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What's In It for Me: The New Economic Reality of Student Internships

by Mark E. Lupe and Susan M. Marcy[1]

If attendance were solely for the trainee's benefit, the company would not conduct the [training] except as a matter of altruism or public pro bono. *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982).

With these words the court in *Donovan v. American Airlines, Inc.* recognized an economic truth: in the absence of an altruistic motive, a training site will only accept a student trainee in an internship if there was some business advantage.[2] But what should have been obvious, found itself at odds with a 6 factor test developed by the United State Department of Labor ("DOL") which required, among other things, that the training site derive no "immediate advantage" from the presence of the student. With the increase of internships and clinical trainings, the tension between the six factor test and the economic reality of training sites reached a point where two United States Circuit Courts have now rejected the mechanical application of the six factor test in favor of a new seven factor test.

Whether a student in an internship is performing work within the scope of an educational institution's program as a student **or** is acting as an unpaid worker in violation of the Fair Labor Standards Act ("FLSA") has been resolved in the past through reference to the six factor test developed in a series of sub-regulatory guidance documents by the DOL. The guidance documents find early expression in Wage and Hour Division field operations handbook and in 2010, lead to the development and publication by the DOL of *Internship Programs Under the Fair Labor Standards Act* (2010).[3] The DOL's six factor test was developed using the holding and facts of the Supreme Court case of *Walling v. Portland Terminal Company*.[4]

However, as the 11th Circuit in *Collier Anesthesia* observed:

> [The Department of Labor] has no more expertise in construing a Supreme Court case than does the Judiciary. *Portland Terminal* is nearly seven decades old and, in our view, addresses a very different factual situation involving a seven-or-eight-day, railroad-yard-brakeman training program offered by a specific company for the purpose of creating a

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Message from the Chair

by Pat Lott

Welcome to 2017. We are definitely living in interesting times, and my hope is that the students of Florida and our educational institutions will benefit from whatever is in store for us.

I am pleased that the Education Law Journal is hitting the streets again, thanks to our Journal Subcommittee, Jason Fudge, Mark Lupe, Mike Dyer, Bob Harris, Paul Carland, and Steve Schroeder. Kudos!

The Education Law Committee met via webinar October 19, 2016. Highlights of the meeting were a report from the Education Law Certification Committee, an overview of CLE opportunities for the 2016/2017 year from Vice Chair Rob Batsel, and two lively CLE presentations. Brian Rubenstein with Cole, Scott & Kissane brought us up to date about the emerging topic of transgender and its legal implications at educational institutions in Florida, and Xinning Shirley Liu spoke about compliance with the new Law on the Management of Foreign Non-Governmental Organization Activities in Mainland China.

As you may know, there is a separate Education Law Certification Committee of the Florida Bar. The members of the Committee work to establish standards for certification and for administration of the annual Education Law Certification Exam. Mr. Ned Julian, an attorney practicing in Sanford, is chair of the Certification Committee this year. At the October 19, 2016, meeting, Ned described several significant amendments that the Committee has recommended to Florida Bar Rule 6-27.3. Rule 6-27.3 sets minimum standards for certification in education law. The amendments include a change to the exam waiver provision and a change that permits certain areas of experience common to education lawyers, such as preparation of institutional policies, presentation of training, and advising collective bargaining teams, to be considered in granting certification. Generally, these changes are intended to align the certification requirements with current practice responsibilities of attorneys practicing in the area of education law. The proposed amendments to Rule 7-27.3 have been submitted for approval by the necessary Bar committees and upon approval will be submitted to the Board of Governors for final approval. Approval is expected in time for the submittal of applications in July-August 2017 and for the 2018 exam.

I hope you will join us at the Winter Meeting of the Florida Bar at the Gaylord Palms Hotel and Convention Center in Kissimmee January 25-28, 2017. The Education Law Committee will meet on Friday afternoon, January 27, commencing at 1:00 p.m. We expect exciting and timely CLE presentations after the short business meeting. Jennifer Rusie from Ogletree Deakins will bring us the latest and greatest on website accessibility, and the team of Cathy Beveridge and Amanda Chafin from Buchanan Ingersoll will address the implications of marijuana in school and on campus, with a specific focus on the issues affecting the employer.

Best wishes for a happy and prosperous New Year!

Pat Lott
Chair, Education Law Committee

Good News-Bad News: Contractual Indemnification by Public Universities, Colleges, and School Districts

The Good News is you may contractually agree to these provisions.
The bad news is the Florida Supreme Court has held that they are now enforceable.

by Mark E. Lupe and Susan M. Marcy[1]

Almost all practitioners working in education law in the Florida public sector have faced demands by vendors and other contracting parties for indemnification by our clients. In rejecting these demands, public sector counsel would confidently point to authority such as AGO 2000-22, which had correctly interpreted then existing case law, to conclude that a public body may not agree to indemnify another party to a contract or alter the state's waiver of sovereign immunity such that the county's liability may be extended beyond the financial limits established in section 768.28, Florida Statutes.

Public sector practitioners were used to modifying contractual indemnification clauses by adding words like: "to the extent permitted by law" and "without waiving any defense available under Section 768.28 Florida Statutes" - confident that the added words would shield their clients from limitless financial exposure under contractual indemnification clauses. Both parties met their objectives – the public body being able to conclude a contract for desired goods or services and the counterparty receiving a contractual agreement of indemnification (albeit of very questionable value).

All of that changed on April 6, 2016, when the Florida Supreme Court held that the Florida Department of Transportation (DOT) ***could*** be held liable under a contractual indemnification agreement.[2] Moreover, the extent of liability would be controlled by principles governing contractual liability without consideration of the limitations of sovereign immunity.

Historically, the Florida Supreme Court has held that the defense of sovereign immunity is not available to protect a public agency from a cause of action arising from its breach of an express written contract for which it had statutory authority to enter.[3]

> Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless. ***We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.*** (emphasis added).[4]

Thus, more than twenty years ago, it became clear that a public agency ***with capacity to contract*** could be held liable for damages for breach of the contract and that sovereign immunity was not a defense to a damage award in such a contract action. However, public bodies could still not contractually agree to indemnify a counterparty against damages arising out of tort beyond the limits set forth in Section 768.28 Florida Statutes.[5] Under Article X, Section 13 of the Florida Constitution, only the Legislature can waive the State's sovereign immunity. The Legislature created a limited waiver of the state's immunity in tort by enacting section 768.28, Florida Statutes. The Attorney General has recognized this limitation by stating:

> It is well settled that section 768.28, Florida Statutes, constitutes the only manner in which the state's immunity in tort has been waived. While it has been judicially recognized that a legislative grant of the power to contract constitutes a waiver of the state's immunity to be sued in contract, there have been no decisions that such authority would allow a political subdivision to contract away its immunity in tort beyond that provided in section 768.28, Florida Statutes. (Citations omitted).[6]

The tension between the statutory authority to contract and the restriction on indemnification was partially resolved in a 2005 case examining an indemnity agreement between a municipal agency, the Kissimmee Utility Authority ("KUA"), and CSX Transportation, Inc. ("CSX").[7] In *American Home Assurance*. KUA had entered into a grade crossing agreement with CSX which required KUA to "defend, indemnify, protect, and save [CSX] harmless from and against" certain designated losses and casualties. The crossing agreement also required KUA to indemnify any company whose property was operated by CSX at the railroad crossing."[8] The Court's analysis of the enforceability of the contractual indemnification clause turned on the

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historical distinction between state, county, and municipal government for purposes of sovereign immunity. While state and county government enjoyed complete immunity prior to the enactment of Section 768.28, Florida Statues, the same was not true of municipalities. Municipalities only enjoyed limited sovereign immunity at the time §768.28 went into effect.[9] Consequently, the Court held that municipalities had both the authority to contract and to indemnify private parties without limit because the indemnification agreements did not conflict with the limited waiver of sovereign immunity found in Section 768.28, Florida Statutes.[10]

Whether the state could contractually waive sovereign immunity through an indemnity clause was resolved by *Schwefringhaus*. In *Schwefringhaus,* the Florida DOT appealed a judgment awarding $502,462.22 to CSX as indemnity for the amount of a settlement and related attorneys' fees paid by CSX to resolve a negligence claim arising out of a grade crossing accident.[11] The indemnity clause stated that, "The [State Road Department] will indemnify and save harmless [CSX's predecessor in interest] from and against all loss, damage or expense arising or growing out of the construction, condition, maintenance, alteration or removal of the highway hereinabove described."[12]

The DOT maintained that "the indemnity clause required a separate statutory authorization because it was essentially a waiver of sovereign immunity, which only the Legislature has the power to waive."[13] However, the Court explained that the instant case and *American Home* turned on whether the indemnity clause was 'part and parcel' of the 'fairly authorized' crossing agreement, not based on the clause itself being fairly authorized."[14] Therefore, because the indemnity provision was "part and parcel" of the statutorily authorized crossing agreement, DOT could not invoke sovereign immunity to avoid its obligations under the crossing agreement.

In light of *Schwefringhaus*, consider the meaning of this often used contractual provision:

> To the extent permitted by law and without waiving any defense arising under Section 768.28, Florida Statutes, the College agrees to indemnify and hold the Vendor, its officer's, agents, and employees harmless from any and all loss, cost, liability, and expense (including attorney's fees) arising, growing out of, or in any way connected with, any other claims or litigation now or hereafter asserted with respect to any injury or damages resulting from or arising out of any alleged defect in the work, goods, or materials ordered herein or by reason of the design or construction thereof, and agrees to reimburse Vendor for any and all expenses (including attorney's fees) in connection thereof.

Hasn't *Schwefringhaus* made the underlined language meaningless?

Certainly the first response to a contractual indemnification clause is to strike it. However, there are certainly circumstances where it is not possible to simply strike an indemnity clause. Perhaps, in such circumstance, an alternative would be to limit the financial exposure under the indemnity clause. For example:

> To the extent permitted by law and without waiving any defense arising under Section 768.28, Florida Statutes, the College agrees to indemnify and hold the Vendor, its officer's, agents, and employees harmless from any and all loss, cost, liability, and expense (including attorney's fees) which may occur during or which may arise out of the performance of this Agreement. The indemnity obligation of the College for actions sounding in tort is limited in accordance with the provisions of section 768.28, Florida Statutes, to $200,000 for any claim or judgment by any one person and to $300,000 for all claims or judgments, or portions thereof, arising out of the same incident or occurrence, when totaled together inclusive of attorney's fees and costs. The terms claim and judgment, as used herein, are inclusive of attorney's fees and costs.

Alternatively:

> The indemnity obligation of the College for actions arising out of the performance of this agreement shall not exceed $XXX,XXX, which shall be calculated as the total for all claims or judgments arising out of the same incident or occurrence, inclusive of attorney's fees and costs.

Consider also adding language which would provide that there is no obligation to indemnify to the extent that the claim or judgment arises, in whole or in part, out of the acts or omissions of the party to be indemnified or the acts or omissions of their employees or agents.

Today the law is clear that entities with limited sovereign immunity may, by contract, agree to indemnify a counterparty and, moreover, that the financial exposure under such an indemnification agreement is unlimited. It is therefore incumbent upon us as legal counsel to eliminate or carefully define the scope and limits of financial exposure under contractual indemnification clauses. It would also be wise to advise our clients regarding limitations on insurance coverage for contractually assumed liability where such liability would not otherwise exist.

Endnotes:

1 Mark E. Lupe is a 1982 graduate of the University of Toledo College of Law and serves as General Counsel at Florida SouthWestern State College and also served as 2015 – 2016 Chair of the Florida Bar Education Law Committee. Susan M. Marcy is a 1995 graduate of Wayne State University College of Law and serves as Director of Legal and Risk at Florida SouthWestern State College.

2 *Florida Dept. of Transp. v. Schwefringhaus*, 188 So.3d 840 (Fla. 2016).

3 *Pan–Am Tobacco Corp. v. Dep't of Corr.*, 471 So.2d 4 (Fla.1984).

4 *Id.*

5 An excellent example of this reasoning is contained within AGO 2000-22, which concludes:

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GOOD NEWS-BAD NEWS, continued

. . . the county may not agree to alter the state's waiver of sovereign immunity and extend the county's liability beyond the limits established in section 768.28, Florida Statutes. Thus, a county may not enter into an agreement that attorney's fees and costs will be paid to the prevailing party in a dispute arising from a contract to the extent such an agreement alters the limits of liability established in section 768.28, Florida Statutes.

6 *Id.*

7 *American Home Assur. Co. v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).

8 *Id.* at 463.

9 *See,* William N. Drake, Jr. and Thomas A. Bustin, *Governmental Tort Liability in Florida: A Tangled Web,* The Florida Bar Journal, Volume LXXVII, No. 2 (February 2003).

10 *Id.* at

11 *Florida Dept. of Transp. v. Schwefringhaus*, 188 So.3d 840 (Fla. 2016).

12 *Id.*

13 *Id.* at 844.

14 *Id.* 845.

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> labor pool for its own future use. This case, however, concerns a universal clinical-placement requirement necessary to obtain a generally applicable advanced academic degree and professional certification and licensure in the field.[5]

This single quote perfectly captures the growing tension between the role a clinical experience or internship plays in the contemporary higher education environment and the continued mechanical application of the six factor test.

The 1947 *Portland Terminal* case, the defendant railroad company offered railroad-yard-brakeman training program for prospective employees. In determining whether the participants in the brakeman training program were trainees or unpaid employees in violation FLSA, the Supreme Court examined whether the trainee or the railroad company was the "***primary beneficiary***" of the training program. Under the facts of *Portland Terminal* the Court resolved the question by examining whether:

1. The training, even though it includes actual operation of the facilities of the employer, 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.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her 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.

The Supreme Court held that the trainees were not "employees" for purposes of the FLSA and that "[t]he Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees."[6]

In *Collier Anesthesia*, twenty-five former student registered nurse anesthetists sought to recover unpaid wages and overtime under FLSA for their clinical hours that were a prerequisite to obtaining a master's degree. The program of study required students to participate in a minimum 550 clinical cases to complete their education and be awarded their master's degree. The court noted that clinical experience is required by Florida law, the Council on Accreditation, for Nurse Anesthesia Educational Programs, and the National Board of Certification and Recertification of Nurse Anesthetists.[7]

During the course of their clinical experience the students worked long hours without pay, while the individual supervising the students received compensation from health care payors. The students claimed that the compensation demonstrated that the employer was the primary beneficiary of the clinical experience. In response, the *Collier Anesthesia* court stated "[w]e cannot realistically expect anesthesiology practices to expose themselves to these costs by providing students with the opportunity to participate in 550 cases each, without receiving some type of benefit from the arrangement."[8] Instead the court stated, "[i]ndeed, there is nothing inherently wrong with an employer's benefiting from an internship that also plainly benefits the interns."[9]

The court examined the six factors enumerated by the DOL and concluded that they were simply a distillation of the *Portland Terminal* facts into a legal test.[10] Because this test was adopted by the DOL without the benefit of the formal rule making process or adversarial process, the court concluded that it was not persuasive and therefore not entitled to deference.[11]

However, the court recognized that there was a potential for abuse of student interns and sought to fashion a test to discern the primary beneficiary in a relationship where both the intern and the employer may obtain significant benefits. In so doing, the court sought to focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is otherwise abusive towards the student.[12] The court stated that this inquiry struck the proper balance between the needs of a contemporary educational environment and the congressional concerns underlying the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."[13]

In striking this balance, the court adopted the Second Circuit's articulation of "a non-exhaustive set of considerations" for determining the "primary beneficiary" in cases involving modern internships. In particular, the Second Circuit identified the following 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.

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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.[14]

The *Collier Anesthesia* court viewed the Second Circuit's approach as flexible in which:

> ". . . "[n]o one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee...." Rather, courts must engage in a "weighing and balancing [of] all of the circumstances," including, where appropriate, other considerations not expressed in the seven factors. The Second Circuit has described this approach as "flexible" and "faithful to *Portland Terminal,*" reasoning that "[n]othing in the Supreme Court's decision suggests that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace."[15]

As the *Collier Anesthesia* court noted, these seven factors are in some respects mere restatements or expansions on the DOL six factor test. But, conspicuously absent is the old factor four which focused on whether the employer derived an immediate advantage from the activities of the trainees. The court explained that "the training in *Portland Terminal* was so different from a modern internship for academic, certification, and licensure purposes that we do not see how this particular consideration sheds light on the primary-beneficiary analysis here."[16]

The seven factor test thus accommodates the reality of the contemporary internship. By necessity, the contemporary internship will almost always benefit both the internship site and the student. For the student, there is a wealth of practical information to be acquired in the workplace. For the employer, the student intern provides a service which has value, albeit of a lessor value than that of a skilled regular worker. As noted by the *Collier Anesthesia* court, this new balance under the seven factor test accommodates the needs of the student to learn in the workplace while simultaneously guarding against the abuses to which the FLSA was directed.

Endnotes

1 Mark E. Lupe is a 1982 graduate of the University of Toledo College of Law and serves as General Counsel at Florida SouthWestern State College and also served as 2015 – 2016 Chair of the Florida Bar Education Law Committee. Susan M. Marcy is a 1995 graduate of Wayne State University College of Law and serves as Director of Legal and Risk at Florida SouthWestern State College. Susan M. Marcy is a 1995 graduate of Wayne State University College of Law and serves as Director of Legal and Risk at Florida SouthWestern State College.

2 Merriam Webster defines the word "intern" as "an advanced student or graduate usually in a professional field (as medicine or teaching) gaining supervised practical experience."

3 See, DOL Opinion FLSA2004-5NA (http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm); DOL Opinion FLSA2006-12(http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.htm) and, USDOL Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (2010) (https://www.dol.gov/whd/regs/compliance/whdfs71.pdf).

4 *See Schumann v. Collier Anesthesia, P.A.*, __ F.3rd __, 2015 WL 5297260 (11th Cir. 2015), *citing Walling v. Portland Terminal Co.,* 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947).

5 *Schumann v. Collier Anesthesia, P.A.,* 2015 WL 5297260 at *1.

6 *See Walling v. Portland Terminal Co.,* 330 U.S. at 153, 67 S.Ct. at 641.

7 *See Collier Anesthesia,* 2015 WL 5297260 at * 2.

8 Slip opinion at 22, citing, *See Am. Airlines*, 686 F.2d at 272 ("if attendance were solely for the trainee's benefit, the company would not conduct the [training] except as a matter of altruism or public pro bono").

9 Slip opinion at 23.

10 The precise words of the court are: "[j]ust as it is clear that the Handbook refers to *Portland Terminal* in its introduction to the six factors it sets forth, it is equally plain from reviewing the six factors that the Handbook derived them by simply reducing the facts of *Portland Terminal* to a test." *Collier Anesthesia,* 2015 WL 5297260 at * 2.

11 "At most, [the DOL test} is entitled to *Skidmore* deference, meaning that the deference it is due is "proportional to its 'power to persuade.'" *Collier Anesthesia*, 2015 WL 5297260 at *7 (citing *United States v. Mead Corp.*, 533 U.S. 218, 235, 121 S. Ct. 2164, 2175-76, 150 L.Ed.2d 292 (2001))(citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944)).

12 Ibid.

13 Slip opinion at 12, citing, Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 707 n.18, 65 S. Ct. 895, 902 n. 18 (1945).

14 *Glatt v. Fox Searchlight Pictures, Inc.,* 791 F.3d 376, 384 (2d Cir.2015).

15 *Collier Anesthesia,* 2015 WL 5297260 at *10 (citing *Glatt*, 791 F.3d at 384–85.

16 *Collier Anesthesia,* 2015 WL 5297260 at *11.