A New And More Flexible Approach To Internship Programs

Insights
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Class action lawsuits filed by interns who claim they should be classified as employees have proliferated over the last few years. In these types of cases, a large number of interns have argued that they were actually entitled to be paid wages under federal and state laws.

The success they have enjoyed stems from a rising concern that unpaid interns are becoming the modern-day equivalent of entry-level employees, performing many of the same duties as paid workers – except that in many cases, of course, the interns are working for free.

Labor Department's Hardline Position
Not surprisingly, the U.S. Department of Labor (USDOL) takes a very strict approach to this issue. Following a test established by a 1947 Supreme Court decision, the USDOL evaluates internship programs using a six-factor test that requires all prongs to be met for an unpaid internship to be considered lawful. The test requires that:

- the internship must be similar to training provided in an educational environment;
- it must benefit the intern;
- the employer cannot receive any immediate advantage from it;
- the intern does not displace any regular employees;
- the intern will not necessarily be entitled to a job at the conclusion of the internship; and
- the intern must understand there is no entitlement to wages.

Federal Courts Shifting Their Analysis For The Better
The USDOL's test has recently been under fire from both the 2nd and 11th Circuit Courts of Appeal, which have each adopted a more flexible approach to evaluating such claims. These federal appellate courts disregard the Labor Department's rigid test, finding it not well-suited for modern internship programs.

This is especially welcome news in the healthcare industry, where internships are here to stay. Those who wish to advance in the healthcare field in the United States must participate in clinical trainings in order to obtain academic degrees, professional certifications, and necessary licensures.

The recent 11th Circuit decision in *Schumann v. Collier Anesthesia, P.A.*, which adopted the test outlined just a few months earlier by the 2nd Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, provides a particularly helpful guide for healthcare employers to use in evaluating their internship programs.

Before examining this decision, it's important to note that they only extend to intern classification cases brought under the federal Fair Labor Standards Act (FLSA), and that they only cover employers in Connecticut, New York, Vermont, Alabama, Florida, and Georgia – for now. Cases brought under state wage and hour law in these jurisdictions may follow the USDOL's test or their own state law precedent. Further, other circuits and states may utilize a more narrow approach.

Still, these cases may signal a trend that courts are more willing to recognize that the landscape has changed, and the hope is that they can be used as persuasive authority for employers in other jurisdictions.

Internship Program Leads To Litigation

In *Schumann v. Collier Anesthesia*, 25 former student-registered nurse anesthetists brought a class action claim against both the anesthesiology clinic where they were interning and the college where they were attending a master's degree program to become certified registered nurse anesthetists. They each claimed to be entitled to compensation for work they performed in connection with a clinical curriculum.

The curriculum required the students to work approximately 40 hours per week in an anesthesia practice, and successful completion of the program was required by the state before the students could obtain their degrees and be certified and licensed.

Before the case could even get to trial, the judge applied the USDOL's six-factor test and ruled in favor of the employer and college. The judge concluded that the students were not employees and not entitled to any compensation**.**

The plaintiffs appealed to the 11th Circuit Court of Appeals, which decided to send the case back to the trial court. The appeals court wants the internship program to be reexamined under a new standard, which the college and anesthesia practice believe will make it even easier for the trial court to rule in their favor.

While the defendants have to sweat out a final decision (and possibly another appeal), the battle they have been waging has already resulted in a more fair and realistic legal test that will benefit all healthcare employers.

A New And More Flexible Standard

This new approach requires that any court examining an internship program weigh the following non-exhaustive factors in coming to a conclusion:

1. Does the intern clearly understand that there is no expectation of compensation?
2. Does the internship provide training that would be similar to that given in an educational environment (including clinical and other hands-on training provided at educational institutions)?
3. Is the internship tied to the intern's formal education program by integrated coursework or academic credit conferred?
4. Does the internship accommodate the intern's academic commitments by corresponding to the academic calendar?
5. Is the internship's duration limited to the period during which it provides beneficial learning to the intern?
6. Does the intern's work complement, rather than displace, the work of paid employees, while also providing significant educational benefits to the intern?
7. Do the intern and employer understand that there is no entitlement to a paid job at the internship's conclusion?

Benefits Of The New Test

Many of these factors look familiar because this new test overlaps greatly with the USDOL six-factor test. Significantly, however, under this new approach, the fact that the employer receives benefits from the internship program no longer means an automatic finding that the intern should be treated as an employee. Under a strict application of the USDOL's test, this would have arguably led to such a negative finding.

This new test concedes that, without a more flexible approach, healthcare employers such as anesthesiology practices would not be willing to take on the risks, costs, and detriments of teaching students in a clinical environment for extended periods without receiving some benefit for their troubles.

Further, this new test recognizes that the modern internship is often a requirement in the healthcare industry for academic credit and professional certification and licensure. In other words, the fact that students need to seek the internships drives the need for them to exist.

Finally, the test acknowledges that society has decided that clinical internships are necessary and important. After all, licensure and certifications laws require this work in order for students to advance in their field and become treating providers.

In sum, this new test makes it easier for healthcare employers to prove that their internship programs are not actually harboring employees in disguise.

Five Steps To Compliance

This decision provides important guidance to healthcare employers. Here are five practical steps you

can take to stay on the right side of the law. First, it is important that your internship program have a formal supervision and evaluation component. In the *Schumann* case, the school required daily evaluations by both the student and the certified registered nurse anesthetists or anesthesiologists who supervised the student.

The clinical courses required end-of-semester self-evaluations prepared by the student and summative semester evaluations completed by the clinical instructor or coordinator. This proved critical in the court's analysis, so you should follow its guidance.

Second, your payroll costs should remain substantially unchanged when you have an internship program. Using an internship program to reduce your payroll costs (for example, to reduce the number of paid employees performing certain tasks) will greatly increase the risk that a court will find you primarily benefitting from the interns, rather than the other way around.

Third, your internship program should generally accommodate the intern's academic commitment by corresponding to the student's academic calendar.

Fourth, your program should be somewhat of a burden. In the *Schumann* case, an anesthesiologist testified that he viewed the students as more of a burden than a benefit because, among other things, the learning process impeded the actual delivery of anesthesia.

Additionally, he testified that allowing students to participate in the administration of anesthesia under his license created an added stress that would not otherwise be present. This means that you should not view your interns as your employees, but rather as students you are teaching, and you should treat them as such.

Finally, this case provides a reminder that internship programs should not be used as a way to employ free labor.

These cases and situations are fact-intensive, and you should review your internship programs in light of whatever laws apply in your jurisdiction. You should consult with your labor and employment attorney if you have questions as to what test applies in the states where you do business.

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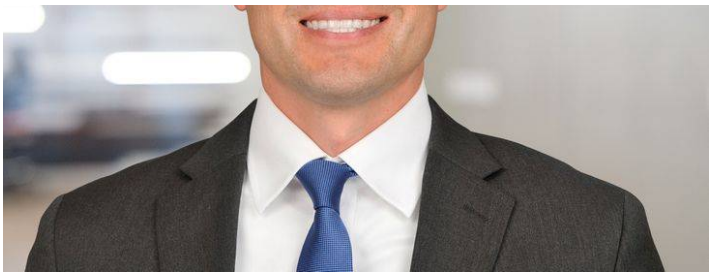

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