hold a series of "listening events" in the months leading up to the announcement of the changes
- The changes won't be announced until later this year, but you can bet we'll see them before the mid-term elections in November

Questions?