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Paychecks for Unpaid Interns?

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Traditionally, internships have served as a rite of passage for acceptance into the “adult” working world. Fetching coffee, making copies, and assuming the less glamorous tasks of an organization were expected to be performed enthusiastically and without pay, as the price of entry into numerous industries. Many successful executives including the late Apple co-founder Steve Jobs, fashion designer Betsey Johnson, and even rapper/producer/entrepreneur Sean “Diddy” Combs, got their start amongst the ranks of the lowly interns. However, these days, internship programs throughout the country are changing.

First and foremost, under what circumstances are unpaid internships permissible? According to the U.S. Department of Labor (“DOL”), for a worker to qualify as an unpaid intern and be exempt from minimum wage and overtime requirements, each factor in the following six-factor test must be met: (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 intern; (3) The intern does not displace a regular employee, but works under close observation; (4) The employer derives no immediate advantage from the activities of the intern, and, on occasion, the employer’s operations may be actually impeded; (5) The intern is not necessarily entitled to a job at the conclusion of the training period; and (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in training.

California’s Department of Labor Standards Enforcement (“DLSE”) has adopted the DOL’s six-factor test. In California, individuals who do not meet each prong of the DOL’s six-factor test will not qualify as unpaid interns and therefore, they must be paid at least the minimum wage, overtime wages when applicable, and provided meal and rest periods. Nonetheless, individuals who are properly classified as unpaid interns, even though they are not entitled to wages, are still entitled to protections under California’s Fair Employment and Housing Act (“FEHA”). For example, the FEHA protects unpaid interns against harassment and discrimination just like regular, paid employees are protected.

Clearly, as evidenced by the recent plethora of class action litigation by unpaid interns, if your business has an internship program, this is an issue that simply cannot be overlooked. As recently as March 2015, Viacom agreed to

pay \$7.2 million to settle a class action lawsuit brought by unpaid interns at MTV and BET. Similarly, other well-known companies such as the Hearst Corporation, publisher of *ELLE*, *Esquire*, and *Marie Claire* magazines, Fox Searchlight Pictures, Marc Jacobs, Elite Model Management, and even the Olsen twins’ Dualstar Entertainment Group (coincidentally both Olsen twins reportedly completed internships in the fashion industry) have all been hit with class action lawsuits within the past few years.

Best practices dictate that every California business take an objective look at their internship program to evaluate whether their interns are properly classified and exempt from the minimum wage and other labor law requirements. An essential question that a business must ask is: “Who is primarily benefitting from the internship—the intern or the business?” If the answer is “the business”—because it is essentially receiving free labor—then this is evidence that the intern may actually be an employee who is entitled to wages under applicable labor law. It is also important for a business to maintain documentation as to the structure and features of its internship to ensure that the program stays focused on serving the educational needs of the intern. Additionally, if the intern is obtaining school credit for his or her participation in the internship, the business should strive to maintain an on-going dialogue with the academic institution.

Finally, as the movie “The Devil Wears Prada” depicted, for many young workers, internships and entry-level jobs can be abrupt and difficult introductions to the harsh realities of the working world. Whether you are legally required to pay your interns or not, treat them with respect—one day that lowly intern may occupy the corner office.

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