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Qualified Small Business Stock Under IRC §1202: Tax-Free Money for the Masses?

Christopher Karachale

Introduction

Since January 1, 2013, taxpayers with gross incomes of $250,000 or more have seen a significant increase in the rate at which their long-term capital gains are taxed. The American Taxpayer Relief Act of 2012 (Pub L 112–240, 126 Stat 2313) increased the rate from 15 percent to 20 percent and imposed a net investment income tax of 3.8 percent, bringing the total current rate on long-term capital gains to 23.8 percent.

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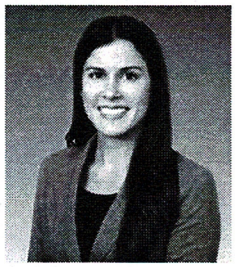

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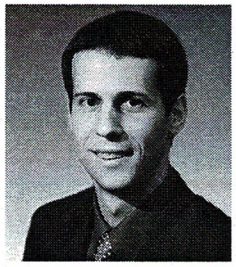

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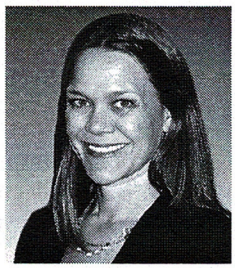

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INTRODUCTION

In the film "Pursuit of Happyness," Will Smith's character, Chris Gardner, gets an internship at a brokerage firm, only to discover it is unpaid. Already financially strapped, Gardner and his young son end up living in a homeless shelter and in bathrooms so that he can do the internship with the hope of ultimately securing a paying job with the company. Does Gardner have a wage and hour claim against the company?

As this article will explain, the answer depends on whether Gardner would be classified under the law as an employee, intern, or volunteer. Indeed, determining which of these labels applies to a person performing work has important ramifications on what laws an employer must follow with respect to compensation. For instance, certain wage and hour laws require an "intern" to be paid as an employee, while others laws govern work being performed by volunteers.

This article steps through the process of determining whether a person performing services is an employee, intern, or volunteer and discusses the laws applicable under those different classifications.

WAGE AND HOUR LAWS APPLY TO "EMPLOYEES" BUT NOT TO "INTERNS"

At the most basic level, the Fair Labor Standards Act (FLSA) (29 USC §§201–219) and California law provide minimum wage requirements and other protections to workers within the state. See 29 USC §§201–219; Lab C §§1171–1206; Industrial Welfare Commission (IWC) Orders 1–17. Notably, to be covered by these laws, a worker must be classified as an "employee" rather than as an "intern" or "volunteer," because these laws exempt interns and volunteers from minimum wage and overtime regulations on public policy grounds.

California provisions relating to coverage define "employee" as "any person employed by an employer" and define "employ" as "to engage, suffer, or permit to work." See, *e.g.,* IWC Order 4-2001; 8 Cal Code Regs §11040(2). Similarly, the FLSA defines an employee as "any individual employed by an employer" and "employ" as "to suffer or permit to work." 29 USC §203(e)(1), (g). However, almost 70 years ago, in *Walling v Portland Terminal Co.* (1947) 330 US 148, the United States Supreme Court announced that the FLSA definition of "employ" 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." 330 US at 152. See also *Wirtz v San Francisco & Oakland Helicopter Airlines, Inc.* (9th Cir 1966) 370 F2d 328 (restating *Portland Terminal* principle).

THE DOL'S SIX-PART TEST FOR CLASSIFYING WORKERS AS "INTERNS"

There is no California statute or regulation that expressly defines which workers are to be considered "interns," but the U.S. Department of Labor (DOL) has provided guidance to for-profit, private-sector employers to assist them in determining whether a worker can be properly classified as an "intern" and therefore exempt from minimum wage and overtime compensation laws. Specifically, the DOL has articulated six criteria, derived from the Supreme Court's *Portland Terminal* case, to be applied to determine whether an intern is exempt from the FLSA's minimum wage coverage. DOL Op Ltr FLSA 2004-5NA (May 17, 2004). Given the similarity of the definitional provisions for "employee" and "employ" under the federal and state employment laws and in view of the similar purposes of the state and federal minimum wage law generally, the California Department of Labor Standards Enforcement (DLSE) has historically followed federal interpretations, including the DOL's six-factor test. DLSE Op Ltr 2010.04.07; DLSE Op Ltr 2000.05.17 (DLSE applies federal case law and interpretations of FLSA when not inconsistent with state law). See also *Bell v Farmers Ins. Exch.* (2001) 87 CA 4th 805, 812; *Ramirez v Yosemite Water Co.* (1999) 20 C4th 785, 798. Determining whether an individual should be considered an "intern" or an "employee" is a highly fact-specific undertaking and turns on "all the circumstances surrounding their activities." DOL Op Ltr FLSA 2004-5NA.

The six criteria used by DOL are as follows (DOL, Wage & Hour Div, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act, April 2010 (available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf)):

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

According to the DOL, if all six factors are met, an employment relationship does not exist under the FLSA, and the FLSA's minimum wage and overtime provisions do not apply to the intern. However, courts have taken more of a "totality of the circumstances" approach when making this determination. See *Reich* v *Parker Fire Protection Dist.* (10th Cir 1993) 992 F2d 1023, 1027. See also *Harris v Vector Mktg. Corp.* (ND Cal 2010) 716 F Supp 2d 835, 843; *Marshall v Regis Educ. Corp.* (10th Cir 1981) 666 F2d 1324, 1326; *Ulrich v Alaska Airlines, Inc.* (WD Wash Feb. 9, 2009, No. C07-1215RSM) 2009 US Dist Lexis 10104 (finding that all six factors were satisfied).

Determining whether an individual should be considered an "intern" or an "employee" is a highly fact-specific undertaking and turns on "all the circumstances surrounding their activities."

Because the application of these criteria can be confusing, it is important to take a more in-depth look at each factor and how those factors have been viewed by the DOL in the past. It is also important to remember that whether an individual meets the DOL's criteria is based entirely on the specific facts applicable to that individual.

Factor 1

The first factor requires that the internship program be an extension of the academic experience. The DOL takes a broad view of what activities are similar to

those that would be given in an educational environment. In general, the more a training program is "structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience." Fact Sheet #71. In addition, an intern's work must constitute "the practical application of material taught in the classroom." DOL Op Ltr FLSA 2006-12 (Apr. 6, 2006). Important considerations include whether the internship is part of a bona fide academic program, whether the intern gets academic credit for the work performed, and whether the intern has to complete some assignment that connects the internship to his or her academic training (*e.g.*, a paper or journal entries). That said, granting academic credit alone would not bestow an FLSA exemption on what is otherwise an employment relationship. Compare DOL Op Ltr 2006-12 (no-credit externship; DOL found interns exempt from FLSA) with DOL Op Ltr FLSA 2004-5NA (May 17, 2004) (credit-bearing internship when DOL could not definitively find interns FLSA exempt).

Factor 2

The second factor requires that the internship benefit the intern. This requirement mixes easily with the first and is similarly easy to satisfy. The DOL has indicated that the more the internship provides the intern "with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training." Fact Sheet #71. In contrast, the DOL has found that (Fact Sheet #71)

> if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

Factor 3

The third factor is arguably one of the most problematic. This factor requires that the intern (1) not displace regular employees and (2) work under close supervision of existing staff. Regarding displacement, the DOL has made it clear that interns will be considered employees if they are used as "substitutes for regular workers or to augment [an employer's] existing workforce during specific time periods." Fact Sheet #71. Furthermore, if the employer would have "hired additional employees or required existing staff to work additional hours had the interns not performed the work," then the interns will be considered employees under the FLSA. Fact Sheet #71. Whether an intern displaces regular employees will largely depend on the level of responsibility assigned to the intern, the number of interns, and the number of hours each intern works. Generally, the fewer hours worked, the less likely it is that interns displace regular employees. As for supervision, the DOL has noted that (Fact Sheet #71)

> if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely viewed as an educational experience. If, however, the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.

It stands to reason that if an employer must consistently assign employees to supervise interns, the interns are not likely displacing those employees.

Factor 4

The fourth factor requires that an employer not derive any immediate advantage from the activities of the intern. Along with Factor 3, this is one of the most arduous to meet. The DOL has advised that (Fact Sheet #71)

> if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.

See also DLSE Op Ltr 2010.04.07; DOL Op Ltr (Mar. 24, 1994) (interns assisted in daily operations and general duties in youth hostel); *McLaughlin v Ensley* (4th Cir 1989) 877 F2d 1207, 1208 (when trainees are required to work alongside regular employees and perform all job duties without any learning opportunity, employer is essentially using trainees to get work done that they otherwise would have to pay employee to do). This does not mean that an intern cannot, on occasion, perform productive tasks for the employer, as long as these tasks are isolated instances or de minimis. DLSE Op Ltr 2010.04.07; *Atkins* v *General Motors Corp.* (5th Cir 1983) 701 F2d 1124, 1129 (isolat-

ed instances of activities such as general cleaning and uncrating machinery were de minimis). Indeed, courts have recognized that the "law presumes that [the employer] will derive 'some' benefit from offering training." *Ulrich v Alaska Airlines, Inc.* (WD Wash, Feb. 9 2009, No. C07-1215RSM) 2009 US Dist Lexis 10104, *14.

Factor 5

This factor is easy to satisfy, simply requiring that the intern not necessarily be entitled to a job at the end of the internship. The DOL has advised that for a true internship relationship to exist, the internship should be for "a fixed duration, established prior to the outset of the internship." Fact Sheet #71. Employers should not use unpaid internships as a trial period for new employees—that is, if there is an expectation that the intern will be hired on a permanent basis at the conclusion of the internship, the individual will generally be considered an employee. Fact Sheet #71.

Factor 6

This factor requires that both the employer and intern understand that the intern is not entitled to wages. Like Factor 5, this requirement is generally easy to satisfy. Regarding paid interns, the DOL has clarified 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 WHD Op Ltr (May 8, 1996).

THE DIFFERENCE BETWEEN INTERNS AND VOLUNTEERS

Where do volunteers fit in to this equation? How are they different from interns? Does an employer have to pay an employee who wants to do "volunteer" work that is close in scope with the job duties that an employee performs?

"Volunteer" Defined Under California and Federal Law

Both California and federal wage and hour law provide definitions for whom can be considered a volunteer. The California Labor Code defines volunteer to mean "an individual who performs work for civic, charitable, or humanitarian reasons for a public agency or [501(c)(3) corporation] . . . without promise, expectation, or receipt of any compensation for work performed." Lab C §1720.4(a). In a 1988 Opinion Letter, the DLSE set forth that the "controlling factor" in the determination of whether one is a volunteer is the intent of the parties. See DLSE Op Ltr (Oct. 27, 1988). The DLSE stated that "[i]f the person intends to volunteer his or her services for public service, religious, or humanitarian objectives, not as an employee and *without contemplation of pay,* the individual is not an employee." DLSE Op Ltr (Oct. 27, 1988) (emphasis in original). Federal law defines a volunteer very similarly to California law. See 29 CFR §553.101(a).

The DOL has made it clear that interns will be considered employees if they are used as "substitutes for regular workers or to augment [an employer's] existing workforce during specific time periods."

Although these definitions are a starting point, there is no bright-line test for determining who is a volunteer. An initial important factor in the determination is that for a person to be considered a volunteer, the individual must be performing services for a public agency or nonprofit organization. Indeed, governmental agencies and nonprofits rely heavily on volunteers. This makes for a difficult balancing test when it comes to regulating volunteers: legislatures do not want to curb volunteer activities for civic or humanitarian purposes, but at the same time, they want to protect individuals from wage and hour abuse and coercion to perform work under the guise of being labeled a "volunteer." See 29 CFR §553.101(b); *Tony & Susan Alamo Found. v Secretary of Labor* (1985) 471 US 290, 302.

For-profit, private sector employers therefore cannot simply classify persons performing work for them as "volunteers" in order to avoid compensating them. If a private employer is not paying the individual performing the work, then the worker must satisfy the unpaid intern test described above. Similarly, the DLSE has clarified that (DLSE Op Ltr (Oct. 27, 1988))

> when religious, charitable or nonprofit organizations operate commercial enterprises which serve the general public, such as restaurants or thrift stores, or when they contract to provide personal services to businesses, such enterprises are subject to the Industrial Welfare Commission Orders and volunteers may not be utilized.

With respect to federal law, "the FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer in many circumstances for charitable and public purposes." DOL Op Ltr FLSA 2006-4. The DOL considers a variety of

factors in determining whether an activity is "ordinary volunteerism." These factors include (DOL Op Ltr FLSA 2001-18)

(1) The nature of the entity receiving the services;

(2) The receipt by the worker (or expectation thereof) of any benefits from those for whom the services are performed;

(3) Whether the activity is less than a full-time occupation;

(4) Whether regular employees are displaced;

(5) Whether the services are offered freely without pressure or coercion; and

(6) Whether the services are of the kind typically associated with volunteer work.

Federal regulations provide certain examples of activities that are considered volunteer services. These include "helping out in a sheltered workshop or providing personal services to the sick or the elderly in hospitals . . . or driving a school bus to carry a football team or band on a trip." 29 CFR §553.104(b).

Whether Employees Who Volunteer Must Be Compensated

Many employers encourage their employees to participate in volunteer services and even provide incentives for doing so. This can result in tricky situations concerning whether the employee's time spent "volunteering" should actually be compensable time under federal and state wage and hour laws. If the employee is performing the "same types of services" for the employer that employs the individual, then the volunteer work is compensable. 29 CFR §553.101(d); DOL Op Ltr FLSA 2001-18. For instance, a nurse who is an employee of a state hospital cannot "volunteer" to perform nursing services at a state-operated health clinic. 29 CFR §553.103(b). In that situation, the nurse would be entitled to the compensation requirements of the FLSA. However, a city police officer who volunteers as a part-time referee in a city-sponsored basketball league would not be performing the "same types of services." 29 CFR §553.103(c).

The DOL stated that even when the employer sponsors a volunteer event such as a blood drive or a Habitat for Humanity project, "if there is a significant connection between the employer and the charity, they may be found to be a single enterprise under [the] FLSA . . . [and] the hours worked for the charity must be combined with the hours worked for the employer and compensated." DOL Op Ltr FLSA 2006-4. However, if the volunteer work is not connected with the employer and the employer does not direct the employee to volunteer as part of employment, then such services constitute volunteer activities. In such a case, "[t]he employer is merely trying to encourage employees to donate their time to others . . . and is not obligated to treat the volunteer hours as compensable time under the FLSA." DOL Op Ltr FLSA 2006-4. See DOL WH Op Ltr (Apr. 20,1984).

Volunteers May Receive Some Remuneration, But How Much?

Although a key consideration in categorizing a person as a volunteer is no expectation of compensation, volunteers may receive compensation for expenses, reasonable benefits, or a nominal fee. 29 CFR §553.106(a). But how much can the volunteer receive before losing volunteer status? Under the FLSA, this question is answered by "examining the total amount of payments (expenses, benefits, fees) in the context of the economic realities of the particular situation." 29 CFR §553.106(f).

An initial important factor in the determination is that for a person to be considered a volunteer, the individual must be performing services for a public agency or nonprofit organization.

The DOL regulations provide additional guidance. With respect to expenses, reimbursing a volunteer for the approximate amount of out-of-pocket expenses, such as payment for meals or transportation costs, is appropriate. 29 CFR §553.106(b). Regarding reasonable benefits, individuals may still be considered volunteers even when a public agency includes volunteers in group insurance or pension plans. 29 CFR §553.106(d).

How much of a nominal fee can be paid to a person without converting the volunteer into an employee? In an effort to answer this question, the DOL looked to the FLSA's definition of "incidental," in which Congress set forth a 20 percent test to determine whether something is insubstantial. See 29 USC §213(c)(6)(G). Applying that test to volunteer stipends, the DOL has stated that a fee paid to a volunteer is nominal if the payment does not exceed 20 percent of what the organization would otherwise pay to hire that person for the same services. DOL Op Ltr FLSA 2005-51.

In determining whether an amount is nominal, various additional factors will be evaluated. These include whether the fee is, in actuality, a substitute for compensation; whether the fee is tied in any way to productivity; whether the volunteer has agreed to be

available around the clock or only during certain specified time periods; whether the volunteer provides services as needed or throughout the year; and whether the volunteer has traveled a substantial distance or expended significant time and effort on the task. 29 CFR §553.106(e).

Laws That Protect Volunteers

To encourage volunteering, various federal and state laws have been put in place to protect volunteers from being personally liable for harm caused while volunteering. For instance, under Health & S C §1799.102, if a volunteer provides medical or nonmedical care at the scene of an emergency, the volunteer cannot be found liable for any civil damages resulting from any act or omission.

Volunteers may receive compensation for expenses, reasonable benefits, or a nominal fee. . . . But how much can the volunteer receive before losing volunteer status?

Other California statutes providing volunteers protection against personal liability include Govt C §§8657, 8659 (immunizing certain medical volunteers who render services during a state of emergency); Bus & P C §§2395–2396, 2727.5, 2861.5 (providing protections for nurses and doctors who render emergency care under circumstances described in these statutes); and Corp C §5231 (extending liability protection to volunteer directors of nonprofit organizations).

At the federal level, Congress passed the Voluntary Protection Act (VPA) "to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities." 42 USC §14501.

Under the VPA, volunteers will not be liable for harm caused while volunteering if (42 USC §14503(a))

(1) They acted within the scope of their responsibilities;

(2) They were properly licensed or certified (if necessary under the circumstances);

(3) The harm was not caused by criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed; and

(4) The harm was not caused by operating a motor vehicle, vessel, aircraft, or other vehicle for which a state required the owner or operator to possess an operator's license or maintain insurance.

If it is the volunteer who gets injured, the volunteer is not covered by workers' compensation because the person is not an employee. See Lab C §3352(j). However, a public agency, private employer, or nonprofit organization can affirmatively opt to extend workers' compensation coverage to their volunteers—so the injured volunteer may have workers' compensation protection after all. See Lab C §§3362.5, 3363.5.

UNPAID INTERNS AND VOLUNTEERS ARE PROTECTED AGAINST DISCRIMINATION AND HARASSMENT IN CALIFORNIA

When it came to discrimination and harassment laws as applied to unpaid interns and volunteers in California, there was not much, if any, legislative guidance on the topic until recently. On September 9, 2014, Governor Jerry Brown signed Assembly Bill 1443, which extended the existing antiharassment and antidiscrimination protections of the Fair Employment and Housing Act (FEHA) (Govt C §§12900–12996) to unpaid interns and volunteers. The expanded FEHA protections came into effect on January 1, 2015.

FEHA Background

Before the expansion of FEHA to unpaid interns and volunteers, neither federal nor state law provided discrimination and harassment protections for individuals who are not paid for their work. The pre–AB 1443 version of FEHA only protected employees, applicants for employment, and certain contractors. Specifically, Govt C §12940 proscribed as "unlawful employment practices" the discrimination and harassment of these individuals because of their

- Actual or perceived race;
- Religious creed;
- Color;
- National origin;
- Ancestry;
- Physical disability;
- Mental disability;
- Medical condition;
- Genetic information;
- Marital status;
- Sex;
- Gender;
- Gender identity;
- Gender expression;
- Age;
- Sexual orientation; or
- Military and veteran status.

However, the statute does not define who is an "employee" under FEHA; rather, it merely excludes persons employed by close relatives and those "employed" by nonprofit sheltered workshops and rehabilitation facilities. Govt C §12926(c). As a result, before the statute was amended, courts hearing claims brought by unpaid interns and volunteers generally rejected those types of claims.

Expanding FEHA to Cover Interns and Volunteers

With AB 1443 effective as of January 1, 2015, the antidiscrimination and antiharassment provisions of FEHA have been extended to unpaid interns and volunteers. This means that California employers are now expressly prohibited from

- Discriminating in the selection, termination, training, or other terms or treatment of unpaid interns and volunteers on the basis of protected characteristics (Govt C §12940(c));
- Harassing unpaid interns and volunteers on the basis of protected characteristics (Govt C §12940(j)(1));
- Taking adverse action against an unpaid intern or volunteer on the basis of his or her religious belief or observance (Govt C §12940(*l*)(1)); and
- Refusing to provide reasonable accommodations for an unpaid intern's or volunteer's religious belief or observance unless doing so would pose an undue hardship (Govt C §12940(*l*)(1)).

Moreover, employers can be held liable for the sexual harassment of unpaid interns and volunteers by nonemployees if the employer knew or should have known of the conduct but failed to promptly take appropriate corrective action. Govt C §12940(j)(1).

Why Protect Unpaid Interns and Volunteers?

In amending Govt C §12940 to include unpaid interns and volunteers within its scope, the California Legislature cited California and non-California court opinions that considered the issue as well as several public policies relied on by the bill's author and its supporters. For example, the Assembly Committee on Labor and Employment pointed to a high-profile New York federal court decision, *Wang v Phoenix Satellite Television US, Inc.* (SD NY 2013) 976 F Supp 2d 527, which the Committee indicated had "renewed concerns about legal protections for unpaid interns." Assembly Comm on Labor & Employment, Analysis of Assembly Bill No. 1443 (2013–2014 Reg Sess) Mar. 17, 2014, p 3. In *Wang,* the plaintiff, an intern at a broadcasting company, alleged that her supervisor would make inappropriate comments about her appearance, told sexually suggestive stories, squeezed her buttocks, and tried to forcibly kiss her. The court dismissed her claims on the grounds that it was "axiomatic" under both federal and state law that compensation is a threshold issue in determining the existence of an employment relationship. 976 F Supp 2d at 536.

In another case cited by the California Legislature, *O'Connor v Davis* (2d Cir 1997) 126 F3d 112, the Second Circuit upheld dismissal of a Title VII lawsuit brought by an unpaid student intern who alleged that her supervisor nicknamed her "Miss Sexual Harassment," asked her to remove her clothing during a meeting, told her that she "looked tired" because she and her boyfriend must have had a "good time" the night before, and had suggested that the plaintiff and the other employees engage in an "orgy" with the supervisor. The court concluded that the plaintiff's claims failed because she did not receive either direct or indirect remuneration, and thus, she was not an "employee" under the statute. 126 F3d at 116.

Assembly Bill 1443 ... extended the existing antiharassment and antidiscrimination protections of the FEHA to unpaid interns and volunteers.

In considering whether or not to expand the protections to volunteers, the California Legislature also relied on a few notable cases arising under FEHA. In *Mendoza v Town of Ross* (2005) 128 CA4th 625, the court held that a volunteer with cerebral palsy could not maintain a claim for wrongful termination and employment discrimination under FEHA because he was unpaid and did not allege that he was provided any substantial benefits. 128 CA4th at 637. The court explained that "compensation of some sort is indispensable to the formation of an employment relationship." 128 CA4th at 637. Similarly, in *Estrada v City of Los Angeles* (2013) 218 CA4th 143, 145, the court held that the workers' compensation benefits that the city voluntarily provided to volunteer reserve police officers did not amount to remuneration transforming them to "employees" for purposes of FEHA. Rather, as the court explained, the benefits "help to make a volunteer whole" in the event of injury and were more akin to reimbursements for out-of-pocket expenses than actual compensation for services performed. 218 CA4th at 155.

As reflected in *Wang, O'Connor, Mendoza,* and *Estrada,* whether a plaintiff received significant remuneration was a heavy, if not dispositive, consideration for courts considering discrimination and har-

assment claims asserted by unpaid interns and volunteers. See also EEOC Compliance Manual §2: Threshold Issues at 2-III.A.1.c (available at https://www.eeoc.gov/policy/docs/threshold.html). Indeed, both the *Mendoza* and *Estrada* courts relied on language in FEHA's legislative history that explained that by providing reasonable accommodations for disabled employees, "employers were helping to strengthen our economy by keeping people working who would otherwise require public assistance." *Mendoza,* 128 CA 4th at 636 (citing Assembly Comm on Judiciary, Analysis of AB 2222 [1999–2000 Reg Sess], Apr. 11, 2000, p 4); *Estrada,* 218 CA4th at 151 (quoting *Mendoza*). According to the court in *Mendoza,* "this rationale clearly indicate[d] that the Legislature assumed and intended that disabled persons need to be compensated 'employees' in order to benefit" from FEHA's protections. 128 CA4th at 637.

Unpaid interns and volunteers are exposed to the same workplace environments as their employed counterparts, and employers should owe a safe, discrimination- and harassment-free workplace to all, including unpaid interns and volunteers.

Among the various policy considerations for expanding FEHA was the observation that unpaid interns and volunteers are exposed to the same workplace environments as their employed counterparts, and employers should owe a safe, discrimination- and harassment-free workplace to all, including unpaid interns and volunteers. The legislature also noted that several professional graduate programs require or at least typically include some type of internship before completion. In *O'Connor v Davis* (2d Cir 1997) 126 F3d 112, the plaintiff was a student in social work who was required as part of her major to perform 200 hours of field work in order to graduate. In holding that the plaintiff was not an employee, the court was "not unsympathetic" to the plaintiff's predicament and recognized that her success was dependent on successfully completing her internship. Such dependency "made her vulnerable to continued harassment much as an employee dependent on a regular wage can be vulnerable to ongoing misconduct." 126 F3d at 119. Despite this observation, the court still held that it was for Congress to provide a remedy for someone in the plaintiff's position. Indeed, following the *Wang* decision, New York subsequently amended its Human Rights Law to extend its protections to unpaid interns. Connecticut, Oregon, and the District of Columbia have also enacted similar protections for unpaid workers.

The Expanded FEHA in Action

Since the amended FEHA went into effect, not many cases have specifically dealt with the application of the amended law to unpaid interns and volunteers, but there have been some. In Abikhalil v American Med. Response Ambulance Serv. (CD Cal, No. CV 15-9358 PSG (PJWx)), ECF No. 1-2 at ¶9, the plaintiff, who alleged that she worked as a "volunteer/intern" for the defendants, asserted claims under FEHA that allege, among other things, that the defendants' employees "engaged in quid pro quo harassment by conditioning continued interning/volunteering, approval of Plaintiff's intern responsibilities, and opportunity for Plaintiff to fulfill her internship requirements on Plaintiffs' engaging in sexual acts with [them]." Although the Abikhalil case remains in its initial stages, it appears to be one of the first cases that may deal with the application of the expanded statute. In at least two other cases when the issue was raised, the courts concluded that the expanded protections to unpaid interns and volunteers do not apply retroactively. See Farias v AMTRAK (CD Cal, Aug. 11 2015, No. SA CV 15-0633 DOC (AJWx)) 2015 US Dist Lexis 105488, *17; Woodson v California (ED Cal, Feb. 10, 2016, No. 2:15-cv-01206-MCE-CKD) 2016 US Dist Lexis 16496, *7.

CONCLUSION

Whether an individual performing services is an employee, intern, or volunteer is an important determination because different laws apply to each of those categories. The determination is not always straightforward and is quite fact-specific, but thinking through the application of the authorities discussed in this article is an important first step in properly classifying a person performing services.