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unpaid internships: a new test in california

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In a slow economy, unpaid internships are booming. As students and recent graduates struggle to market themselves to employers, many are increasingly willing to work for free, in order to get a foot in the door.

But employers should beware: just because a person is willing to take an unpaid internship does not mean that the employer is off the hook for paying wages. Indeed, federal regulators are ratcheting up their scrutiny of unpaid internships. A recent *New York Times* article quoted Nancy Leppink, the acting director of the wage and hour division at the U.S. Department of Labor ("DOL"): "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."

It is clear what employers cannot do. They cannot simply label a particular low-level or menial job an "internship," and thereby get the work done for free, instead of hiring an employee to perform that function. What is less clear is what counts as a legitimate internship. For many years, the federal DOL has imposed a 6-factor test in order to determine whether an unpaid internship is lawful. The California Division of Labor Standards Enforcement ("DLSE") imposed a more onerous 11-factor test.

Here, there is some good news for California employers. The California state standards have just been simplified and now conform to the federal analysis. In an opinion letter dated April 7, 2010, the DLSE explicitly overturned its previous 11-factor test, in favor of the 6-factor test applicable under the federal Fair Labor Standards Act ("FLSA"). This means that the test for unpaid internships is now the same in California as it is, for example, in Texas or Florida.

The 6 factors attempt to ensure that an internship is essentially for the benefit of the intern, not the employer. The training must be:

1. "similar to that which would be given in a vocational school";
2. primarily "for the benefit of the trainees or students";
3. such that "trainees or students do not displace regular employees, but work under their close observation";
4. such that the employer "derives no immediate advantage" from the activities of trainees or students;
5. such that "trainees or students are not necessarily entitled to a job at the conclusion of the training period"; and
6. such that all participants "understand that the trainees or students are not entitled to wages for the time spent in training."

The first criterion, similarity to vocational training, appears problematic, because many internships may bear little resemblance to vocational school. However, the DLSE found that a particular internship program met this criterion because an intern received community college credit for the time spent at the employer's facilities and the tasks performed were "directly related to training and the educational and vocational objectives of the program." The second criterion underscores the basic mission of the test, which is to ensure that internships constitute valuable training for the intern, rather than a boon to the employer. The "close observation" required under the third criterion ensures that interns are actually receiving training as they work and that the employer shoulders a significant burden to accomplish this. Also, this criterion is satisfied as long as occasional or incidental work performed during the internship "does not unreasonably replace or impede the educational objectives," and thereby also displace regular workers. For the fourth criterion, regarding no "immediate advantage" to the employer, the DLSE emphasized that, considering the employer's costs and burdens in training an intern, the "predominant benefit" of the program should accrue to the intern. For the fifth criterion, the DLSE recognized that some employers may use internship programs to assess potential employees, such that certain hopes for subsequent employment may arise. But, rather than looking at such informal expectations, the DLSE found this criterion was met because the agreements signed by the interns made it clear that they had no entitlement to a job at the conclusion of the program. Similarly, with respect to the sixth criterion, the DLSE examined the formal agreements signed by program participants.

The upshot is that an internship should primarily benefit the intern, not the employer. An employer should devote substantial resources to closely monitoring, supervising, and training interns. An employer may also benefit from an intern's work, but preferably toward the end of the internship program, which would show that the intern has learned a valuable skill. Interns must be trained for entering a certain profession or line of work. If an intern is simply performing tasks that any entry-level employee could perform, in a way that displaces an employee, that is not a legitimate internship. Also, the agreements signed by the employer, intern, and any third parties should clearly reflect that the intern is not entitled to any job after the program ends and that the intern is not entitled to any wages or benefits for time spent in training.

Of course, if an employer has any doubt, it can always pay an intern applicable minimum wages and otherwise treat him or her as a full-fledged employee.

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Ask MSK - Q&A Section:

Q: To count as a legitimate internship, must an intern receive school credit for their work?

A: No, but it is probably a good idea, because receiving school credit weighs in favor of legitimacy. In the recent DLSE opinion letter, the internship program at issue involved a program wherein all interns were simultaneously enrolled in a local community college, where they were earning up to 14 college credits. This fact helped establish the first criterion (similarity to training provided in a vocational school) and the second criterion (the internship primarily benefits the trainee).

Q: Is there a specific penalty assessed against employers with invalid internship programs?

A: No, but such employers run the risk of violating a gauntlet of wage and hour laws, both federal and state. They could be held liable for paying minimum wage, overtime, and penalties for missed meal and rest breaks, perhaps for the entire period of the internships. Plus, they might incur additional penalties under California Labor Code Section 203 for failure to pay all wages due at the end of employment within 72 hours, as well as any attorneys' fees incurred through litigation. Employers should consult experienced employment counsel to ensure that their internship programs are in compliance.

Q: Assuming that an internship program essentially adheres to these criteria, what steps should an employer take to ensure that the program will be deemed valid in the event there is a challenge?

A: Employers should carefully review their agreements with internship participants and any educational institutions to ensure that the language of these agreements reflects these criteria. Employers should ensure that none of the language suggests or establishes an employment relationship. Also, all agreements should explicitly provide that interns are not entitled to wages or a job afterwards.

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