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Is the Six-Factor Test Still Good? Eleventh Circuit Endorses Modified Intern Test

October 1, 2015

A recent decision by the Eleventh Circuit Court of Appeals appears to reject the U.S. Department of Labor's oft-recited six-factor test, which is used to determine whether interns are actually functioning as employees. In *Schumann v. Collier Anesthesia, P.A., et al*, No. 14-13169 (September 11, 2015), instead of the six-factor test, the court endorsed a primary beneficiary test designed to account for the economic realities of modern-day internships for academic credit and professional certification.

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Background

Twenty-five former student registered nurse anesthetists (SRNAs) who had enrolled in a master's degree program at Wolford College, LLC, to become certified registered nurse anesthetists (CRNAs) initiated the action. Each SRNA participated in a clinical curriculum—a prerequisite to obtaining a master's degree under Florida law—at Collier Anesthesia, P.A., a Florida corporation that provides anesthesia services. The clinical curriculum required SRNAs to participate in a minimum of 550 clinical cases in a variety of surgical procedures.

The SRNAs filed suit against Wolford College, Collier Anesthesia, and several individual part-owners of Collier, alleging that they were "employees" of the defendants, not interns and that they were therefore entitled to recover unpaid wages and overtime under the Fair Labor Standards Act (FLSA). The SRNAs alleged that Collier benefited financially by using their services in place of CRNAs, that they were scheduled to work at Collier-staffed facilities 365 days per year (including weekends, holidays, and the days in between semesters),

and that they were forced to arrive well before their shifts began, which caused the SRNAs to work a minimum of 8.75 to 10 hours per day. They also submitted testimony from a former Collier scheduler who testified that she strove to use SRNAs to reduce the number of CRNAs needed for the schedule, and that if SRNAs had not been scheduled, Collier would have needed CRNAs to cover their shifts.

The defendants responded by presenting evidence that schedules are actually "living document[s]," which are subject to frequent change up to the last minute before a shift starts. Some physicians testified that the SRNAs were more often a burden than a benefit—in part, because "the learning process impedes the actual delivery of anesthesia"—and that certain surgeons and hospital locations refused to permit students in the operating room. The defendants also presented evidence that Collier could adequately meet its patient safety and legal obligations without using SRNAs or incurring additional personnel costs, and that Collier actually lost money due to the time spent training SRNAs.

The district court granted summary judgment to the defendants and the SRNAs appealed, claiming that the court had improperly declined to follow the DOL's six-factor test and that summary judgment was precluded because of the existence of genuine issues of material fact.

The Eleventh Circuit's Decision

The Eleventh Circuit observed that the DOL's six factors did little more than reduce the very specific facts of the Supreme Court decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639 (1947), to a rigid test. The court also noted that trying to apply the facts of the nearly 70 year-old *Portland Terminal* case to the facts at issue here "is like trying to use a fork to eat soup." Indeed, the trainees at issue in *Portland Terminal* were participants in a seven- or eight-day practical training for prospective yard brakemen. Participants were not guaranteed a job upon completion, but were required to successfully complete the course to be eligible to serve as brakemen. Portland Terminal effectively used the program to create a ready workforce pool for itself. The difficulty in analogizing those facts to a case involving long-term, state-mandated clinical internships designed for academic credit and professional certification is clear.

Accordingly, in *Collier*, the Eleventh Circuit adopted "an application of *Portland Terminal*'s 'primary beneficiary' test tailored" for the specific internship program at issue. In determining whether the employer or unpaid intern is the primary beneficiary of the program, the appellate court endorsed a seven-factor "non-exhaustive set of considerations," first articulated by the Second Circuit Court of Appeals in *Glatt v. Fox Searchlight Pictures, Inc.* Under the *Glatt* test, no one factor is determinative and every factor need not point in the same direction to conclude that a student is not an employee. Instead, courts must weigh and balance all of the circumstances, which may include considerations outside of the seven *Glatt* articulated factors:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Perhaps the most important distinction between the *Glatt* test and the DOL's test is the "primary beneficiary" analysis. The fourth factor of the DOL's test is that the employer providing the training may not derive *any* immediate advantage from the students' or trainees' activity. As the Eleventh Circuit noted, however, such an expectation is no longer feasible. According to the court, "we find it difficult to conceive that anesthesiology practices would be willing to take on the risks, costs, and detriments of teaching students in a clinical environment for extended periods (four semesters, for example) without receiving some benefit for their troubles." "[T]he mere fact that an employer obtains a benefit," the court continued, "does not mean that the employer is the 'primary beneficiary,' of the relationship" and cannot render student interns "employees" for purposes of the FLSA.

Recognizing that some employers may be inclined to maximize their own benefit at the unfair expense of students or trainees, the court suggested a balancing test: Focus on the benefit to the student, but consider whether the manner in which the program is implemented takes unfair advantage of or is otherwise abusive towards the student.

The court did not take a position on whether the SRNAs at issue were "employees," but instead directed the lower court to reassess the facts using the balancing tests articulated in its opinion. The Eleventh Circuit's opinion, and the balancing tests it articulated, will be well-received by employers with academic or clinical internship programs, many of whom may have found it difficult, if not impossible, to establish that they derived no immediate advantage from such programs. The opinion is a welcome signal that the courts are

beginning to recognize the need to more carefully balance the inherent complexities of long-term internship programs with the requirements of the FLSA.

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