WSGR ALERT

APRIL 2010

CALIFORNIA DLSE UNDERSCORES THAT STRICT REQUIREMENTS STILL APPLY TO UNPAID INTERNSHIPS

On April 7, 2010, the California Division of Labor Standards Enforcement (DLSE) issued an opinion letter addressing the requirements employers must meet in order to have unpaid interns in compliance with California law. Although widely published news reports, including a recent *New York Times* article analyzing the DLSE's April 7th opinion letter, have raised hopes that California is relaxing its position with respect to the permissibility of unpaid internships, such optimism appears to be misplaced and employers must continue to exercise caution in this area.

The DLSE's guidance is timely, as thousands of college graduates and students prepare to hit the job market in search of employment opportunities. Many employers offer internships for a variety of reasons, including providing useful "real world" experience to students seeking to learn more about a particular industry or profession, and trying to help the children of customers, business colleagues, or friends. However altruistic their reasons, employers must be aware that California and federal law severely limit the circumstances under which such internships can be unpaid.

In response to a letter from an attorney representing Year Up, Inc., (a program aimed at developing fundamental job and technical skills in information technology for 18- to 24-year-olds) about the classification of internships in California, the DLSE concluded that the interns enrolled in the internship program were not employees under California law, and therefore were exempt from coverage under California's minimum wage law. In reaching its conclusion, the DLSE followed the federal Department of Labor's (DOL's) criteria for determining whether the interns were exempt from minimum wage coverage and examined the "totality of the circumstances" surrounding their activities. Ultimately, the DLSE's opinion letter reiterated its longstanding position that California follows the same stringent federal factors in analyzing the classification of interns, and thus serves as a reminder to employers that improper classification of employees as unpaid interns can be costly.

The DOL has articulated six criteria to determine whether an "intern" or "trainee" is exempt from the Fair Labor Standard Act's minimum wage coverage. In order to qualify as an unpaid internship, *all* six factors must be satisfied under state and federal law. The six criteria are as follows:

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

2. The training is for the benefit of the trainees or students.

3. The trainees or students do not displace regular employees, but work under their close observation.

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

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

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

The DLSE's new opinion letter concluded that all six criteria also must be satisfied in California. However, the agency now appears to take a more relaxed approach as to when an employer will meet certain aspects of the six factors. For example, in determining whether regular employees are displaced (i.e., the "non-displacement" criterion), the DLSE now takes the position that occasional or incidental work by an intern should not defeat the exemption provided such work does not intrude into activities that could be performed by regular workers and effectively displace them. As the stringent six criteria must still be satisfied, it will be difficult for companies, particularly for-profit companies, to have properly classified unpaid interns. The recent *New York Times* article regarding internships quoted Nancy J. Leppink, the acting director of the federal Labor Department's Wage and Hour Division, as stating, "There aren't going to be many circumstances [where for-profit companies can have unpaid internships and] still be in compliance with the law."

Many companies have relied upon unpaid interns as a way to minimize costs and provide opportunities to eager workers who are willing to work for free in hopes of ultimately securing a paid position. Such an approach is risky, and employers must understand that the consequences of utilizing unpaid internships that do not comply with applicable law are potentially serious. As with misclassification of an employee as an

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independent contractor, employers with misclassified unpaid interns face potential liability for unpaid wages and violations relating to failure to pay minimum wage, which could be significant for a full-time intern. In addition to the wages due to unpaid interns, the employer could face potential liability for overtime and missed meal or rest periods. Moreover, the employer could be liable for various penalties under California's Labor Code (including waiting-time penalties for failing to pay wages on a timely basis), as well as unpaid employment-related taxes owed to governmental agencies.

For more information about legal issues regarding interns, please contact Fred Alvarez, Kristen Dumont, Laura Merritt, Ulrico Rosales, Marina Tsatalis, Alicia Farquhar, or another member of the firm's employment law practice.

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