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Unpaid Summer Interns: Worth the Risk?

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An important client calls. His or her son or daughter is in law school and is having difficulty landing a summer job. The client asks if you can provide an unpaid internship at your law office. This may be a win-win opportunity: free help; the student gets needed experience and client relations are solidified. Not so fast. This may be too good to be true, but caveat emptor: the work without pay may violate federal and California wage-and-hour laws.

Can law students be unpaid volunteers or must they be compensated for their work? Unfortunately, the answer is not simple: neither the Fair Labor Standards Act (FLSA) nor the California wage-and-hour statutes address this issue directly.

The federal Department of Labor has set forth six criteria derived from the Supreme Court's 1947 decision in *Walling v. Portland Terminal*, 330 U.S. 148 (1947) to determine whether a trainee is covered by the FLSA. As of April 7, 2010, the California Division of Labor Standards Enforcement (DLSE), which enforces California's wage laws, adopted this test. DLSE 2010.04.07 All six factors must be satisfied to permit employment or engagement of the intern without payment of wages:

The training received by the intern, even though it includes actual operation of the employer's facilities, must be similar to that which would be given in a vocational school; the training must for the benefit of the trainees or students; the trainees or students must not displace regular employees, but must work under their close observation; the employer may derive no immediate advantage from the activities of trainees or students, and on occasion the employer's operations may be actually impeded; the trainees or students must not necessarily be entitled to a job at the conclusion of the training period; and the employer and the trainees or students must understand that the trainees or students are not entitled to wages for the time spent in training.

To satisfy the first criteria, training similar to that in a school, the internship must involve students in real life situations and provide them with an educational experience that they could not obtain in the classroom. In the law firm context appropriate activities would include, among other things, shadowing attorneys at court, during client calls, attending client meetings and closings and participating in trainings and social and legal networking events, in summary, what student would expect in a clinical course.

The DLSE and Department of Labor have uniformly found that, where academic credit is offered for internships, the second factor is satisfied and the internship inures to the benefit of the student. Indeed, prior to its April 7, 2010 adoption of the six federal factors, the DLSE required employees to satisfy six additional factors, one of which required the clinical training to be part of an educational curriculum. The DLSE's removal of this requirement appears to facilitate retaining unpaid interns, as it would no longer require a law firm to establish a formal program with a law school in which the student would receive course credit

Regardless, law firms seeking to make sure that the unpaid internship benefits the intern should be encouraged to partner with law schools. Many law schools have externships programs recognizing that law firms seek to hire employees who understand the practical application of legal instruction in the workplace. While such programs have traditionally focused on governmental or company positions, there

is no reason why they could not be extended to law firms especially given the reduced size of most summer associate programs and large number of law students seeking real world experience.

The second, third and fourth factors are designed to avoid the displacement of paid employees by free labor. At bottom, they address which party ultimately benefits from the relationship. The DLSE opines that the tasks performed must be "directly pertinent" to the intern's education and should not be "an integral part of the [business' activities] from which the [business] derives a substantial benefit." Analyzed in connection with the "close supervision" language, the work an intern performs must be subjected to frequent monitoring and direction. Supervision must be consistent and any benefit to the employer must be counterbalanced by impediments to the employer's operations in time and economic costs.

One DLSE opinion letter explained that an employer should not use an intern to perform a task if the employer would have to hire additional employees or pay current employees to perform the task "but for" the intern. While the DLSE would not interpret the nondisplacement rule so strictly, the conservative approach is to limit intern work to that which would not likely be performed by associates or paralegals. Interns should not be performing research absent supervision, drafting memoranda, and performing document review similar to the work of first year attorneys.

Not employing the intern at the end of the screening period and ensuring that the trainee understands that they will not be paid for their time, law firms would need to have interns sign offer letters confirming the nature of the internship relationship, explaining that the interns are neither entitled to wages nor a job at the end of the program. Detailing the nature of an intern's expected experience while not determinative, would be helpful in establishing that the intern and not the law firm is the primary beneficiary of the relationship. Law firms would, however, be reminded that they may under no circumstances ask interns to waive potential wage claims. Any prospective waiver would be *per se* unenforceable, well settled under both federal and state law.

Employers whose internship programs fail the six-part test may be liable for a myriad of damages and penalties. These include unpaid wages, overtime, meal and rest periods, penalties for improper wage statements, unpaid payroll taxes to the Internal Revenue Service and the California Franchise Tax Board and penalties, unpaid taxes to the Employment Development Department for unemployment insurance, a $10,000 plus one-year incarceration for failure to secure workers' compensation insurance, possible penalties under the Private Attorneys' General Act, and waiting time penalties to former misclassified interns and potential attorneys' fees.

Solo practitioners and law firms should not assume that unpaid interns will not complain for fear of retaliation if they wish to pursue a career in the given industry. Federal government scrutiny may increase, especially given newly-confirmed Department of Labor Solicitor M. Patricia Smith's investigations into unpaid internships while Commissioner of the New York Labor Department. Moreover, the lack of enforcement and subjectivity of the six-part test has recently been questioned by organizations such as the Economic Policy Institute, which may increase governmental prosecution. The Economic Policy Institute's April 5, 2010 Policy Memorandum criticized the six-part test as fostering the growth of unpaid internships, which limit participation to students who can afford not to be paid leaving interns unprotected by discrimination and harassment law. Because neither the DLSE nor the Department of Labor has yet opined on the legality of unpaid legal internships and no recent case law exists, law firms can only look to the six factors in determining whether free labor may in the long run be an expensive undertaking.

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