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April 7, 2010

Joseph W. Ambash, Esq.
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Re: Educational Internship Program

Dear Mr. Ambash:

This responds to your request for an opinion regarding an internship program administered by your client, Year Up, Inc., which is aimed at developing fundamental job skills and technical skills in information technology for 18-24 year olds primarily in underserved communities. Specifically, you seek an opinion from the Division of Labor Standards Enforcement's (DLSE) as to whether California law requires that the trainee/interns enrolled in the program are to be treated as employees subject to California's wage and hour laws.

As more fully discussed below, our analysis of the internship program structure and interns' specific activities leads us to conclude that such interns enrolled in the internship program are not employees under California law. Consequently, based upon the representations of the program structure and practices in your letter, interns in the described program are exempt from coverage under the State's minimum wage law.

In summary, the internship program is operated by Year Up, Inc., a non-profit 501(c)(3) organization (the "Program"), that serves 18-24 year olds in primarily underserved communities who have not progressed beyond a GED or high school diploma. The objective of the program is to "close the Opportunity Divide by providing urban young adults with the skills, experience, and support that will empower them to reach their potential through professional careers and higher education."

The Program is described as providing an 11-month intensive educational and training curriculum designed with the following goals: providing young adults with technical skills in information technology; developing professional skills for working in an office environment; offering a support network of social workers, instructors, and mentors; and instilling the importance of lifelong learning through career development tools and assistance with applying to college. In the first 5 months enrollees participate in a learning and development phase where they receive college level classroom instruction. Students are dually enrolled with the Program and local community college where students can earn up to 14 college credits in approved courses. The

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Program pays the college the cost of tuition for participants. The second phase of the program is the Internship Phase which is for 6 months with placements made pursuant to agreements with non-profit or for-profit businesses. It is the latter phase of the program on which you seek an opinion from this office.

In addition to the overall internship program structure, you have also provided specific information regarding internship placements with 5 area businesses and site-specific practices at those business sites.

This letter will initially address your request for clarification of the criteria DLSE uses to determine the trainee/intern exemption from the minimum wage law for enforcement purposes. Then, a description of salient aspects of the internship program will be discussed followed by an analysis of the program under the relevant criteria. The analysis portion generally addresses the common features of the 5 placement sites described in your letter and will only identify a specific placement site where appropriate to the analysis.

California Law Regarding Trainees and Interns

There is no state statute or regulation which expressly exempts persons participating in an internship from the minimum wage and overtime requirements. The federal courts have noted, as well, that the federal Fair Labor Standards Act (FLSA) itself provides little guidance in distinguishing between trainees/interns and employees. (*Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1025 (10th Cir. 1993).) Federal courts, however, have long interpreted the definitional provisions under the FLSA as *not* including categories of individuals who perform some work for others, but who are not “employees” and thus not covered under the Act.

The FLSA provides requirements for payment of minimum wages and other protections to “employees.”¹ The FLSA defines “employee” as “any individual employed by an employer” and the term “employ” to include “to suffer or permit to work.” (29 USC §203(e)(1)) The Supreme Court long ago interpreted these definitions to conclude that the language does not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. (*Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *Wirtz v. San Francisco and Oakland Helicopter Airlines, Inc.*, 370 F.2d 328 (9th Cir. 1966) [stating same *Portland Terminal* principle].)

The State minimum wage requirements are set forth in various statutes and in Orders of the Industrial Welfare Commission. (Labor Code §1171 et seq., IWC Orders 1 through 17) California courts long ago recognized that the power of the Legislature and IWC to establish minimum wages of employees contemplates existence of an employment relationship in order for the minimum wage law to apply. (*Hutchison v. Clark* (1944) 67 Cal.App.2d 155, 160-161 [cosmetology students

¹ Among the purposes of the FLSA is to establish a national floor under which wage protection cannot drop. (*Pacific Merchant Shipping v. Aubry*, 918 F.2d 1409, 1421 (9th Cir. 1990), cert den. 112 S.Ct. 2956.) The FLSA expressly allows states to provide higher protections. (29 USC 218(a))

in training are not employees subject to IWC Order 2].) State provisions relating to coverage similarly define “employee” to mean “any person employed by an employer” and the term “employ” as meaning “to engage, suffer, or permit to work.” (See e.g., IWC Order 4-2001, §2, Definitions [8 CCR 11040 §2].) Based upon the similarity of the definitional provisions for “employee” and “employ” which relate to coverage under the respective laws, and in view of the similar purposes for the State and Federal minimum wage law generally, it is reasonable to look to federal interpretations as guidance for purposes of enforcing the State’s minimum wage and overtime provisions where there is no inconsistency. (DLSE OL 2000.05.17 [DLSE applies federal case law and interpretations of the FLSA where such interpretation is not inconsistent with state law]; see also, *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 812-818; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798 [“where the language or intent of the state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced”].)

DLSE 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. Similar to the federal exemption from coverage, the effect of a sufficient showing that the intern/trainee is enrolled in a bona fide internship or training program is that the trainee/intern falls outside the coverage of the State’s minimum wage laws. (See, DLSE OLs 1993.1.7, 1993.09.07, 1996.12.30, 1998.11.12, 1998.11.12-1, 2000.05.17)

The federal Department of Labor (DOL) has articulated six criteria, derived from the Supreme Court’s *Portland Terminal* case, to be applied to determine whether a “trainee” is exempt from FLSA’s minimum wage coverage.² (DOL OL 5/17/04 [criteria derived from *Portland Terminal*].) The six criteria used by DOL are as follows:

- (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;
- (5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

² The listed criteria is also contained in DOL’s Wage & Hour Manual (BNA) 91:416 (1975) and in DOL/WH Field Operations Handbook, Sec. 10b11 (10/20/93).

(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.

DOL has consistently applied this test for trainees to determine the employment status of student interns. (DOL OL 5/17/04, citing DOL OLs 5/8/1996, 7/11/95, 3/13/95, and WH Publication 1297 [Employment Relationship Under the Fair Labor Standards Act].) The above criteria must be applied in view of “all the circumstances” surrounding the intern’s activities. (DOL OL 5/17/04, 5/8/96 [activities on premises of employer business].) The six criteria thus provide for a consistent assessment of the “totality of the circumstances” necessary to determine whether a trainee or intern is an employee or exempt from coverage. (*Reich v. Parker Fire Protection District, supra*, 992 F.2d 1023, 1027.)

In the past, DLSE has articulated an “11-factor test” which consisted of the 6 factors from DOL’s criteria interpreting federal law, plus 5 additional factors which are identified in *Wilcox, California Employment Law*, §104[1](e).³ (See also, DLSE OLs 1998.11.12, 1993.10.21) However, the 5 additional factors do not appear to be based upon any source statute or regulation from which they derive nor are the additional factors identified with specific case law. More recently, DLSE applied a 6-factor test for the trainee/intern exemption under an economic realities test for determining an employment relationship where the 6 factors differed, in part, from the above-stated 6 factors used by DOL.⁴ (DLSE OL 2000.05.17)

The DLSE has consistently applied federal interpretations of statutes, regulations, and case law under the FLSA where there is no inconsistency with State laws. In this regard, the similar definitions for “employee” and “employ” under the FLSA and State law manifest a consistency which warrants similar interpretation. Since DOL’s 6-point formulation is derived from the early U.S. Supreme Court’s opinion in *Portland Terminal* case and has been applied (with varying

³ The additional factors to be met under the historical 11-factor test by DLSE are as follows: (7) Any clinical training is part of an educational curriculum, (8) the trainees or students do not receive employee benefits, (9) the training is general, so as to qualify the trainees or students for work in any similar business, rather than designed specifically for a job with the employer offering the program, i.e. upon completion of the program, the trainees or students 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 to an independent educational program, and (11) advertisements for the program are couched clearly in terms of education or training, rather than employment, although the employer may indicate that qualified graduates will be considered for employment.

⁴ The 6 factor test in the DLSE opinion letter in 2000 stated: (1) whether the student is closely supervised during his or her externship experience, (2) whether records are maintained with respect to on-hands training received, (3) whether the student’s on-hands training activities are directly related to the educational goals, (4) whether the student replaces regular workers, (5) whether or not the student becomes an integral part of the principal activity of the business in which the student extern was placed, and (6) whether the business activity derives any consequential economic benefit from work performed by an individual. (DLSE OL 2000.05.17, citing *Marshall v. Baptist Hospital, Inc.*, 473 F.Supp 465 (D.C.M.D 1979), overruled on other grounds, 668 F.2d 234, and *Souder v. Brennan*, 367 F.Supp 808, 813 (D.D.C. 1973).)

degrees of deference) by the federal appellate courts,⁵ it is reasonable and appropriate for the DLSE to look to the factors used by the DOL in determining the exemption for purposes of coverage of State minimum wage coverage for trainees/interns in the absence of a State statute or regulation on the matter.

It is, therefore, the 6 criteria derived from the *Portland Terminal* case that will be utilized in evaluating the internship program described in your letter. We now turn from our discussion of the applicable law to a description of the Program followed by an analysis under the applicable 6 criteria.

Initial Learning & Development Phase of Program

The organization's overall educational program is funded from a variety of sources. Approximately one half of the funding is from a mix of contributions from individuals, foundation, or corporations, and in-kind donations. The other half of funding is from the internships where corporate partners are asked to financially sponsor the interns they take to train. The corporate partners on average contribute approximately \$875 per week per intern and such payment is critical to the intensive training and guidance students receive during the L&D phase and for the tuition payments made by the program to the local community college.

The organization recruits students to the overall program based upon word of mouth, presentations at high schools, distribution of flyers, radio ads, and other media publicity. Students are selected competitively on the basis of an application for admission, interviews, and learning assessments to evaluate basic computer, writing, and communication skills.

Students who participate in the internship must first complete the first five-month Learning & Development phase of the program which consists of 32 hours of college level instruction per week in classrooms conducted by program-employed instructors. There is no cost to the student for the educational courses and, upon completion, students receive up to 9 college credits through a dual-enrollment agreement with a local community college.

Students receive an educational stipend of \$153/week for the San Francisco Bay Area which serves two purposes. First, it helps students cover living expenses while learning. The stipend allows students the option of learning on a full-time basis which is consistent with overcoming opportunity barriers to individuals from underserved communities who often must divide their time between work and school.

⁵ E.g. *Reich, supra*, 992 F.2d at 1027 [six criteria are relevant but not determinative, affirmed judgment using criteria]; *Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127-1128 (5th Cir. 1983) [substantial deference].

The stipend is also used as a behavior modification tool throughout both phases of the program.⁶ The stipend amount may be lowered for specific types of infractions of a code of conduct which all students agree to follow. Under the point system for infractions, students who are tardy, skip class, dress inappropriately, or behave inappropriately lose points pursuant to a predetermined matrix which results in reductions to the stipend. Students have the opportunity to restore their points over time when they do not receive infractions but the stipend cannot be increased above the original amount. Significantly, reductions in a stipend attributable to infractions have no effect on the sponsorship payment from the corporate partners who pay a fixed amount.

As stated previously, under a dual-enrollment agreement with the local community college, the Program's students earn a total of 9 college credits in courses meeting certain academic standards required by the educational institution. The Program pays course fees to the college under the dual-enrollment agreement. Courses during the L&D phase for which credit is earned include Introduction to Computers, Using PCs, Computer Hardware, Operating System Technology, Business Communications, and Professional Skills.

The Internship Phase of Program

Students successfully completing the first L&D phase of the program advance to the internship component where they are provided work-based experiential training in information technology (IT) as an application and further development of skills from the classroom instruction received during the L&D phase.

The Program has "partner agreements" with local business with the purpose of providing on-the-job training to student interns as a part of their educational experience. The agreements provide for a (sponsorship) fee payable by the internship partner and invoiced by the program.

The partner agreement further describes the relationship with the student as follows: "The intern is a full-time student in the [Program] and in a local institution of higher education. Because the intern is participating in an educational program s/he is not considered an employee of [the Program] or the Internship Partner. The intern receives a weekly educational stipend, paid directly by [the Program]. The Intern shall not be expected to, or entitled to, participate in direct compensation, health or disability insurance, retirement benefits, or other company welfare or pension benefits (if any) to which employees of the Internship Partner may be entitled."

The partner business designates a supervisor, who is an employee, to train the interns and the program surveys the supervisors throughout the internship. Internship hours are limited to 36

⁶ The point system has three main goals which: (1) ensures the students know the rules of the program and understand that rule enforcement is predictable and fair, (2) ensures that all interns are working positively towards a common set of goals, and (3) establishes a tool for learning the expected minimum standards of professional behavior by holding them accountable for their actions and face consequences for their behavior. Students start with 150 points and gain or lose points depending on their compliance with established rules of conduct. For example, if a student violates the dress code on a particular day, s/he will lose 15 points. If a student gets to zero points, s/he is asked to leave the program. A loss of points ties directly to a loss in dollars from the weekly stipend.

hours per week but no more than 40 hours. During the internship phase, interns also spend an additional 2 class hours per week at the non-profit organization at an internship management class for job skill development and support where participants receive up to 3 hours of college credits (tuition is paid by the Program). Examples of internship activities include: Installing, repairing, upgrading PCs and printers, virus investigation and removal, assisting with corporate LAN consolidation and migration efforts, LAN deployments for new hires and internal team transfers, imaging and configuring desktops and laptops, using diagnostic tools to troubleshoot desktop, laptop and peripheral hardware to resolve technical issues, and conducting reports using software programs.

The participating student also signs an internship acceptance form where he or she agrees to the expectations and consequences under the internship program requirements. The student agreement states, in part: "I understand that I will be placed at a corporation for an unpaid Internship as part of my educational experience at [the Program]. This Internship will allow me on-the-job training to supplement the training and course work at [the Program]. During my Internship I will continue to be a full-time student of [the Program] and will not be considered an employee of [the Program] or the corporation. I understand my Internship is a training experience and that I will not be entitled to a position at the corporation where I train."

The intern is required to submit weekly time sheets (signed by site supervisors) and status reports describing the type of work done at the partner businesses. If an intern is asked to work more than a specified number of hours per week, including class hours, they are to contact the Manager of Internships at the program. The written Internship Procedures allows for 3 personal days which may be used with appropriate advance notice and may be taken in half-day increments. Interns can take a personal day six weeks after the start date at their sites.

The interns receive weekly-based educational stipends throughout the internship to assist with living expenses and motivate participants to adopt professional behaviors through the point system, as previously discussed. In the San Francisco Bay Area, the stipend rate is increased from the \$153/week amount during the L&D Phase to \$250/week during the internship phase. The stipend in San Francisco is higher than some other programs in other parts of the country to reflect the higher cost of living in San Francisco.

A student's behavior impacts receiving stipend dollars as it does in the L&D phase. Thus, points may be lost for violating written standards regarding such matters as arriving and leaving on time and notification of lateness, regular attendances and notification of absences, business dress, appropriate use of electronic devices, timely completion of assignments, timely submission of accurate signed time sheets and status reports, attendance at all planned meetings with the program and internship partner, respecting the law and the core values of the program and those of the internship business site. There is no reduction in the sponsorship fee paid by the partner business if a student's stipend is reduced for infractions.

Students receive up to an additional 4 college credits through the local community college for participating in the internship program in computer technical support (3 credits) and internship work experience (1 credit).

Upon successful completion of the internship phase, students receive a Computer Networking and Information Technology (CNIT) Computer Technician certificate which is a marketable credential. The certificate is offered through the local community college which also issues it to its own students who receive similar training arranged through the college. The certificate prepares students to take the Computer Technology Industry Certification (CompTIA) test for A+ industry certification as a next career step.

Application of Enforcement Criteria to the Educational Internship Program

- 1 (1) The training, even though it includes actual operation of the employer's facilities, is similar to that which is given in a vocational school.*

The overall program describes the participants as "students" who are dually enrolled in the job skills development program and the local community college. The program further describes the study program as providing specific training in computer technology training that is beyond the end-use of computers. The internship phase of the program appears to be a continuation of the learning and development phase with both phases developing individual discipline, basic job skills, and applied knowledge in computer technology. The training is tied to earning college level credits through an academic program with a community college during both core phases of the program.

This criterion contemplates that the training will, to some degree, include operation of the employer's facilities which recognizes that "hands on" experiential training requires use of the employer's facilities. Thus, an intern's use of the employer's computers, network systems, and tools to perform tasks is permissible provided that such use of facilities is directly related to training and the educational and vocational objectives of the program.

There appears to be a sufficient level of technical training in computer hardware and software applications in the internship phase of the program which applies previous and on-going classroom instruction with focus on real world applications and working environments. Training includes both "hard skills" of IT systems support and "soft skills" of professional behavior and etiquette which are more specifically described in your letter and vary amongst placement sites. The training appears to provide educational experiences not typically available in the classroom and similar to a vocational school.⁷

The fact that the internship is not directly administered by a vocational or educational institution is not determinative because the criterion addresses the "similarity" of the training with that given in a vocational school. In this case, the descriptions of the class instruction, the described activities at the placement sites, and certification for completion of the program are sufficiently similar to that provided in vocational programs.

⁷ DLSE does not approve programs under vocational or academic standards for purposes of this analysis. The inquiry is limited to determining the nature of the training/internship program for purposes of determining whether California's wage and hour laws apply to these interns.

Based upon the information provided, the internship program satisfies this criterion.

(2) The training is for the benefit of the trainees or students.

DOL has recognized that an internship inures to the benefit of the students who receive college credit for performing the internship even though it is not a required program. (DOL OL 5/17/04). DOL has also found that a training program “primarily” benefits the students where they observe the practical application of the classroom instruction in the workplace. (DOL OL 4/6/06 [externship program in various careers].) However, the student must derive more than “some” benefit from exposure to the workings at the placement site so as to enhance their marketability in the vocational area. (See DLSE OL 1998.11.12) [journalism interns performing activities beyond that which would be included in a journalism program].) Conversely, where there is a “predominant” benefit to the student, there is generally no employment relationship. (DOL OLs 3/13/95 [insufficient information for determination of college interns], 7/7/77 [pharmacy student clinical externship not employees].)

The educational program serves young adults who have not progressed beyond a high school diploma or GED certificate. Its core objectives are development of basic job skills and workplace discipline, and technical training in computer technology. To that end, the internships at the 5 placement businesses provide each intern with up to 36 hours of training per week and the program provides two hours per week of a class (Internship Management) for which interns receive both college credits and a marketable computer technician certificate upon successful completion.

During the internship, the Program continues to provide college and career readiness resources such as advisors, business mentors, guest speakers, social workers, career counselors, and assistance with financial aid applications. Some of these services are through partnerships with other social services organizations as well as a full-time on-site social worker to assist students with issues that arise during their internship.

The internship phase of the program provides for both observation and application of classroom instruction for the young adult interns to succeed in a computer vocation. The internship training activities and additional other services provided by the Program during the internship appear to be directly tied to the core components of the educational objectives which predominantly benefit the interns.

(3) The trainees or students do not displace regular employees, but work under their close observation.

DLSE has, at times, previously interpreted the non-displacement criterion strictly to mean that *any* work performed by an employee that could be performed by a regular worker would not satisfy this factor.⁸ Thus, whenever an intern would perform any described tasks that could be

⁸ One previous DLSE letter set forth a “but for” test such that “but for” the utilization of interns, the employer would have to hire additional employees or pay existing employees for tasks performed by the interns. (DLSE OL 1998.11.12 [factor not met for journalism interns performing clerical, research and accounting tasks].)

performed by other workers, e.g. minor clerical, incidental administrative work, etc., the test would not be met and the trainee exemption could not apply. An overly strict interpretation of the factor which fails to recognize both the dynamic real world environments interns are placed and the objectives of the internship program could easily operate to render nearly all bona fide training and internship programs invalid under applicable wage and hour laws. However, if the educational goals or objectives of an internship program include exposure to real world working environments (to a similar extent as the recognition that a trainee's activities may result in the operation of an employer's facilities under the first criterion), occasional or incidental other work by the intern should not defeat the exemption so long as such work does not unreasonably replace or impede the educational objectives for the intern and effectively displace regular workers.

A more recent DLSE letter stated that the non-displacement factor requires that the tasks performed must be "directly pertinent to his or her education only" and the activities performed should not be "an integral part of the [business'] activities from which the [business] derives a substantial economic benefit. (DLSE OL 2000.05.17 [applying variation of criteria to determine employment relationship of culinary externs].) Our office views this formulation as providing an analytical approach to the non-displacement language under this criterion and not necessarily separate criteria with independent significance. Consistent with the overall determination to be made under the totality of the circumstances, no bright line exists and the impact to which minor or incidental work will have upon the trainee or internship will, of course, depend on the facts.⁹

The non-displacement language is joined with "close supervision" language under this criterion which, taken together, underscores that the actual role of the trainee must be one which necessarily requires close supervision rather than performing substantial independent work which can be performed by regular workers. If a trainee or intern is loosely supervised, there is more likely an employment relationship (DLSE OL 1998.11.12) On the other hand, substantial supervision may offset any advantage perceived to be received by the employer (DOL OLs 3/13/95, 1/28/88.) and may demonstrate the role of the intern or trainee as the true recipient of the benefits of experiential training consistent with the Program's educational requirements and objectives.

The agreement between the Program and its internship partners who provide on-site placements at the latter's businesses states that interns will not displace regular workers. Your letter also indicates that each of the business placement sites has confirmed that regular workers have not been displaced as a result of the placement of interns. Regarding non-displacement, however, a showing requires more than such representation that no regular employee was replaced by a trainee. Rather, the nature of the activities to be performed by the intern must be examined to determine whether the training activities bear a direct relationship with the educational or vocational objectives and do not unreasonably intrude into activities which could be performed by regular workers who would be subject to compensation for such work.

⁹ The impact of other minor tasks or incidental work is also relevant to the fourth criterion as discussed *infra*.

In addition to the Program's partnership agreements which represent that there will be no displacement of workers as a result of the intern's activities and the more recent representation by the businesses confirming those facts, your letter acknowledges that "interns perform services that may be parallel to the service provided by Company ... employees working in the type of position for which the intern is training."

You state that the interns "are not viewed as employee substitutes and are monitored, evaluated, reviewed, and considered as the students they truly are." This statement is supported by the supervision structure at the program sites where both supervisors directly train one-on-one (ranging up to 10-15 hours per week per intern), serve as a resource for the intern at other times answering questions, monitor intern's activities, and provide weekly evaluation and feedback on the interns customer service and business professional skills. In addition to observation by supervisors, indirect training and mentoring every day is provided by regular employees in the activity area in which the intern is training.

Except for Company C, the other four business placements generally provide one assigned supervisor for each intern and also utilize other employees who are shadowed by the intern or otherwise assigned to train or mentor in activities performed by the intern. Supervisors are required to attend an orientation session where the Program communicates the requirements for the educational training and the Program regularly surveys supervisors and visits business partner sites to ensure students are participating in meaningful internships.¹⁰

Regarding interns placed at Company C who appear to have a larger supervisor to intern ratio, the supervisor generally spends the same number of hours with each intern and other employees are delegated to interns to provide mentoring and training as at other placement businesses in the Program.

Rather than displacing regular workers, the interns at all placements appear to require and rely upon their supervisors directly and other regular workers indirectly to acquire and learn the skills necessary for the described activities. Additionally, the extensive level of observation of the interns by the businesses' employees at the various placement sites demonstrates that the interns are performing in accordance with the educational objectives and shows that an assigned supervisor (employee) is required to and actually performs sufficient supervision of the interns work.

The six month duration of an internship is not unlike a semester-long internship through a regular educational institution. Since the business sites have their full complement of workers prior to and after interns are placed, the modest time period interns are placed at the sites for technical training (most likely in their first real-world experience) makes their contribution to the business' service somewhat limited and appropriately monitored by the business.

¹⁰ Also, the local community college which grants college credits for the Program's interns has representatives make on-site visits to confirm that the students are performing the types of technical activities required for receiving college credit. These visits are similar to those which the college makes to verify training activities for its own non-Program students earning credits at other companies.

Based upon all of the above facts, and in view of the extensive supervision of interns by assigned on-site employees and monitoring of the interns activities site by the Program and local college, there is no displacement of regular workers at placement sites where students perform internship activities.

(4) *The employer that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, the employer's operations may even be impeded.*

With regard to this criterion, DOL has indicated that where the "predominant benefit" is to the student, no employment relationship will exist. (DOL OLs 7/7/77, 3/13/95) On the other hand, where trainee/interns are placed in a business and the activities performed are directly performing the main work of the business, such interns are stepping in the place of a worker and the employer may likely gain an immediate (economic) advantage as a result. (E.g., DOL OL 3/24/94 [interns assisted in daily operations and general duties in youth hostel; *McLaughlin v. Ensley*, 877 F.2d 1207, 1208 (4th Cir. 1989) [where trainees are required to work alongside regular employees and perform all job duties without any learning opportunity, the employer is essentially using trainees to get work done that they otherwise would have to pay an employee to do].)¹¹ However, isolated instances of performing activities not directly related to training (and ordinarily compensable) may be *de minimis*. (*Atkins v. General Motors Corporation*, 701 F.2d 1124, 1129 (5th Cir. 1983) [isolated instances of activities such as general cleaning and uncrating machinery were *de minimis*].)

The key language in this criterion is whether the advantage or benefit the employer receives is *immediate*. Where the training activities involved increased responsibility near the end of the training but trainees are still supervised throughout the period and do not assume the duties of regular workers, there is no immediate benefit to the employer. (*Reich v. Parker Fire Protection District, supra*, 992 F.2d 1023, 1028; see also, DOL OLs 1/28/88, 3/13/95 [substantial supervision may offset any advantage perceived to be received by employer] DLSE OL 1998.11.12. [if interns are loosely supervised, an employment relationship may be found].)

Additionally, the educational validity of the training program may be relevant to the calculus of relative benefits under this factor (*Reich, supra*, 992 F.2d at 476) which serves as a reminder that the context of the inquiry depends upon all the circumstances surrounding the interns' activities including consideration of the educational and vocational objectives of a program.

¹¹ Both DLSE and federal cases have previously noted that the exemption will not be found where the intern's activities become an *integral* part of the business' activities and the business derives any consequential economic benefit from the intern's activities. (DLSE OL 2000.05.17, citing *Marshall v. Baptist Hospital, Inc.*, 473 F.Supp 465 (D.C.M.D. 1979) [x-ray technician trainees performed all duties of regular employees and minimally supervised] and *Souder v. Brennen*, 367 F.Supp 808, 813 (D.D.C. 1973) [patient workers in mental hospitals performed work for which they were in no way handicapped and institution derived some consequential economic benefit which indicate an employment relationship under economic reality test].)

Here, the educational validity of the training provided to the Program's interns establishes that interns predominantly benefit from the training at all business sites since the internship follows an intensive classroom phase and provides an opportunity for further learning in the application of previous and continuing instruction for which college credit is earned by the student.

The Program has listed the types of activities performed by interns at the five placement sites with examples of hardware and software installation/configuration, repair and preventative maintenance of PCs and related systems, trouble shooting, virus detection and removal, etc. The Program acknowledges that the various businesses may receive incidental benefits from the tasks interns perform while practicing their skills (especially towards the end of the internship period) and may indirectly benefit from goodwill generated through corporate social responsibility. It maintains, however, that any advantage is outweighed by the burden the businesses assume as a corporate partner in the Program and that any benefit or advantage is not immediate.

The performance of the described tasks performed by interns at the placement sites has some benefit to the placement business. This is natural and expected insofar as some work is being done to maintain the business' information technology based systems. The described activities, however, are consistent with the course curriculum provided in the previous L&D phase and the Program's overall educational objectives and certification which are transferable within the industry. It appears that an individual would only be qualified to perform productively as an employee at the business sites only upon completion of the internship, after which an intern is issued a computer technician certificate.

Moreover, the described supervision of the on-site activities performed by interns and the ongoing training and mentoring by other regular employees, as discussed previously, demonstrates *substantial supervision* of the intern's activities. Additional monitoring and visits by the Program and local college to verify the educational training components at the placement contributes to the educational integrity of the internship program. Such direct supervision of interns and monitoring of the internship ensures that interns are neither treated nor have the same duties as regular employees, but simply are regarded as students provided with an opportunity to learn skills in information technology and professional behaviors which are targeted skills under the Program. The substantial structured supervision and informal observation of interns by other workers thus offsets any perceived advantage the businesses receive in the activities performed by the Program's interns. (DOL OLS 1/28/88, 3/13/95 [substantial supervision may offset any advantage perceived to be received by employer].)

Due to the interns' inexperience, any perceived benefit the businesses receive in performance of tasks is not likely realized until the latter period of the internship. Yet, the supervision continues throughout the internship period. (See *Reich, supra*, [no immediate benefit if trainees supervised and do not assume duties of regular employees].) Further, any such limited benefit is counter-balanced by impediments to the employer's operations in both time and economic costs in teaching the intern the activities, reviewing any work performed as well as immediate economic costs to the business in participating in the program. Specifically, the Program asserts that all internship partners incur substantial supervision costs which involves time

taken away from and impeding their regular duties. Other employees are also impeded in their role in training and mentoring which lowers productivity of the affected employees.¹² Each supervisor also incurs additional commitments such as attending the Program's orientation sessions for their training, biweekly calls from the Program's internship team, completion of written surveys twice per internship cohort for each intern and hosts 1-2 on-site visits from the Program.¹³ Additionally, each partner business contributes over \$22,000 to sponsor each intern for the duration of the 6 month internship period.¹⁴

Based upon the above, the partner businesses derive no immediate advantage from the activities of interns and sponsorship of interns is a clear burden and impediment to the operation of the partner businesses.

(5) The trainees are not necessarily entitled to a job at the conclusion of the training period.

The inquiry under this factor is aimed toward the time period of the training and up to its completion. Federal interpretations of this factor, including the seminal case of *Portland Terminal Co.* (FLSA not intended to penalize employers for instruction that will greatly benefit trainees), clearly recognize that employers may offer training programs for reasons which include training of novices and assessing potential employees. (See, *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982); *Reich v. Parker Fire Protection District*, *supra*, 992 F.2d at 1028, fn. 1.)

The Program here requires participants to sign an acceptance form for both the L&D and internship phases of the program. The L&D phase acceptance form expressly states that an internship is not guaranteed and the internship phase acceptance form states that interns are not necessarily entitled to a position at the corporation where the intern is trained. Additionally, the partnership agreement between the Program and partner businesses states that "interns are not necessarily entitled to a job ... at the conclusion of the training period." These pre-program forms

¹² In addressing a university externship program where a student "shadows an employee" and is designed to expose students to various careers, DOL stated: "...the sponsor's need to assign a shadowed employee means the sponsor does not receive any tangible benefit and may in fact lose productive work from the employee assigned the student." (DOL OL 4/6/06)

¹³ The partner businesses estimate that their employees spend the following totals for supervisor hours due to participating in the internship program: Company A - 1,249 hours for 14 supervisors (15 interns), Company B - 350 hours for 7 supervisors (8 interns), Company C - 200 hours for 1 supervisor (5 interns), Company D - 1,320 hours for 4 supervisors (4 interns), Company E - 96 hours for 1 supervisor (1 intern). Additional hours spent by other employees of the businesses who spend time on an ongoing basis training and mentoring the Program's interns are not tracked by the Program.

¹⁴ The sponsorship contribution is used to pay both the direct costs of the L&D phase and fees owed to the community college for college credits under the Program's dual-enrollment agreement.

executed by the student participants and the partner businesses make it sufficiently clear that trainees are not entitled to positions at the conclusion of the internship training phase.¹⁵

The Program provides some evidence that some interns are subsequently hired by the business partners following their internship. This fact, however, does not defeat satisfaction of this factor which is focused on the time up to completion of the training period. The Program has taken the above-described steps to make it clear to interns at the outset their non-employment status both during and upon the completion of the internship period. Additionally, there is no evidence that the application and criteria for acceptance to the Program itself is in any way intended or perceived as a mechanism for application and screening by the business partners who have offered employment to interns subsequent to completion of the Program.

(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.

Generally, students who perform work in the course of their studies, as part of the curriculum, are not employees if they receive no *remuneration* or credit toward fees. (DLSE Manual, §43.6.8, citing DLSE OLS 1993.10.21, 1993.01.07-1) This factor seeks to determine any expectation of the trainee to receive payment of wages (or other benefits constituting compensation) for performing training activities.¹⁶

The Program's materials describe and the student internship acceptance form states that "I understand that I will be placed at a corporation for an unpaid internship as part of the educational experience at [the Program]." Additionally, each business partner signs an agreement that states that "the trainees are not entitled to wages for time spent in training" and that the company "shall have no obligation to pay any amounts to the Program or others as a result of the Program except [the specified sponsorship fees]." The Program further represents that none of the Program's interns have ever received any wage, commission, salary, or bonus for the time spent during the internship

¹⁵ On the other hand, the Program utilizes some verbage in its program materials (radio ad and Internship Management Class) which essentially describes the training as an "apprenticeship." However, this word does not appear to be used as a term of art which could raise some ambiguity over the student's status during the training period. In any event, the other program materials and forms executed by students and corporate businesses refer to "internship" and the overall structure of the program is clearly that of an education-based internship such that the solicitations are effectively for training and not for employment.

¹⁶ Agreements or other statements by trainees that they will not be paid for their activities do not constitute a waiver of protections under the FLSA but are relevant only insofar as it shows the expectations of trainees for purposes of this factor. (*Donovan v. American Airlines, Inc.*, *supra*, 686 F.2d at 269, fn 3; *Reich v. Parker Fire Protection District*, *supra*, 992 F.2d at 1029, fn. 2). Under State law, the minimum wage law is similarly protected against waiver. (Labor Code § 1194(a).) The inquiry in the above discussion seeks only to determine the exemption from coverage of the minimum wage laws for trainees/interns who are not regarded as employees.

While the above language is clear with respect to payment of wages, the intern does receive an “educational stipend” during their internship which must be examined. Such examination is appropriate to address the source of the stipend and variations in amounts for interns based upon the described point system. The educational stipend is described as serving two purposes: 1) to help students cover living expenses while learning and 2) as a behavior modification tool where points are either lost for violations of an established code of conduct or restored over time when students do not have infractions.

DOL has noted in opinion letters 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. (DOL OLs 5/8/96, 7/17/95.) The stipend is paid to students during both phases of the Program and the amount during the internship phase is \$250 per week¹⁷ and is intended to allow students from underserved communities to learn on a full-time basis. The educational stipend is established, administered and paid directly by the Program to the students, i.e., no amounts are paid to the interns by the corporate employers.

The amount of the stipend can only be lowered by application of the Program’s point system which students are subject to throughout both phases. A critical objective of the point system is to develop general job skill behaviors to maximize success in job and career endeavors and to discourage behaviors such as tardiness, skipping class or training, dressing inappropriately, or behaving inappropriately in violation of an established code of conduct of which all students are made aware. Significantly, the Program states that while stipend amounts may be lowered for infractions (and may be restored over time for no infractions), the stipend amount never exceeds the established amount (\$250/week). This effectively ensures that the stipend amount paid to interns during the internship does not exceed the amount previously established for helping towards reasonable expenses incurred by interns. Further, it appears that the Program’s own requirements and standards determine the infractions, point values for the types of infractions, and actual reductions which are directly related to the educational objectives of the Program.¹⁸ Thus, the corporate partner does not have significant control over administering the point system, nor, in ultimately determining reductions from the educational stipend amount.

Notably, any decrease in the stipend a student receives does not reduce the amount of the fee the partner businesses pay to the Program for sponsorship. The sponsorship fee amounts paid by the corporate partners also do not appear to be directly tied to the educational stipend other than

¹⁷ During the L&D phase, the educational stipend is \$153/week. The program explains the increase for the internship phase as necessary to cover increased travel expense and professional dress-related costs while on internships. The stipend amount is higher in San Francisco than at other Program sites across the country to reflect the higher cost of living in the area.

¹⁸ The point system appears to create a behavior modification tool aimed solely at developing important general work place behaviors which are not necessarily tied to the interns actual training activities but promote behaviors enabling students to be disciplined and successful in maintaining a job. On this basis, the ability of the Program to lower the educational stipend for an intern should not be considered a form of *remuneration* for training activities.

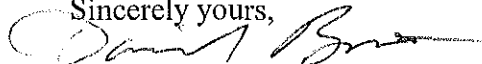
to provide a significant source of funding for the Program in general. The sponsorship fee amounts to approximately \$22,000 per intern while the entire stipend students receive over the 11-month period is approximately \$9,500.

Since the educational stipend amount here is a modest contribution towards living and other expenses incurred by interns (and is received during both phases of the Program), it neither constitutes direct nor indirect payment in the form of wages or other remuneration *for the activities performed by interns* at the corporate partner site.

Based upon the above analysis and in view of the totality of the circumstances described in your letter, DLSE concludes that the Program's internship satisfies the 6 criteria.¹⁹ Thus, the interns would appear to be exempt from California's minimum wage law. Of course, the facts of any new intern placement which vary from your letter must continue to be reviewed on a case by case basis.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Division of Labor Standards Enforcement.

I hope the above sufficiently responds to your request for an opinion in this potentially confusing area of employment law and thank you for your interest in ensuring compliance with California's wage and hour laws.

Sincerely yours,

David Balter
Acting Chief Counsel

cc: Angela Bradstreet, Labor Commissioner

¹⁹ The above analysis does not include a discussion of the additional 5 criteria previously used by DLSE under the discontinued historical 11-factor test (see, Footnote 3, *supra*). However, the ultimate conclusion would be the same had the discontinued additional factors been taken into account. The training is part of an educational curriculum since the students are dually enrolled in a local college during the internship period and receive college credits upon completion (Factor 7); the students do not receive any employee benefits during the internship (Factor 8); the training is sufficiently general and, upon completion, students receive a computer technician certification for use in the industry rather than providing training designed specifically for a job with the corporate partners (Factor 9); the screening process for enrollment in the Program is not the same as for employment in that the Program selects students on the basis of an application for enrollment from a population of underserved young adults, interviews, and a learning assessment for evaluation of basic computer, writing, and communication skills (Factor 10); and advertisements are clearly couched in terms of education or training, rather than employment (Factor 11; see also, footnote 15, *supra*)