



Board of
Behavioral
Sciences

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MEETING NOTICE

Policy and Advocacy Committee March 22, 2010

Department of Consumer Affairs
El Dorado Room
1625 North Market Blvd.
2nd Floor North, Room 220
Sacramento, CA 95834

10:00 a.m. – 2:00 p.m.

- I. Introductions
- II. Discussion and Possible Action Regarding Registrants Paying for Supervision
- III. Discussion and Possible Action to Clarify the Term Associate Clinical Social Worker
- IV. Suggestions for Future Agenda Items
- V. Public Comment for Items Not on the Agenda

Public Comment on items of discussion will be taken during each item. Time limitations will be determined by the Chairperson. Items will be considered in the order listed. Times are approximate and subject to change. Action may be taken on any item listed on the Agenda.

THIS AGENDA AS WELL AS BOARD MEETING MINUTES CAN BE FOUND ON THE BOARD OF BEHAVIORAL SCIENCES WEBSITE AT: www.bbs.ca.gov



Arnold Schwarzenegger
Governor

State of California
State and Consumer
Services Agency
Department of
Consumer Affairs

NOTICE: The meeting facilities are accessible to persons with disabilities. Please make requests for accommodations to the attention of Marsha Gove at the Board of Behavioral Sciences, 1625 N. Market Boulevard, Suite S-200, Sacramento, CA 95834, or by phone at 916-574-7861, no later than one week prior to the meeting. If you have any questions, please contact the Board at (916) 574-7830.

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To: Policy and Advocacy Committee Members

Date: March 8, 2010

From: Kim Madsen
Executive Officer

Telephone: (916) 574-7841

Subject: Registrants Paying for Supervision

Background

In June 2009, a licensee contacted the Board of Behavioral Sciences (BBS) regarding the practice of mandating employees that are BBS registrants to pay for the supervision they receive in their employment setting. Prior to contacting the BBS, the licensee inquired with the California Association of Marriage and Family Therapists (CAMFT) and the Division of Labor Standards Enforcement regarding this practice. Each entity responded that such an arrangement is inappropriate under current law.

In preparing a response to the licensee, BBS staff consulted with legal counsel, who cited various provisions of both the Business and Professions Code and the Labor Code that affirmed that mandating a registrant to pay for supervision received from his or her employer is inappropriate. This subject was discussed at the October 10, 2009 and January 23, 2010 Board meetings.

Current Status

In response to the numerous comments and concerns regarding this subject, BBS staff contacted the Division of Labor Standards Enforcement to request the attendance of a representative at this meeting. Unfortunately, a representative was not available. However, BBS staff was directed to review the opinion letters regarding this subject which are located on the Division of Labor Standards Enforcement's web site.

The Division of Labor Standards Enforcement also stated that if further clarification regarding a specific situation is desired, a letter with a full description of the situation may be sent to the address below requesting an opinion.

Chief Counsel
Division of Labor Standards Enforcement
San Francisco--Headquarters
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Attachments:

Sample opinion letters
Memo from James Maynard, Staff Counsel



MEMORANDUM	
DATE	September 14, 2009
TO	Board of Behavioral Sciences
FROM	James Maynard, Staff Counsel
SUBJECT	LAWS PROHIBITING PAYMENT BY INTERN TO EMPLOYER

There are two sources of law, the federal Fair Labor Standards Act and the California Labor Code, regarding the payment of wages to an employee. Generally, if an employee is allowed to work, the time spent working is compensable. (29 U.S.C. § 203(g); *IBP Inc. v. Alvarez* (2005) 546 U.S. 21, 24 (defining “work or employment” as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.)

If an employer pays an employee wages, that employer is generally prohibited from deducting money from an employee’s wages. (Cal. Labor Code §§ 216, 221.) This would include a practice where the employee is paid the full amount of his or her full wages and is then required to pay a certain amount back to the employer to cover the costs of supervision. (See Cal. Labor Code § 221.)

The law contemplates only a few permissible bases for either withholding money from an employee’s wages or requiring the employee to pay his or her employer. (Labor Code § 224.) These permissible deductions or withholdings include: (1) those required by state or federal law, (2) deductions specifically authorized by the employee to cover insurance premiums or other deductions not amounting to a rebate or deduction from the standard wage set by an agreement, or (3) where a deduction to cover health, welfare or pension plan contributions is expressly authorized by a wage agreement. (*Id.*; *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313 (emphasis added).)

Additionally, the Board’s own laws, specifically Business and Professions Code sections 4980.43(b) and 4980.43(e)(1) encourage employers to provide fair remuneration to interns and require experience to be gained either as an employee or as a volunteer.

The Board's laws generally contemplate that interns should be paid for their work as employees. To the extent that interns are paid as employees, their employer may not require such interns to pay for the required supervision.

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*

September 11, 1998

Sunil Lewis Vatave, Esq.
Vatave Saltz & Nimoy
610 Newport Center Drive

RE: Request for Opinion Letter, Charging Applicants for Training

Dear Counsel:

This is in response to your request for an opinion letter regarding charging a training fee to applicants. The facts set forth in your request are as follows: Prospective telemarketing employees are offered a job only upon satisfactory completion of the training class, which is conducted by the prospective employer, not an outside school. Applicants are not required to take the class, but are advised they will not receive an offer of employment (absent demonstration of substantial sales experience) unless they take the class. The training fee is waived if the applicant becomes an employee and remains in the employ of the employer for at least five days.

The criteria normally employed by DLSE to determine whether a training class would not constitute hours worked for which wages are due are set forth in "California Employment Law", Wilcox, Section 1.04[1][f]. Historically, DLSE has required that training, to be exempt from hours worked, and thus non-compensable, be an essential part of an established course of an accredited school or an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession. A course which is specifically tailored to practices used by the employer would not qualify. Additionally, the work performed by the applicants during the training cannot be work which would have otherwise been performed by bona fide employees (marketing to an actual consumer). Also, it appears from your letter that the screening process for admission to the program, if not identical to the screening process for employment, is inextricably intertwined, and that successful completion of the training entitles the applicant to employment. Any one of the above would render the training program ineligible for exemption from being considered hours worked. Thus the "trainees" would be considered employees, and must be compensated, rather than charged for time spent in such training.

Sunil Lewis Vatave, Esq.
September 11, 1998
Page Two

Additionally, Labor Code Section 300 prohibits assignment of wages unless a detailed set of required elements are set forth in writing, including the requirement that the assignment is voluntary and revocable, neither of which appear to be satisfied by the scenario set forth in your letter.

Labor Code Section 450 specifically provides that no employer or agent thereof, shall compel any employee or applicant for employment to patronize his employer or purchase anything of value. To the extent the training has any purported intrinsic value, Labor Code Section 450 prohibits your client from charging prospective employees to pay for the training.

Turning to your question concerning the applicability of Labor Code Section 224, the statute does not permit an employer to make an otherwise unlawful deduction from an employee's wages, even if written authorization for such a deduction has been obtained. Put another way, Section 224 only authorizes lawful deductions from wages; the deductions you proposed do not fall into that category.

I hope this addresses the questions posed by your letter. If you have further inquiries, please feel free to contact my office.

Very truly yours,



Miles E. Locker
Chief Counsel

cc: Jose Millan
Tom Grogan
Greg Rupp
Nance Steffen

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENTLEGAL 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

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To: Policy and Advocacy Committee Members

Date: March 8, 2010

From: Kim Madsen
Executive Officer

Telephone: (916) 574-7841

Subject: Request to Consider Amending the Clinical Social Work Statute

The Board received a request from National Association of Social Workers (NASW) California Chapter Executive Director, Janlee Wong, to consider amending the Board's licensing law related to Associate Clinical Social Workers (ACSW). Mr. Wong stated that the use of the term ACSW by the Board is a source of confusion as a result of the establishment of Academy of Certified Social Workers (ACSW) credential by NASW in 1960.

Mr. Wong offered two options for consideration. The first option requests that the Board change the title "Associate Clinical Social Worker" to "Associate Social Worker" in statute. The second option requests that the Board designate in statute that the title Associate Clinical Social Worker be known by the abbreviation ASW (Associate Social Worker).

Staff's initial research regarding this request revealed that the term Associate Clinical Social Worker is referenced in at least one other section of California Law in addition to the Board's statutes and regulations.

Attachments:

NASW request letter
Academy of Certified Social Workers web-page