

Talent Acquisition Excellence

ESSENTIALS

» 07.2017

Vol.5 Issue 07

PRESENTED BY

HR.com
Making HR Professionals Smarter



TOP SUMMER LEGAL PITFALLS FOR EMPLOYERS

Hiring interns in California

Amir M. Kahana

FEATURED RESEARCH

**BACKGROUND
SCREENING**

PAGE 09-22

Talent Acquisition Excellence

ESSENTIALS

» 07.2017

Vol.5 Issue 07

PRESENTED BY



Index

ON THE COVER



Top Summer Legal Pitfalls For Employers

Hiring interns in California

Interns can provide an affordable source of high-skilled labor and potential recruiting pipeline, among many other benefits.

PG 05

Features

24

I Am Not Your Bystander
A take on institutionalized racism and poverty

27

3 Tips To Enhance Talent Acquisition And Retention With AI
AI as an HR tool is a solution, not a threat

32

Generation Why
The attitudinal shift uniting today's workforce

36

The Candidate Era Has Begun
How to stay ahead?

ARTICLES

08 Top 3 Insights On Recruiting And Hiring Remote Workers

Building a strong remote work program

Carol Cochran

25 Why Diversity Training Must Be Partnered With Inclusion Strategies

Harnessing the benefits of diversity and inclusion

Sujata N. Chaudhry and Brittany Lawton

29 Why Is Blockchain A Great Career Option For IT Professionals?

The next big thing for job seekers

Mike Russo

34 7 Interview Questions To Hire Top Talent

Avoiding toxic employees

Dianna Booher

37 Managing Staffing Turnover And Growth

What you need to know

Jason Leverant

FEATURED RESEARCH



BACKGROUND SCREENING

PAGE 09-22

Top Summer Legal Pitfalls For Employers

Hiring interns in California

By Amir M. Kahana



Many employers can benefit from hiring interns in California. Interns can provide an affordable source of high-skilled labor and potential recruiting pipeline, among many other benefits. However, employers need to take great care not to violate the relevant state and federal laws pertaining to hiring interns. Below we discuss two of the most common questions, which is whether they are employees, and must they be paid.

As explained below, interns are generally considered employees, and employers seeking to hire unpaid interns must comply with a strict six-factor test or face liability.

In most Cases, Interns are Employees, not Independent Contractors

Whether an intern is an employee or an independent contractor depends on the same multi-factor test that applies to all employees.

As the [California Labor Commissioner's Office explains](#), there "is



no set definition of the term ‘independent contractor’ and as such, one must look to the interpretations of the courts and enforcement agencies to decide if in a particular situation a worker is an employee or independent contractor.”

However, in “handling a matter where employment status is an issue, that is, employee or independent contractor, DLSE [Department of Labor Standards Enforcement] starts with the presumption that the worker is an employee.” *Id.* (citing Labor Code Section 3357.) This is “a rebuttable presumption however, and the actual determination of whether a worker is an employee or independent contractor depends upon a number of factors, all of which must be considered, and none of which is controlling by itself.” *Id.*

California Courts apply the “multi-factor” or the “economic realities” test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341. As the DLSE explains, “in applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed.”

The additional factors include (https://www.dir.ca.gov/dlse/faq_independentcontractor.htm):

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal.
2. Whether or not the work is a part of the regular business of the principal or alleged employer.
3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work.
4. The alleged employee’s investment in the equipment or materials required by his or her task or his or her employment of helpers.
5. Whether the service rendered requires a special skill.
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
7. The alleged employee’s opportunity for profit or loss depending on his or her managerial skill.
8. The length of time for which the services are to be performed.
9. The degree of permanence of the working relationship.
10. The method of payment, whether by time or by the job.
11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

As the DSLE explains, “Even where there is an absence of control over work details, an employer-employee relationship will be found if (1) the principal retains pervasive control over the operation as a whole, (2) the worker’s duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary.” *Id.* (citing *Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288).

Reviewing these factors, it is highly unlikely that a California court would consider an intern an independent contractor. As a result, employers must comply with all legal requirements for employees when hiring an intern, including paying payroll taxes and providing meal and rest breaks.

Unpaid Internships must Comply with Six-factor Test

The 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.” DSLE April 7, 2010 Opinion Letter Regarding Educational Internship Program.

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. (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.
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.

“

In “handling a matter where employment status is an issue, that is, employee or independent contractor, DLSE [Department of Labor Standards Enforcement] starts with the presumption that the worker is an employee.” *Id.* (citing Labor Code Section 3357.)”

If an internship complies with all six factors above, then the intern is exempt from the relevant minimum wage laws, and the internship can be an unpaid internship. If it does not, an employer could be subject to liability, including waiting time penalties and attorneys’ fees, for failing to pay interns. The application of the test is case-specific, and requires a careful application of the above criteria to each individual intern program. **CWTE**



Amir M. Kahana is Managing Partner of Kahana & Feld LLP. Amir, an AV Preeminent Rated business litigator and proven trial attorney, focuses his practice on labor and employment defense, general business litigation, and shareholder and partnership disputes. Amir has a long track record of success, including obtaining one of the largest jury verdicts in Orange County history and effectively defending hundreds of cases for business clients.

Connect [Amir M. Kahana](mailto:Amir.M.Kahana)
Visit <http://kahanafeld.com/>

Would you like to comment?

