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California Labor Dept. Revises Guidelines on When Interns Must Be Paid

By STEVEN GREENHOUSE

California's labor department has issued updated guidelines on whether internships should be paid or unpaid, with the new rules giving employers slightly more latitude not to pay them.

In an advisory letter to a program that teaches information technology, the department's top lawyer reinterpreted the criteria on compensation for internships, and, in a nod to employers, said interns need not always be paid when they do some of the same work as regular employees.

Many wage and hour regulators maintain that interns must be paid if their work is of "immediate advantage" to the employer, but the California agency's top lawyer advised that such an advantage can be offset — and the intern not be paid — if the employer provides close supervision and lays out money for training.

Over all, the guidance from the California Division of Labor Standards Enforcement was emphatic that for internships to be unpaid, they must be educational and predominantly for the benefit of the intern, not the employer.

As the number of internships has risen sharply, many interns have complained of being placed in unpaid positions doing largely unskilled work.

In recent weeks, the federal Labor Department has vowed to step up enforcement against employers that illegally fail to pay interns. Nancy J. Leppink, the acting director of the department's wage and hour division, said, "There aren't going to be many circumstances" where for-profit companies can have unpaid internships and "still be in compliance with the law."

The California agency's guidance letter involved Year Up, a program based in San Francisco that aims to develop basic job skills in information technology for 18-to-24-year-olds in poorer communities, many of them with a high school diploma or G.E.D.

After five months of courses, participants are placed in six-month internships, where supervisors oversee them closely — often working with social workers — to teach them skills like installing computers and removing viruses. The interns get college credit. The companies contribute about $875 a week per intern, much of it to Year Up.

In his guidance letter, David Balter, acting chief counsel for the Division of Labor Standards Enforcement in California, said these internships seemed highly educational and mainly to benefit the interns. Thus, he said, the interns did not have to be considered employees under California law. If considered employees, interns must be paid at least the minimum wage.

“We saw this as a good example of what an allowable unpaid internship should be,” Mr. Balter said Friday.

The federal government has established six criteria — embraced by California and many other states — to determine when internships can be unpaid. The criteria include that the internship should resemble training given in a vocational school or academic institution, that the intern does not displace a regular paid worker and that the employer “derives no immediate advantage” from the intern’s activities.

Ms. Leppink says all six criteria must be satisfied for interns not to be paid. But the California agency’s guidance embraced a less strict test, saying the “totality of the circumstances” should be assessed, a standard adopted by the United States Court of Appeals for the 10th Circuit.

Mr. Balter said the new guidelines were similar to the advice his agency gave in 2000 to some restaurants, hotels and country clubs that used culinary students in 18-week internships.

In that situation, the agency suggested that payment was not required if an intern “performs culinary tasks directly pertinent to his or her education only, is closely supervised,” and “does not displace regular workers.” But, the agency said, if a restaurant required an intern to bus tables or wash dishes, that would probably be considered an employer-employee relationship and the intern would most likely have to be paid.

Mr. Balter cited another guidance letter that said film studios should pay college students who do routine work like delivering messages, filing tapes and clipping newspaper articles, partly because the work was so similar to that of regular employees and could displace such employees.

In the new guidance, the agency noted that it had previously concluded that interns should be paid if they did any work normally done by a regular worker.

But showing more leeway, Mr. Balter wrote that interns could do occasional work done by regular employees, as long as it “does not unreasonably replace or impede the education objective for the intern and effectively displace regular workers.”

The guidance acknowledged that the Year Up interns provided some advantage to companies training them, especially toward the end of their six-month internships when they had become more expert in information technology.

But it concluded, “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.”