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Practice Group(s):
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The High Price of Unpaid Interns

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Employers in California who make use of “unpaid interns” must take special care. The importance of this issue is spotlighted as a risk-laden trend in three recent, high-visibility lawsuits. In the first, two former interns who worked for an international media company on a major motion picture alleged they were misclassified as unpaid interns in order to keep production costs down. The second suit was filed by a former *Harper’s Bazaar* intern against media conglomerate Hearst Corporation in February 2012, alleging that she was improperly classified as an unpaid intern to avoid paying her minimum wage and overtime. The third suit was filed on March 14, 2012 as a putative wage and hour class action on behalf of an unpaid intern and all other similarly situated unpaid interns on PBS’ Charlie Rose Show.

Background

These lawsuits highlight the widespread but dangerous practice of calling eager and sometimes inexperienced workers “interns.” The worker is often anxious to learn a new skill, gain exposure to a potential future employer, and/or gain valuable experience in order to become more marketable. In turn, the employer is thrilled to obtain needed labor at little or no cost, without having to comply with expensive and onerous employment laws and regulations.

Those laws and regulations include those governing the wages and hours (including overtime and meal and rest breaks) of workers, safety in the workplace, workplace related injuries and illnesses (and the protections afforded by the workers compensation system), and payment and reporting of payroll taxes and other employment-related obligations. And while the interests of the worker and those of the employer would therefore appear to be fully consistent, the law and the agencies which operate in this arena have a very different perspective.

By way of example, many newspapers historically used workers called “unpaid interns” either part time during the school year or during summer vacation. The interns were more than eager to gain exposure to the operations of an actual newspaper. While the “internship” was not part of any school or college course, the opportunity for the intern to enhance his/her resume was irresistible. The newspapers, in turn, jumped on the opportunity to enlist willing workers at little to no cost to perform the less glamorous tasks associated with newspaper publishing. The interns typically performed work such as fact-checking articles, conducting research needed by the writers and sometimes performing clerical tasks such as filing and clipping archival materials.

California DLSE Regulations

According to the California Department of Industrial Relations, Division of Labor Standards Enforcement (“DLSE”), which enforces California’s strict wage and hour laws, however, the newspapers opened themselves to substantial liability for violation of, among other laws, California’s laws governing payment of minimum wage and overtime.

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DLSE has established an eleven-part test which must be fully satisfied to avoid an employment relationship and properly classify a worker as an unpaid intern. The eleven requirements are:

1. The training, even though it includes operation of the employer's facilities must be similar to that given in a vocational school.
2. The training must be for the benefit of the interns and NOT the employer.
3. The interns must not displace regular employees but must work under their close supervision.
4. The employers providing the training must derive no immediate advantage from the activities of the interns and on occasion its operations should actually be impeded.
5. The interns must not necessarily be entitled to a job at the conclusion of the training period.
6. The employer and interns must understand that the interns are not entitled to wages for the time spent on training.
7. The interns must not receive any employee benefits.
8. The training must be part of an educational curriculum.
9. The training should be general so as to qualify the interns for work in any similar business, rather than designed specifically for a job with the employer offering the internship. In other words, upon completion of the internship, the interns should not be fully trained to work specifically for the employer offering the internship, but should require further specific training for such employment.
10. The screening process for the internship should not be the same as for employment and should not appear to be for that purpose; it should involve only criteria relevant for admission to an independent educational program.
11. Any advertisements for the program should be couched clearly in terms of education, rather than employment although the employer may indicate that qualified graduates will be considered for employment.

All eleven criteria must be met for the worker to qualify as an intern instead of being deemed an employee. As applied to the example above, the newspapers failed to meet several of the established criteria, including the requirement that the internship be part of an educational curriculum and that the employer derive no immediate advantage or benefits from the interns' activities.

Conclusion

DLSE strongly cautions businesses to obtain an advance opinion from DLSE as to whether a specific program will qualify as a bona fide internship rather than employment. That is in part because the agency scrutinizes these programs very closely and has a tendency to find them to constitute employment.

The request for opinion (which can take months to obtain) should include:

- a factual discussion relating to each of the eleven criteria;
- a description of the course (including the curriculum and nature of the program);
- the hours of classroom and clinical (or workplace) instruction;
- a description of the screening process for the interns;

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- a copy of the agreement with the interns; and
- an explanation of the tuition arrangement and any provision for refund upon employment.

As a result, merely calling an eager, willing worker an unpaid “intern” will not automatically enable a company to avoid application of California’s onerous employment laws and regulations. Much more is needed. Businesses are therefore well-advised to seek advice from experienced counsel before embarking on an unpaid internship program.

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