

Are unpaid summer internships still legal?

By Andre Bates

For many California companies, summer brings a fresh crop of young and enthusiastic interns eager to improve their future employment prospects by gaining industry skills and making new professional contacts. By tradition, many of these summer internships are unpaid. Can this practice continue in the current legal environment where California courts have steadily broadened the scope of workers who must be classified as employees and who are therefore entitled to the protections of California's employment laws?

In April of last year, the California Supreme Court issued a landmark decision in the *Dynamex Operations West v. Superior Court*, 3 Cal. 5th 903 (2018), case that starts with the presumption that all workers are employees and that businesses bear the burden of overcoming this presumption by satisfying all three prongs of a new "ABC" test:

(A) Is the worker free from control and direction of the hiring entity in connection with the performance of the work;

(B) Does the worker perform work that is outside the scope of the hiring entity's business; and

(C) Is the worker customarily engaged in an independently established trade, occupation, or business.

The failure to prove any one part of the "ABC" test results in the worker being classified as an employee. By shifting the burden to the business, the Supreme Court effectively created a presumption that workers are employees.

The Supreme Court expressly limited the application of its decision to "one specific context" regarding "what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors for purposes of California wage orders." As limited, the decision may not have direct relevance to the question of unpaid internships but its reasoning may still have an impact. That is because the Supreme Court's reasoning in *Dynamex* was driven, in large part, by the mandate the court found to "broadly"

interpret employment-related statutes and regulations in light of their remedial purpose and therefore favor the classification of workers as employees in order to extend various legal protections to them. That rationale should give businesses pause about the legality of their unpaid internships, particularly since California has never had any legislation or regulation that expressly exempted internships from the application of Industrial Welfare Commission wage orders.

Nevertheless, there are indications that unpaid internships are safe for now. Last year the U.S. Department of Labor issued a new set of guidelines for unpaid internships adopting the "primary beneficiary test" that seeks to provide businesses with more flexibility in the operation of their internship programs. See *DOL, Wage & Hour Div., Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, Jan. 2018. The primary beneficiary test as articulated by the 2nd U.S. Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016), is a non-exhaustive list of seven factors to aid courts in determining whether an intern is an employee for purposes of the federal Fair Labor Standards Act:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation — any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa;

2. The extent to which the internship provides training that would be similar to that which could be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;

5. The extent to which the internship's duration is limited to the period in which the internship provides the



intern with beneficial learning;

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

In applying these factors, courts must consider the totality of the circumstances and balance the tangible and intangible benefits provided to the intern with the intern's contribution to the company's productivity.

It is expected that the California Division of Labor Standards Enforcement and California courts will follow the DOL's lead and adopt the primary beneficiary test. In a 2010 opinion letter, the DLSE stated that it "has historically followed federal interpretations which recognize the special status of trainees and interns who perform some work as part of an educational or vocational program" as being exempt from California's minimum wage laws if there is "a sufficient showing that the intern/trainee is enrolled in a bona fide internship or training program." David Balter, Cal. Dep't Of Indus. Relations, Div. Of Labor Standards Enforcement, Op. Letter No. 2010.04.07 (Apr. 7, 2010), at 4. The opinion letter further stated that "it is reasonable and appropriate for the DLSE to look to the factors used by the DOL in determining the exemption for purposes [...] of state minimum wage coverage for trainees/interns in the absence of a state statute or regulation on the matter." *Id.* at 6.

Following the DOL's new guidelines, there are several steps that businesses can take to ensure that their interns are the "primary beneficiary" of their internship programs. First, businesses could require that their interns be eligible to receive academic credit, or at minimum, ensure that the internship relates to the intern's area of academic study. This academic benefit could be further extended by offering formal training or other classroom like activities. Second, businesses should closely monitor the work performed by their interns to ensure that it stays consistent with the educational purpose of the internship. Finally, businesses must make it clear to their interns that they should not have any expectation of employment after the conclusion of the internship. Ultimately, the goal of the internship must be to provide a benefit first and foremost to the intern rather than the business.

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