

## First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

August 4, 2010  
Issue No. 87



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### Unpaid Interns — The Legal Test

Given the number of unemployed recent graduates and a difficult economy, unpaid internships seem like a sensible option to connect companies with trainees and students. However, California and federal law both apply a strict test to determine if any unpaid internship is valid.

This has become a hot topic since, on April 7, 2010, the California Division of Labor Standards Enforcement (“DLSE”), which enforces California law concerning the proper payment of wages, issued a new opinion letter addressing the subject. The opinion letter came in response to a specific request from a non-profit company called Year Up, Inc., which sought guidance on whether its internship program would meet the requirements of California law. The DLSE letter is an exhaustive analysis with 19 footnotes, which eventually found that Year Up’s program qualified under a 6-factor test. Both California and federal labor law now use the 6-factor test to determine if an internship program is valid. All six factors must be met.

The risks involved in misclassifying employees as unpaid interns are that a company will have violated minimum wage law, and face potential liability for unpaid wages, overtime, missed meal and rest breaks and employee benefits for the misclassified interns. In addition, the employer could face tax liabilities for unpaid employment taxes to federal and state government agencies.

Significant to the letter was the DLSE’s abandonment of its former 11-factor test. The DLSE is now in line with federal law, specifically the federal Department of Labor (“DOL”), and both apply the following 6-factor test:

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 trainees or students, and on occasion the employer’s operations may be actually impeded;

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5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Even though the DLSE has reduced its criteria from 11-factors to 6-factors, it will still be difficult for any for-profit company to meet this test and be able to use unpaid interns.

For example, Factor No. 3 would pose a problem for companies seeking to cut costs by replacing wage-earners with unpaid interns who will perform essentially the same work as paid employees. While the interns can perform minor or incidental work that would otherwise be done by employees, they must be closely supervised by the employer which will presumably hinder the employer's ability to profit from the work of interns.

Factor No. 4 envisions that employers will receive no immediate advantage from the use of interns while recognizing that at the end of the training the interns should improve their skills and have increased value and responsibility, but will still be supervised throughout the internship. As required by Factor No. 2, the training must truly benefit the trainees or students and not necessarily the employer.

Factor No. 5 provides that the interns are not necessarily entitled to a job when the internship ends; therefore, these programs cannot simply be used as unpaid orientation periods.

If the internship program fails to meet all six factors upon close scrutiny, the interns or trainees will be found to be employees and, therefore, entitled to employee protections under the California and federal wage and hour laws. While the DLSE's recent letter streamlines the analysis and makes the California test consistent with federal requirements, it remains challenging and risky for any company to use unpaid interns. Any internship program needs to be reviewed carefully with all of the requirements in mind.

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