

Art Law Gallery

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[The "Starving" Intern: Legal Ins & Outs of Unpaid Internships](#)

Everyone remembers the first day of their highly touted unpaid internship—nerves twitching, heart racing, palms sweating, eager to perform any mundane task with the utmost perfection to impress a new supervisor. For many, especially in art, fashion, and entertainment, these internships are an individual's big break, granting entrance to a career of their dreams by providing hands-on experience and access to priceless networking opportunities. While unpaid internships have seemingly been a mainstay of the creative industries—even Stephen Spielberg, Tom Ford, and Sylvia Plath found themselves fetching coffee at one point—many other for-profit employers are venturing down the unpaid internship route. What many employers would be surprised to learn is that, according to the U.S. Department of Labor's ("DOL") Wage and Hour Division, there are very few circumstances where a for-profit employer can offer an unpaid internship and still be in compliance with the law. With a struggling economy and a significant increase in unpaid internship programs offered by for-profit employers, this issue has been thrust into the spotlight. Internships are increasingly becoming a crucial component of the business world, and while employers can provide an invaluable opportunity for interns, state and federal regulators across the country are focusing on ensuring employers are not taking advantage of wide-eyed, eager students looking to jumpstart their career.

To determine whether an internship program exempts an employer from having to compensate an intern in accordance with California's minimum wage coverage (codified in Labor Code § 1171 et seq., IWC Orders 1 through 17), California's Division of Labor Standards Enforcement ("DLSE") abides by the six criteria set forth by the Department of Labor ("DOL"):

(1)The internship, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school;

The major issues related to this criterion are whether the internship relates to an academic program, builds upon previous and continuing classroom instruction, and applies it to "real world" applications in a working environment. The DLSE's evaluation of this criterion will be fact specific, focusing on the relationship between the intern's academic curriculum and the activities performed as part of the program. If the intern receives school credit that is applicable towards the intern's degree, the internship program is more likely to be considered "similar to that which would be given in a vocational school" because it is an acknowledgement by the educational institution that the employer's program adequately substitutes for classroom

instruction.

Helpful Tips: There are a few actions an employer can take to increase the likelihood its program will satisfy this criterion. First, require the intern to receive school credit for the internship. This does not automatically satisfy the criterion, but it creates an understanding that the internship is meant to augment the intern's educational experience. It also signals that the intern will be receiving a degree from his or her school and the internship will provide credits that fulfill that degree's requirements. Second, layout the probable activities the intern will perform and ensure that they are related to the objectives and goals of the intern's academic program. This can be done by drafting a document that lists the intern's hours and activities, and requiring the advisor of the intern's academic program to verify, in writing, that the internship complies with and is in furtherance of the objectives and goals of the intern's academic program. Typically, an advisor will sign such a document if the intern is required to write an essay at the conclusion of the internship that reflects the intern's experiences and the employer completes an evaluation of the intern that is sent to the intern's advisor. Finally, an employer should maintain a file for each intern that contains proof of school credit, a record of the intern's assignments, evaluations of the intern's work, and any other paperwork related to the intern.

(2)The internship is for the benefit of the interns or students;

A program is "for the benefit" of an intern if the intern learns transferable skills that will help prepare a student for a career within the employer's industry or related to the intern's academic curriculum. In addition, academic credit for an internship is widely accepted as a "benefit" for the intern. The DLSE explains that the intern must derive more than "some" benefit from the program and the benefit must increase the intern's "marketability" to prospective employers within industries related to the intern's academic curriculum. It should be noted that any training related to the internship should be at no cost to the intern. It is unlikely the DLSE would find an unpaid internship "for the benefit" of the intern if the student had to pay the employer directly to provide training.

Helpful Tips: Similar to the first criterion, it is in an employer's best interest to require an intern to receive school credit for the internship. If that school credit is applicable towards the intern's academic degree it will improve the employer's probability of satisfying this criterion because college degrees are usually considered "marketable." In addition, in an attempt to prepare the intern for a career within the employer's industry, it would be prudent to provide the intern with projects and assignments that cover a wide array of subject matters. A wide array of assignments should not be interpreted to include stapling paper and picking up lunch for the office, rather the intern should be exposed to real substantive opportunities, such as shadowing a supervisor, attending meetings, and conducting research assignments. This will give the intern more hands-on experience in different areas of the employer's industry; thus, better preparing them to parlay their

classroom knowledge and internship experience into a relatable career.

(3)The interns or students do not displace regular employees, but work under their close observation;

Previously, the DLSE declared that if a trainee performed any work that could be performed by a regular employee, such as minor clerical work, this factor would not be satisfied and the exemption would not apply. Fortunately for employers in California, the DLSE has begun to relax this interpretation. According to the DLSE, "[a]n overly strict interpretation of [this] factor which fails to recognize both the dynamic real world environments interns are placed and the objectives of the internship program could easily operate to render nearly all bona fide training and internship programs invalid under applicable wage and hour laws" (DLSE OL 2010.04.07). For this reason, the DLSE makes a fact specific inquiry into whether minor or incidental work performed by an intern, which would typically be attributed to a regular employee, effectively "displaces" regular employees. Requiring an intern to work under close supervision of an advisor is a clear indicator that the intern is not displacing regular employees because a regular employee generally is loosely supervised and conducts substantial independent work.

Helpful Tips: This criterion is one of the main culprits that disqualifies an internship program from being exempt from California's minimum wage coverage. An absolute necessity to fulfill this criterion is to assign a supervisor to every unpaid intern. Establishing reoccurring meetings between the supervisor and intern that allow the supervisor to monitor the intern's work, provide advice and instruction, and allow the intern to ask questions will heavily weigh in the employer's favor as it pertains to this factor. The employer should also refrain from assigning the intern clerical tasks, such as collating papers, fetching coffee, or scheduling appointments for the intern's supervisor or other employees. These tasks are not typically considered "educational" and are usually performed by a regular employee. For instance, an intern for a magazine company should not spend time packing and shipping apparel samples back to fashion houses that had provided them for photo shoots. Finally, the intern should have minimal to no contact with clients or customers. If the employer would like the intern to gain experience in understanding how to interact with clients and customers, the intern can shadow his or her supervisor. This allows the intern to observe the interactions and learn, but does not put the employer at risk of failing this criterion.

(4)The employer derives no immediate advantage from the activities of interns or students, and on occasion the employer's operations may be actually impeded;

According to the DLSE, "the key language in this criterion is whether the advantage or benefit the employer receives is immediate" (DLSE OL 2010.04.07). If an intern works alongside regular employees, with little to no supervision or learning opportunities, and performs "the main work of the business," the employer will likely gain an immediate (economic) advantage because

the work being performed generates income for the employer and it comes at little or no cost. This criterion is closely related to the third factor above because if an unpaid intern displaces regular employees, the employer is clearly gaining an immediate advantage by not having to pay a regular employee's salary and the work being performed is vital to the employer's business. Conversely, if the intern, on occasion, happens to perform activities that are not directly tied to training or learning, such activities may be *de minimis*, or inconsequential, if they are truly isolated instances and do not involve substantive work exploited by the employer. The DLSE will conduct a balancing test to determine whether the employer has derived any "immediate advantage," weighing any potential benefits the employer receives from the intern against any benefits the intern gleans from the program and any detriments the employer suffers as a result of the program. The role of the supervisor is key under this test because supervising an intern is considered a detriment to the employer. It takes away time and resources from the supervising employee, which ultimately costs the employer.

Helpful Tips: Along the lines of the tips above, an employer should require the student to receive academic credit, assign a supervisor to each intern, offer a variety of assignments, and schedule meetings between the intern and supervisor. For the reasons previously discussed, these steps will hopefully offset the benefits, if any, the employer is receiving from the intern. In addition, the employer should refrain from using any work product created solely by the intern in any of the business' day-to-day operations. This would likely be viewed as an immediate advantage for the employer and could potentially cause the program to fail this criterion. For example, a graphic design firm should not exploit an unpaid intern's designs created during the internship by making them the only, or crucial, component of a client's new marketing campaign.

(5)The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

While this factor seems self-explanatory, it should be noted that it does not bar an employer from extending an offer to an intern at the conclusion of the internship program. This factor is satisfied so long as at the onset and up to the conclusion of the internship the intern is not led to believe that simply completing the internship will entitle the intern to a job with the employer. Remaining consistent with the other factors of the test, this factor emphasizes that the program should be concerned with providing experience, educating, and preparing interns for a specific career or industry, not for a job with the employer.

Helpful Tips: Before beginning the internship, have each intern acknowledge, in writing, that there is no guarantee of employment after completion of the internship. It would also be wise to inform all employees and intern supervisors to not promise or suggest to the intern that he or she will be hired after they complete the internship.

(6)The employer and interns or students understand that the interns or students are not entitled to wages for the time spent in training.

Please note that minimum wage laws are protected against waiver. Thus, if the internship program does not pass this six-factor test as a whole, an intern's acknowledgment that he or she is not entitled to wages or an outright waiver of wages during the internship will be of little to no consequence.

Helpful Tips: The simplest way to satisfy this criterion is to have all interns acknowledge, in writing, that they are not considered employees at any point during the internship and are not entitled to wages for time spent in the internship program.

Evaluating the Test as a Whole: "All or Nothing" or "Totality of the Circumstances"?

The DOL and DLSE evaluate the six-prong test laid out above in very different fashions. The DOL follows an "all or nothing" review standard, which means that an internship program must satisfy all six criterion to pass the test. On the other hand, California now abides by a "totality of the circumstances" approach, which means that an internship program is evaluated in its entirety, weighing all six factors against one another in order to determine whether it passes the test. It should be noted that all states follow their own variation of the DOL test and evaluate their test differently. Consult your state's labor department to confirm its test and standard of review used to evaluate unpaid internship programs.

"All or Nothing" Standard of Review: The Department of Labor

Under this approach, an internship program must satisfy all six criterion to find that participating interns or students are not employees under minimum wage laws, which makes the program exempt from paying the intern at least minimum wage. Therefore, if the employer fails to satisfy just one of the above six factors, then the entire program will be disqualified from exemption and the intern must be compensated for all hours worked at a rate equivalent to the Fair Labor Standards Act ("FLSA") minimum wage or the employer's state mandated minimum wage. Currently, the DOL and 5th Circuit abide by this standard of review. New York State Department of Labor ("NYSDOL") also follows this approach (the NYSDOL test includes five additional factors on top of the six set forth by the DOL). Although the DOL's Wage and Hour Division has strictly adhered to this approach as it pertains to unpaid training programs not affiliated with an academic institution, it has consistently held that academically oriented programs designed primarily for the benefit of the student will not be deemed to create an employment relationship. This precedent hints at the DOL abating its review standards for unpaid internship programs that are included as part of the interns overall academic curriculum. But, given the DOL's recent public comments against unpaid internship programs offered by for profit employers, the DOL's stance on these programs is blurry, at best. One thing is for certain, the DOL is emphasizing this issue and claims it will investigate and audit more for profit employers that utilize unpaid interns. The final opinions of these future audits should shed more light on the DOL's standard of review for these types of internship programs.

"Totality of the Circumstances" Standard of Review: California

A "totality of the circumstances" approach allows a reviewing body to consider an internship program in its entirety to determine whether the interns participating in the program are considered employees as it pertains to minimum wage laws. This allows an employer's program to fail certain factors of the test, but still qualify for exemption from minimum wage laws because the other factors weigh so heavily in the employer's favor. Although this approach gives the employer more leeway to pass the test, the more straightforward criteria, such as the DLSE's final two factors, are still likely to be required to pass. For instance, if an employer informs its intern that he or she will be hired at the end of the internship and allows the intern to think he or she will be compensated during the internship, it is not likely that school credit or any other benefit the intern is receiving will compensate for this blatant disregard of the final two factors of the test. On the other hand, if it is questionable that the employer may be receiving some benefits from the intern or the work performed by the intern could be perceived as displacing a regular employee, an employer's program could still pass the test if the intern was receiving a clear and substantial benefit from the internship and the other factors were met.

In the past, California's DLSE followed the "all or nothing" approach in applying the DOL's test, as well as supplemented the test by adding up to six additional factors for review. This changed on April 7, 2010, when the DLSE adopted a "totality of the circumstances" approach, actually citing a DOL opinion that stated "[w]hether trainees are employees ... will depend upon all of the circumstances surrounding their activities on the premises of the employer" as precedent. The DLSE reasoned that the "all or nothing" test could be too restrictive and is not a proper application to evaluating modern day internship programs. To many, this is a reasonable conclusion given that the DOL's test and reasoning is based on a 1947 Supreme Court case, *Walling v. Portland Terminal Co.*, that involved a training program for railroad workers. In the current working environment, especially in regards to white collar jobs, employers offering an unpaid internship program are typically receiving some type of benefit from the intern, and this approach allows the DLSE to consider the program as a whole and whether the perceived benefit of the employer is equal or less than the benefit the intern receives. Under this approach, the "benefit" factors are more likely to be satisfied if the program is mutually beneficial for the employer and intern.

Risks for Employers Associated with Unpaid Internships:

Although California appears to be moving towards a more flexible standard for reviewing unpaid internship programs and their exempt status from minimum wage laws, employers still face substantial risks associated with unpaid internships. The "totality of the circumstances" approach is not widely accepted amongst the states and given the warnings from many state labor departments and the DOL, an employer should not take too much solace from operating in a state following this approach. It is still in the employer's best interest to meet all six criteria because an audit from the DOL may return a failing result even if the employer's state labor department has cleared the program, resulting in penalties for the employer. If the DOL concludes that an employer's program is not exempt from the FLSA minimum wage coverage and the interns are actually employees, the employer could be forced to pay back wages (at the minimum wage

rate), payroll taxes not withheld, unemployment insurance, Social Security, interest, and attorney's fees. Furthermore, federal law allows for a court or government agency to enforce liquidated damages on the employer, which is defined as double the unpaid wages.

Even if an unpaid intern is not considered an employee, employers could still face personal injury liability for injuries suffered by the intern while participating in the employer's internship program. To limit this liability, it is a sensible idea to provide workers' compensation coverage for interns and volunteers. This is not a requirement by law, in most states, but it will help limit the employer's liability for any injuries suffered by interns or volunteers at the employer's facilities during their time spent with the employer.

Conclusion

Ultimately, an internship program can be an invaluable tool for both the employer and intern, mutually benefitting both parties. An intern can interject new ideas and a modern perspective to a design firm, production studio, or magazine, and at the same time, these entities help educate and groom the intern for a successful career in their industry of choice. As more employers begin to utilize internship programs, the relationship between intern and employer clearly becomes more complicated when the intern is unpaid. Given the DOL's commitment to increasing audits for these types of programs, prudent employers should ensure that their unpaid internship programs comply with the law.