So Sue Me Part III

BY JIM CASTAGNERA

Uncle Sam's Increased Attention to Student Workers Generates Concerns and Suits

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CNNMoney.com summed it up for all of us very neatly last November. "This year has been extremely rough: New college graduates had 40 percent fewer job prospects, a new report shows. And the outlook for 2010, while better, is still not very promising." Little wonder then that current students and recent grads are often willing to latch onto any career opportunity offered, even if no paycheck is attached.

This goes for college kids willing to work in unpaid internships, international students prepared to accept any job that enables them to get a foot inside an American employer's door, and graduate assistants content to pull the oars inside and outside the classroom for tenured faculty members.

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The Obama administration is eyeballing what it sees as potential exploitation on all three fronts. The Labor Department's (DOL) Wage & Hour Division is taking aim at unpaid internships, especially in the for-profit arena. Immigration and Customs Enforcement (ICE) is policing employment among international students. And the National Labor Relations Board is expected to reinstate the "employee" status of graduate assistants, a status they enjoyed during the Clinton presidency, then snatched away by the Bush administration labor board.

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Unpaid internships an endangered species?

According to an April 2nd story in the *New York Times*, the DOL's Wage & Hour Division has decided to investigate alleged abuses that it claims are occurring with respect to student internships. "This heightened interest is due to high unemployment rates," speculates Toni McLawhorn, director of career services at Roanoke College. "Are unpaid interns replacing paid workers?" She added that she doubts it.

All the same, the *Times* quoted Acting Wage & Hour Director Nancy Leppink to the effect that, "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid, and still be in compliance with the law."

Those circumstances that allow unpaid interns number precisely six, according to guidance issued to clients by the Philadelphia law firm of Morgan Lewis. They are listed in the adjoining box.

Explains the DOL, "Because the Fair Labor Standards Act's definition of 'employee' is broad, the excluded category of 'trainee' is necessarily quite narrow. Moreover, the fact that an employer labels a worker as a trainee and the worker's activities as training . . . does not make the worker a trainee for purposes of the FLSA unless the six factors are met."

Is the problem as serious as this tough talk from DOL is making it sound? Or is McLawhorn right, when she explains, "Usually, interns are hired with a particular project in mind. It's a win-win." Diane Klein is assistant director for internships at Nova Southeastern University. About the internship opportunities coming through her door, she says "I am seeing a lot that are unpaid." When no paycheck accompanies the position, she adds, echoing McLawhorn, "We do a good job at making sure the student gets course credits. We also make sure that the experience adds value to the intern's resume."

Unpaid internships are permissible when *all* of the following apply ...

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction.
2. The training is for the benefit of the trainees.
3. The trainees do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees, and on occasion the employer's operations may actually be impeded.
5. The trainees are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

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Klein notes, "It's better this year than last. More organizations are coming back and recruiting for interns. Last year it was like pulling teeth." However, "Many organizations consider unpaid internships as making students 'pay their dues.' These employers consider the experience to be a precursor to a paid job… an opportunity to make sure they are hiring the right person."

What really worries Klein are the "mom and pop" outfits that are on the lookout for graduating seniors, who didn't do internships during college and are entering the work force with resumes reflecting little more than their bachelor's degrees. "I see the desperate looks on their faces. Some of these students are ready to do anything to get in the door. These situations make me nervous."

For Karen Evans, director of the Career Development Center at Albright College, "The bad thing that I have seen is that some companies, who formerly would have entertained the thought of hosting an unpaid internship, won't even attempt it anymore."

ICE's looming presence in the background inspires employers to comply with the federal regs more closely than in the *laissez-faire* days of yore. This has generated its own ripple of litigation.

The caution of such gun-shy companies might not be misplaced. *Steshenko v. McKay* is a federal case decided by District Judge Richard Seeborg on April 1st in San Jose, California It may be a harbinger. The plaintiff sued after being terminated from the nursing program at Cabrillo College. Steshenko challenged his termination, contending that he was a whistleblower. Specifically, he claimed he'd been punished for his complaints about what he called "corrupt practices" in the Cabrillo nursing program. He alleged, among other abuses, the "exploitation" of nursing students, who he claimed were forced to work as unpaid interns at an affiliated hospital. (He also complained about poor patient care and other perceived wrongdoing.)

On the defendant college's motion to dismiss the case, His Honor held, "[Steshenko]'s claim that he was terminated for speaking out on such issues is sufficient to survive…." And, although the judge booted Steshenko's claim of involuntary servitude in violation of the Constitution's 13th (anti-slavery) amendment, he gave the plaintiff leave to sue for back-pay compensation for his unpaid internship under the California Labor Code and the federal Fair Labor Standards Act.

The DOL's regulations combined with lawsuits such as *Steshenko* may represent a knockout combination for unpaid internships.

ICE's alphabet soup stimulates a private suit

Meanwhile, Uncle Sam's post-9/11 regulation of international student workers appears at first blush to be a positive force for putting employers and students together. Prior to 9/11 the forms issued to international students by admissions officers at American universities were prepared on typewriters, often by staffers who knew little or nothing about U.S. immigration law.

Armed with a Form I-20, the foreign applicant visited a U.S. consulate in his home country, where more often than not he was issued an F-1 visa—which provided entry into the U.S. Once he left an international airport, such as New York's JFK, and walked into the city's mean streets, he could disappear without a trace. That's exactly what several of the 9/11 terrorists did, resurfacing on that fateful late-summer day in 2001 to attack the World Trade Center towers.

Post-9/11, the Immigration and Customs Enforcement (ICE) bureau was established, along with a computerized tracking system, SEVIS, as the exclusive way for colleges to issue I-20s. SEVIS requires certification and periodic recertification of participating schools. Both the ICE police and American consuls across the globe have access to student records posted there. When a school's current international attendee wants to work off campus (either before or after graduation), SEVIS is how they become authorized to do so. With post-graduation employment in particular requiring government review and approval, one might reasonably fear bureaucratic logjams.

Not so, says Kevin Morris, associate director of the office of international programs at Raleigh's Meredith College. To the contrary, he opines, "I really think the whole process is better. SEVIS has allowed better access by putting all the relevant information in one place." Service is good, he adds, citing in particular the SEVIS "Help Desk," which facilitates quick fixes when school officials make systemic errors. "The SEVIS system is consistent, and if there's one thing international students appreciate, it's consistency."

Optional Practical Training is the graduating international student's ticket to a year or more of employment with a U.S. organization. It's usually subject to quick government approval and little or no post-approval scrutiny. However, a knowledgeable source told me off the record that a graduate's nationality influences ICE's incentive to keep track… an echo of 9/11.

Additionally, ICE's looming presence in the background inspires employers to comply with the federal regs more closely than in the *laissez-faire* days of yore. This has generated its own ripple of litigation. For example, in *Balaban v. Local 1104, Communication Workers of America,* the plaintiff sued his employer-labor union under the federal labor laws.

Balaban, an international student attending SUNY Binghamton, concocted an odd legal theory. After Local 1104 organized the campus's graduate assistants, including Utku Balaban, he was elected to a three-year term as the Graduate Student Employees Union business agent. As a full-time student, he was allowed by U.S. immigration law to work only 20 hours per week while classes were in

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session. The union, as his employer, reasonably required that he keep time sheets.

Submission of a time sheet was the predicate to receiving his $1,200 monthly stipend. Balaban refused, protesting that, if he filled it out honestly, he'd have to admit to working more hours than the law allowed. The union declined to pay him. Following a five-month standoff, the plaintiff finally blinked, agreeing to submit his overdue time records.

The subsequent court opinion suggests that Balaban may have harbored some simmering hostility. In February 2009, while at the union hall to pick up some membership cards, wrote the judge, Balaban got into an altercation with the union local's executive vice president, whom he shoved against the wall. The result was a protection order from the Binghamton City Court, along with union charges against him.

In an internal union trial, Balaban was suspended by the local's executive board for seven years. That's when he sued.

On the union's motion for summary dismissal, federal judge Thomas McAvoy held that the union was well within its rights to require this international student to submit timesheets, so the local could prove its own compliance with federal law. "Plaintiff's concern that completing a weekly schedule may cause him to admit that he is violating federal immigration law does not render the union's requirement unreasonable or unlawful." Judge McAvoy also found that the union had provided Balaban with plenty of "due process" so far as the assault charge was concerned. Consequently, His Honor threw Balaban's suit out the courtroom door.

Grad assistants' unions will rise, phoenix-like, again

Many public schools, such as SUNY, are required by their states' labor laws to deal fairly with union organizing efforts among graduate assistants. Meanwhile, the National Labor Relations Board has taken private colleges and universities on a roller coaster ride. When the NLRB was dominated by Democrats, during the Clinton years, New York University's grad students were deemed to be employees, covered by the National Labor Relations Act. Then, during the Bush Administration, a GOP-run board snatched back their statutory shelter, reversing the NYU ruling and declaring GAs to be primarily students.

In 2010 the Dems are back in the saddle. Without a doubt, unions interested in representing some of the tens of thousands of graduate assistants laboring in private higher education will bring their cases to a board now staffed by three Democrats and just one Republican. The flip that occurred in the *Brown University* case during the Bush era will most likely become a flop in 2010 or 2011. GAs will once again be converted by legal jargon from students into employees. Following such a re-reversal will be a flood of fresh organizing efforts and concomitant labor litigation.

Bottom Line: Uncle Sam's intensified interest in college-student labor will result in lots more litigation producing significant billable hours for lawyers. TC

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