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Employment Law Commentary

Unpaid Internships: A Prevalent Practice Called into Question

By Naghmeh Ordikhani

An unpaid internship for a college student has almost become a rite of passage. Many advocates, however, charge that unpaid internships are just a form of unpaid labor, regardless of the benefits enjoyed by students and companies. Indeed, in the past six months, three proposed class actions have been filed against companies in the media industry accusing them of misclassifying individuals as unpaid interns, instead of employees, thus violating federal and state minimum wage and overtime laws. These legal challenges should be of concern to employers who use unpaid interns, and provide an opportunity for employers to reassess their internship programs and ensure that they are in compliance with federal and California law.

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Recent Class Actions Filed Involving Unpaid Interns

Interestingly, all three of the recent class actions involving unpaid interns were filed by the same New York City law firm and allege New York labor law violations (while two assert federal labor claims as well). The first case was lodged in September 2011 against Fox Searchlight Pictures, Inc., on behalf of two unpaid interns who worked on the production of the film *Black Swan*.[i] A similar case was filed in February 2012 against Hearst Corporation by a former Harper's Bazaar intern.[ii] Both cases were filed in a New York federal court.

On March 24, 2012, a third class action was filed against Charlie Rose, Inc. and television host Charlie Rose, where a former intern claims that she regularly worked 25 hours a week with no pay.[iii] Unlike the other two class actions, this case does not assert any federal labor violations, and was filed in a New York *state* court.

Litigation concerning unpaid interns can be expected in other states and business sectors, particularly in the entertainment, fashion, and publishing industries, where the utilization of unpaid interns is a prevalent and widely accepted practice. Accordingly, all California employers who use interns, regardless of the sector they are in, should keep abreast of the relevant federal and California laws relating to interns.

Evaluating Whether a True Internship Relationship Exists Under Federal Law

When determining whether an individual should be classified as an intern as opposed to an employee under federal law, an employer must first examine if that individual and his or her arrangement meet the definitions of "employee" and "employ" under the federal Fair Labor Standards Act ("FLSA"). Those who fall under these definitions must be compensated for their services in accordance with federal and state minimum wage and overtime laws.

The FLSA defines an employee as "any individual employed by an employer," and employ as "to suffer or permit to work."[iv] In a pivotal case on the matter, the United States Supreme Court held (more than 60 years ago) that the FLSA definition of employ does not "intend to stamp all persons as employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another."[v] Therefore, deciding whether an individual should be considered an intern or an employee under the FLSA depends "upon all the circumstances surrounding their activities."[vi]

The Federal Department of Labor's Six Criteria for Unpaid Internships

The federal Department of Labor ("DOL") has provided guidance to "for-profit," private-sector employers to assist them in making this determination.[vii] To begin with, the federal DOL indicated that the FLSA's definition of employ "is very broad."[viii] Accordingly, it explained that "internships in the 'for-profit' private sector will most often be viewed as employment."[ix] In fact, in April 2010, Nancy Leppink, the DOL's current Deputy Wage and Hour Administrator, told the *New York Times* that "if you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going

Prevailing Parties in Meal and Rest Break Actions Not Entitled to Recover Attorney's Fees (*Kirby v. Immoos Fire Protection, Inc.*)

By Tritia Murata

In *Kirby v. Immoos Fire Protection, Inc.*[1] — issued on the heels of the long-awaited *Brinker* decision[2] — the California Supreme Court unanimously held that a prevailing party in a meal and rest break action is not entitled to recover attorney's fees.

Procedural background. The plaintiffs — former employees of Immoos Fire Protection, Inc. — sued Immoos, alleging six causes of action for violations of various provisions of the Labor Code[3] (including penalties for missed rest periods under section 226.7) and for statutory unfair competition. After the plaintiffs' motion for class certification was denied, they dismissed their lawsuit with prejudice. Immoos then moved for its attorney's fees under section 218.5, a two-way fee-shifting statute requiring that attorney's fees be awarded to the prevailing party "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." The trial court granted the motion as to the rest period claims and two other causes of action. The Third Appellate District affirmed the award as to the rest period claims only.

The California Supreme Court reversed the fee award on the rest period claims, holding that neither section 1194 nor section 218.5 authorizes an attorney's fee award to a prevailing party in a section 226.7 action.

Section 1194 does not cover meal and rest period claims. Section 1194 is a one-way fee-shifting statute that authorizes an award of attorney's fees to employees who prevail on minimum wage or overtime claims. After evaluating section 1194's plain language and legislative history, and the language of related statutes, the court rejected the plaintiffs' argument that "the required payment for missed meal or rest periods is tantamount to a statutorily prescribed minimum wage," and held that section 1194 does not authorize an award of attorney's fees to employees who prevail on a section 226.7 claim.

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to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."[x]

With that said, the DOL has six criteria in place to assess whether interns should be considered employees for the services they provide to "for-profit," private-sector employers. If all of the following factors are met, then an employment relationship does not exist and the interns are exempt from the FLSA's minimum wage and overtime provisions:[xi]

1. The internship, "even though it includes actual operation of the facilities of the employer, is similar to training" that would be given in an "educational environment;"
2. The internship and training "is for the benefit of the intern;"
3. The "intern does not displace regular employees, but works under close supervision of existing staff;"
4. The "employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;"
5. The intern is "not necessarily entitled to a job at the conclusion of the internship;" and
6. The employer and the intern "understand that the intern is not entitled to wages for the time spent in the internship."

Since the application of these criteria can be confusing at times, the DOL has issued numerous opinion letters that include a general discussion of these factors. While the determination of whether an individual meets the DOL's criteria is based entirely on the specific facts of a particular case, these opinion letters can serve as a helpful guide to "for-profit," private-sector employers. A general summary of each factor is provided below:

- *Factor 1:* The DOL has explained that, in general, the more a training program is "structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience."[xii]
- *Factor 2:* The DOL has also indicated that the more the internship provides the intern "with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training."[xiii]
- *Factor 3:* The DOL has made it clear that interns will be considered employees if they are used as "substitutes for regular workers or to augment [an employer's] existing workforce during specific time periods."[xiv] Further, if the employer would have "hired additional employees or required existing staff to work additional hours had the interns not performed the work," then the interns will be considered employees under the FLSA. On the other hand, if the employer is "providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely viewed as an educational experience. If, however, the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training."[xv]

Section 226.7 claims are not "brought for the nonpayment of wages" within the meaning of section 218.5. Having concluded that section 1194's one-way fee-shifting provision does not cover section 226.7 claims, the court then considered whether section 226.7 claims are "action[s] brought for the nonpayment of wages" within the meaning of section 218.5. The court analyzed the plain language, context, and legislative history of sections 218.5 and 226.7 and determined they are not. Section 226.7 is not aimed at protecting or providing wages, the court reasoned. Rather, when an employee sues for penalties under section 226.7, the basis for the lawsuit is the employer's nonprovision of statutorily required rest breaks or meal breaks, not the employer's nonpayment of wages.

The court harmonized its interpretation of section 218.5 with its decision in *Murphy v. Kenneth Cole Productions, Inc.*,[4] which held that the *remedy* of "one additional hour of pay at the employee's regular rate" for violations of section 226.7 is a wage for purposes of determining the applicable statute of limitations. The court explained that an action "brought for the nonpayment of wages" is more accurately described as "an action brought *on account of* nonpayment of wages" — "[t]he words 'nonpayment of wages' in section 218.5 refer to an alleged legal violation, not a desired remedy." Section 226.7 claims are brought *on account of* the nonprovision of meal or rest breaks.

The court further noted that "the most plausible inference to be drawn from [the legislative history of sections 218.5 and 226.7] is that the Legislature intended section 226.7 claims to be governed by the default American rule that each side must cover its own attorney's fees."

Takeaways. Although *Kirby* resulted in the reversal of an attorney's fee award to an employer defendant, the decision nevertheless has positive implications for employers because it makes clear to plaintiffs bringing meal and rest period actions that even if they prevail, neither section 1194 nor section 218.5 will afford them an avenue for recovering their attorney's fees.

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- *Factor 4:* The DOL has also said that when the internship "is predominately for the benefit of the intern," an employment relationship does not generally exist.[xvi] On the other hand, if the interns are "engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements," since the employer is benefiting from the interns' services.[xvii]
- *Factor 5:* The DOL has further advised that for a true internship relationship to exist, the internship should be for "a fixed duration, established prior to the outset of the internship."[xviii] Additionally, unpaid internships should not "generally be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period."[xix]
- *Factor 6:* The DOL has clarified that the "payment of a stipend to the interns does not create an employment relationship under the FLSA as long as it does not exceed the reasonable approximation of the expenses incurred by the interns involved in the program."[xx]

A more detailed discussion of each of these factors can be found in the various opinion letters issued by the DOL.[XXi]

The Applicability of the DOL's Six Criteria to Non-Profit Employers, and Employers in the Public Sector

While the DOL's six criteria apply to "for-profit," private-sector employers, the DOL has noted that it recognizes a number of exceptions to the FLSA's minimum wage and overtime requirements for certain individuals who volunteer for non-profit organizations and employers in the public sector. These individuals generally include:[xxii]

- Volunteers who perform services for a state or local government agency, and those who volunteer for "humanitarian purposes for private non-profit food banks."
- Individuals who "volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations."
- Unpaid interns in the "public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation."

The DOL is considering whether it will issue additional guidance on unpaid internships in the public and non-profit sectors.

California's Laws Relating to Internships

Employers are often surprised to hear that there is no California statute or regulation pertaining directly to the exemption of interns from minimum wages and overtime pay requirements.

In the past, the California Division of Labor Standards Enforcement ("DLSE") took the position that employers should follow five *additional* factors that went beyond the DOL's six criteria when evaluating whether an individual was properly classified as an intern. The additional factors used by the DLSE in its 11-factor test were as follows:[xxiii]

7. Any internship should be "part of an educational curriculum";
8. The trainees should not "receive employee benefits";
9. The training should be general in nature, "so as to qualify the trainees for work in any similar business, rather than designed specifically for a job with the employer offering the program" (i.e., upon the interns' completion of the program, they "must not be fully trained to work specifically for only the employer offering the program");
10. The screening process for the program "is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission into an independent educational program"; and
11. Advertisements for the program should be clearly couched "in terms of education or training, rather than employment."

According to its April 7, 2010 opinion letter, however, the DLSE has now discontinued its use of these five additional factors.[xxiv] In this letter, the DLSE specifically stated that, since these additional factors are not based on any state statute or regulation, "it is reasonable and appropriate for the DLSE to look to the factors used by the DOL" in making this assessment.[xxv] Therefore, a California employer must now apply the *federal* DOL's six criteria to determine whether an intern is exempt from the *California* minimum wage and overtime laws.

The Importance of Classifying an Intern Properly

In addition to the potential exposure to federal and state labor claims, an employer's misclassification of an individual as an unpaid intern instead of an employee could possibly result in other implications for the employer, concerning discrimination laws, immigration laws, employee benefits, workers' compensation coverage, unemployment benefits, and tax issues. It is, therefore, imperative for California employers to ensure that their internship programs are in compliance with federal and state laws.

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[i] Class Action Complaint, *Glatt and Footman v. Fox Searchlight Pictures, Inc.*, Case No. 11 Civ. 6784 (S.D.N.Y. Sept. 28, 2011).

[ii] Class Action Complaint, *Wang v. Hearst Corp.*, Case No. 12 Civ. 0793 (S.D.N.Y. Feb. 1, 2012).

[iii] Class Action Complaint, *Bickerton v. Charles Rose*, Index No. 650780/2012 (N.Y.S. March 24, 2012).

[iv] 29 U.S.C. § 203(e)(1).

[v] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

[vi] Barbara R. Relerford, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., Op. Letter No. FLSA 2004-5NA (May 17, 2004), at 1 ("*DOL May 17, 2004 Opinion Letter*").

[vii] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Fact Sheet # 71: Internship Programs Under the Fair Labor Standards Act, Apr. 2010, available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf *("Fact Sheet # 71").*

[viii] *Id.*

[ix] *Id.*

[x] Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, at B.1, http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all.

[xi] Fact Sheet # 71, *supra* note 7.

[xii] *Id.*

[xiii] *Id.*

[xiv] *Id.*

[xv] *Id.*

[xvi] Tammy D. McCutchen, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., Op. Letter No. FLSA 2002-8 (Sept. 5, 2002), at 2.

[xvii] Fact Sheet # 71, *supra* note 7.

[xviii] *Id.*

[xix] *Id.*

[xx] Daniel Sweeney, U.S. DEP'T OF LABOR, Op. Letter, 1996 DOLWH LEXIS13 (May 8, 1996).

[xxi] *See, e.g.*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., Op. Letter No. FLSA 2006-12 (Apr. 6, 2006); DEP'T OF LABOR, WAGE & HOUR DIV., Op. Letter No. FLSA 2004-16 (Oct. 19, 2004).

[xxii] *Fact Sheet # 71, supra note 7.*

[xxiii] Miles E. Locker, CAL. DEP'T OF INDUS. RELATIONS, DIV. OF LABOR STANDARDS ENFORCEMENT, "Intern Program Exemption" Op. Letter (Nov. 12, 1998), at 1-2, *available at* http://www.dir.ca.gov/dlse/opinions/1998-11-12.pdf.

[xxiv] David Balter, CAL. DEP'T OF INDUS. RELATIONS, DIV. OF LABOR STANDARDS ENFORCEMENT, Op. Letter No. 2010.04.07 (Apr. 7, 2010), at 4.

[xxv] *Id.*

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[1] *Kirby v. Immoos Fire Protection, Inc.* (Apr. 30, 2012 S185827) __ Cal.4th __ , 2012 WL 1470313

[2] *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (Apr. 12, 2012, S166350), ___ Cal.4th ___, 2012 WL 1216356.

[3] Subsequent unlabeled statutory references are to the Labor Code.

[4] *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.

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