

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

45 Fremont Street, Suite 3220
San Francisco, CA 94105
(415) 975-2060

MILES E. LOCKER, *Chief Counsel*

November 12, 1998

Mr. Steven Mikulan
1834 San Jacinto Street
Los Angeles, CA 90026

Re: Intern Program Exemption

Dear Mr. Mikulan:

This is in response to your letter asking for an opinion concerning the use of unpaid "interns" at a weekly newspaper in the Los Angeles area. Your letter states that the newspaper uses "a large [number] of interns to fact-check articles, assist writers by conducting research, and in some instances, to do office chores such as file work and clipping archival materials." Your letter further states that the interns have been acting as unpaid editorial assistants, and occasionally earn wages by temporarily taking over some duties of vacationing editors or by performing work for the newspaper's accounting department.

Your letter goes on to state that the interns are not participating, to your knowledge, in any internship program developed with a high school or college, and that most of the interns are not attending college while participating as interns at the newspaper.

The test used by DLSE to determine whether individuals are exempt from minimum wage and overtime compensation requirements as "trainees" is published at §1.04[1][e] of Wilcox, *California Employment Law*. Under the 11 prong test, a person not on the employer's payroll, but enrolled in a training program by the employer will not be considered an employee only if all of the eleven following criteria are 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 trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.

Opinion/Intern Program Exemption: LA Weekly
Interns

4. The employer derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
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.
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. In other words, on 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.
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.

It would appear on the facts as stated in your letter that the interns are indeed employees whose hours worked are subject to compensation. The very first prong of the test appears not to be met where the interns perform work which falls outside the scope of that which would be included in a course on journalism. Since the duties range from research to filing to accounting, it would appear that the interns are not participating in a program similar to that which would be given in a vocational school. While research and editing might be included in a journalism program, when combined with filing and/or accounting, it becomes apparent that the interns are not participating in the type of training which would qualify the participants to pursue careers in journalism.

Similarly, it appears that the tasks assigned to the interns are more for the benefit of the employer than the employee. Since

the employer does not have to hire employees, even part time, to perform the clerical, research and accounting functions being performed by the interns, it derives an immediate benefit. While the "interns" may derive some benefit from their exposure to the workings of a newspaper, the clerical duties in no way enhance their marketability as journalists. It is unclear from your letter how closely the interns are supervised, and whether the amount of supervision actually impedes the timely performance of duties to which the interns are assigned. If, for example, research assignments are loosely supervised, without frequent monitoring and direction, the individuals performing such research are employees.

The requirement that trainees not displace regular employees does not require that other employees be terminated or laid off to make room for the unpaid interns. Rather, the analysis merely requires a showing that *but for* the utilization of the interns, the employer would have had to hire additionally employees or paid existing employees for the hours spent in performing the tasks done by the interns. On the facts stated in your letter, it appears that additional paid hours would have been required to conduct research and check facts for articles, as well as the clerical duties.

Your letter does not state whether the interns are entitled to jobs at the end of the training. If jobs were promised after completion of the training, the individual must be compensated for the training period.

It appears from your letter that the interns have voluntarily entered into an agreement with the newspaper that they receive no compensation while in such status. Most of the court cases dealing with this issue have held that the longer the duration of the training period, the more likely it would be that an employment relationship has been formed, especially if the long period of training is for an indefinite period. The rationale is that the longer the length of the relationship, the more likely the expectation of compensation in exchange for both the work performed and the forbearance of earnings elsewhere.

If, as you state in your letter, the employees are not enrolled in any high school or college journalism program with direct ties to the newspaper, the relationship between the newspaper and the interns can only be characterized as one between employer and employee. Historically, DLSE has required that the training be an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession.

Based on the limited facts set forth in your letter, it would

appear that whatever *journalistic* training occurs is of a general nature so as not to render the participants eligible for employment with that particular newspaper. While the ninth prong of the test appears to have been met, the program must satisfy all eleven prongs for the employer to evade liability for compensating the participants. The program you describe fails to satisfy several crucial elements, any of which would disqualify treatment of the participants as unpaid trainees or students. No information was provided in your letter upon which an opinion could be rendered with respect to screening of applicants or advertisements for participation in the program.

Your letter also asks whether the paid employees of the newspaper, who belong to a union, can argue that the "interns" are taking work hours away from the union members. Whether such employees have either contractual or statutory rights to a particular work classification and hours performed thereunder is not within the jurisdiction of this agency; likewise your question as to whether the union could compel union membership of the interns is best directed to the agencies charged with enforcing laws relating to union membership. I would suggest that you direct those question either to a competent labor relations attorney or the regional office of the National Labor Relations Board.

If you have any further questions relating to the requirements of California wage and hour laws , please do not hesitate to contact me.

Very truly yours,



Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen