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Doctoral Psychology Interns: Are They Employees Under The FLSA? By Russell R. Bruch, Esq.¹

Introduction

Over the past several months, there have been multiple developments in wage and hour law relevant to doctoral psychology interns. Two key developments in this area are (1) a number of courts issuing decisions refining the test used to determine whether an intern is an employee and (2) the United States Department of Labor (“DOL”) issuing regulations that increase the minimum salary level required to qualify for the “white collar” overtime exemptions. Given this changing legal landscape, programs that engage doctoral psychology interns should reassess whether those interns may be properly classified as nonemployees who are not subject to the Fair Labor Standards Act (“FLSA”) and applicable state wage and hour laws. If interns *are* treated as employees, the internship programs should determine whether the interns must be treated as non-exempt subject to overtime or can qualify as exempt from minimum wage and overtime requirements under the DOL’s new regulations requiring that most exempt employees receive an annual salary of at least \$47,476. The consequences of getting these classifications incorrect can be significant because if an internship program is found to have misclassified interns, there can be substantial wage and hour liability, tax liability, and potential benefits liability.

The below article discusses the current legal landscape with regard to determining whether doctoral psychology interns are employees, offers tips that can be used to support an argument that interns are properly classified as nonemployees, and

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provides information on potentially applicable FLSA overtime exemptions if the interns are deemed employees.²

Legal Standard

The DOL's Six-Factor Test

The FLSA is the federal law that governs whether an individual is entitled to be paid the minimum wage and overtime wages. If an individual is not an employee as defined by the FLSA, the individual does not need to be paid the minimum wage or overtime wages when he or she works more than 40 hours in a week.³

The DOL is the federal agency responsible for enforcing the FLSA. In evaluating whether an intern is an employee under the FLSA, the DOL applies a six-factor test. Those factors are whether:

1. 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;
2. the internship experience is for the benefit of the intern;
3. the intern does not displace regular employees, but works under close supervision of existing staff;
4. 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;
5. the intern is not necessarily entitled to a job at the conclusion of the internship; and
6. the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

See DOL Wage and Hour Division Fact Sheet #71 (April 2010). In applying these factors, the DOL has made it clear that students who are engaged in activities pursuant

² This article is intended as a general discussion of relevant factors. It does not provide legal advice or conclusions. Each institution with an intern program should individually evaluate the status of its interns under the FLSA with competent legal counsel experienced in wage and hour law.

³ This article primarily addresses the federal FLSA. Many states have their own overtime laws, some of which have been interpreted differently than the FLSA. Accordingly, institutions with intern programs should also evaluate their compliance with any applicable state law.

to a specific degree program typically will not be found to be employees under this test. For example, in guidance issued on May 18, 2016, the DOL stated that it “views graduate and undergraduate students who are engaged in research under a faculty member’s supervision in the course of obtaining a degree as being in an educational relationship with the school. As such, the Department will not assert an employment relationship with either the school or any grantor funding the research. Thus, in these situations, the Department will not assert that such workers are entitled to overtime. This is true even though the student may receive a stipend for performing this research.”⁴

The DOL issued similar guidance in a 1994 Opinion Letter regarding graduate students who are engaged in professional research for a medical institution as part of their pursuit of Ph.D. degrees.⁵ In that Opinion Letter, the DOL explained its understanding that these students would concentrate the majority of their time on conducting research relevant to their dissertation project and specifically explained that the receipt of a stipend did not necessarily mean that these graduate students must be classified as employees. Indeed, the medical program in question specifically stated that the students would not be charged tuition or admission fees and could be eligible to receive a stipend of \$18,000 – \$21,600 per year.

In a subsequent Opinion Letter, the DOL stated:

Where educational or training programs are designed to provide students with professional experience in the furtherance of their education and the training is academically oriented for the benefit of the students, it is our position that the students will not be considered employees of the institution to which they are assigned, provided the six criteria referred to above are met. For example, where certain work activities are performed by students that are but an extension of their academic programs, we would not assert that an employer-employee relationship exists for the purposes of the FLSA. In situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction. Where there is no employment relationship

⁴ See Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act, pp. 8-9, *available at* <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

⁵ DOL Wage and Hour Opinion Letter, 1994 DOLWH LEXIS 55 (June 28, 1994).

under the FLSA, the minimum wage and overtime pay provisions of the FLSA have no application to the interns in question.⁶

The DOL has also applied these principles in factual circumstances particularly relevant to psychology internships. For instance, a university was offering a program to pharmacy students that included a "clinical clerkship and externship" component. The program consisted of lectures, lab work and 16 hours per week of on-site work experience at a hospital pharmacy or community pharmacy. The students paid tuition to the university for this program and earned college credits toward graduation. A pharmacist supervised all of the students' on-site work. The DOL was asked whether the students would be considered employees of the university or the pharmacies under the FLSA (and therefore be entitled to payment of minimum wage and overtime wages). In these circumstances, the DOL concluded that the work in the pharmacies "is of such predominant benefit to the student that, generally speaking, we would not assert that an employer-employee relationship exists. . . ."⁷

In another context, the DOL was asked about the employee status of third-year law school students who participated in a law school clinical program where they provided legal services to indigent persons and obtained clinical experience in representing clients and dealing with legal problems. The DOL held that the program was "part of the educational opportunities provided" and the "training is . . . predominantly for the benefit of the law students." Therefore, the DOL opined that the students were not employees under the FLSA.⁸

That said, the DOL has also made clear that it will scrutinize whether the internship is truly for the predominant benefit of the intern, as opposed to providing a source of relatively inexpensive productive labor for the employer.⁹ If the latter, the intern will be considered an employee covered by the FLSA. A key factor in this analysis whether the internship program is part of a degree program. Indeed, the guidance the DOL issued on May 18th, the DOL made a distinction between research assistants who are working towards a degree and postdoctoral fellows. The DOL stated that postdoctoral fellows are employees, in part, because they are not working towards

⁶ DOL Wage and Hour Opinion Letter, 1996 DOLWH LEXIS 13 (May 8, 1996).

⁷ DOL Wage and Hour Opinion Letter, 1997 DOLWH LEXIS 25 (July 7, 1997). The DOL has noted, however, that "where an individual is serving in an after-graduation internship, an employment relation would certainly exist between the graduate intern and the employing pharmacy." Thus, one of the key elements for the DOL in finding no employment relationship and no FLSA coverage is that the work is predominantly an educational exercise.

⁸ DOL Wage and Hour Opinion Letter, 1967 DOLWH LEXIS 287 (Sept. 13, 1967).

⁹ DOL Wage and Hour Opinion Letter, 2004 DOLWH LEXIS 9 (May 17, 2004).

a degree.¹⁰ The DOL expressed a similar opinion with regard to a nonprofit organization looking to establish a hostel-management training course. The internship would have required the student interns to assist in the daily operations of a youth hostel, check guests in and out, perform maintenance and administrative work, design programming for the hostel, and report to the hostel's manager as their supervisor. The DOL determined that the student interns would be considered employees covered by the FLSA and entitled to overtime wages because "it is apparent [that] the employer derives an immediate advantage from the duties performed by the interns in question."¹¹

In short, the DOL's most recent guidance confirms its prior position that, in general, students who are engaged in an educational program as part of their formal studies will not be considered employees even if the student receives a stipend as part of the degree program.

Recent Court Decisions Regarding Interns

In addition to enforcement actions brought by the DOL, the FLSA also allows individuals to file a suit for wages and overtime in federal court. Although some courts still strictly apply the DOL's six-factor test concerning interns, in recent years many courts have considered a more flexible analysis, respectively looking at whether an internship is for the "primary benefit" of the intern, analyzing the "totality of the circumstances," or reviewing the "economic realities" between the intern and the organization rather than a stricter adherence to use of the 6 factors. For example, the U.S. Court of Appeals for the Second Circuit recently rejected strict application of the DOL's six-factor test in a much-anticipated decision, *Glatt, et al. v. Fox Searchlight Pictures Inc.*, 811 F.3d 528 (2d Cir. 2016). In *Glatt*, the Second Circuit established a new "primary beneficiary" test for district courts to use when determining if interns should be classified as "employees" under the FLSA. The court identified seven nonexclusive factors relevant to this analysis:

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.

¹⁰ See Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act, p.6, *available at* <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>

¹¹ DOL Wage and Hour Opinion Letter, 1994 DOLWH LEXIS 17 (Mar. 25, 1994).

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.

The Second Circuit further stated that this list is nonexhaustive and that no single factor is determinative. Rather, courts should consider these factors as part of a balancing process with other relevant evidence when making classification determinations. The court also explained that this test should not be analyzed in the typical employer-employee fashion as the intern enters the relationship expecting to receive educational or vocational benefits that are not necessarily expected with all forms of employment. Indeed, the court noted, "The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real world setting."¹² The court also stated that the question of an intern's employment status is a "highly context-specific inquiry."¹³

Although the Second Circuit was the first appellate court to establish this new primary beneficiary analysis concerning intern classification, numerous other courts at the appellate and district court levels, have since relied on this test when making classification determinations regarding either interns or other nonintern trainees.¹⁴

¹² *Glatt*, 811 F.3d at 537.

¹³ *Id.* at 538.

¹⁴ See, e.g., *Berger v. Nat'l Collegiate Athletic Ass'n*, No. 14-CV-1710, 2016 WL 614365 (S.D. Ind. Feb. 16, 2016) (holding that student-athletes are not employees and listing the *Glatt* primary beneficiary factors as support for the proposition that the DOL test is outdated); *Hollins v. Regency Corp.*, No. 13-CV-07686, 2015 WL 6526964 (N.D. Ill. Oct. 27, 2015) (adopting the *Glatt* primary beneficiary factors and explaining that in the absence of Seventh Circuit authority, the *Glatt* factors shed "substantial light on the pertinent economic realities of the relationship shared by clinical students and their schools.").

The Eleventh Circuit's recent decision in *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015), is particularly illustrative. In *Schumann*, the plaintiffs were former student registered nurse anesthetists who attended a master's degree program with the goal of becoming certified registered nurse anesthetists. During the course of their study, they participated in a clinical curriculum, which, under Florida law, was a prerequisite to obtaining their master's degrees. The students sought to recover unpaid wages and overtime under the FLSA for their clinical hours. In assessing the facts, the Eleventh Circuit stated that the *Glatt* primary beneficiary factors should be used in determining whether the students were employees. *Id.* at 1211. Although the Eleventh Circuit remanded the case back to the district court to ultimately decide whether the students were employees, the Eleventh Circuit noted that a modern internship program warrants a flexible approach in evaluating who primarily benefits from the program:

[A]s we have explained, the modern internship as a requirement for academic credit and professional certification and licensure is very different [from traditional trainee programs]. For starters, the students seeking the internships—as opposed to a particular company's business requirements—drive the need for the internships to exist. Second, licensure and certification laws provide evidence that we as a society have decided that clinical internships are necessary and important. Third, 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. As we have further noted, though, the mere fact that an employer obtains a benefit from providing a clinical internship does not mean that the employer is the "primary beneficiary" of the relationship. Therefore, we cannot see how consideration of whether the employer gains an "immediate advantage" from an internship, in and of itself, brings us any closer to resolving who the primary beneficiary of the relationship is.

Id. at 1213. In closing, the court stated:

In applying the factors to ascertain the primary beneficiary of an internship relationship, we caution that the proper resolution of a case may not necessarily be an all-or-nothing determination. That is, we can envision a scenario where a portion of the student's efforts constitute a *bona fide* internship that primarily benefits the student, but the employer also takes unfair advantage of the student's need to complete the internship by making continuation of the internship implicitly or explicitly contingent on the student's performance of tasks or his working of hours well beyond the bounds of what could fairly be expected to be a part of

the internship. For example, in the context of an internship required for an academic degree and professional licensure and certification in a medical field, consider an employer who requires an intern to paint the employer's house in order for the student to complete an internship of which the student was otherwise the primary beneficiary. Under those circumstances, the student would not constitute an "employee" for work performed within the legitimate confines of the internship but could qualify as an "employee" for all hours expended in painting the house, a task so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship.

Id. at 1214-15.

In *Benjamin v. B & H Education, Inc.*, No. 13-CV-04993, 2015 WL 6164891 (N.D. Cal. Oct. 16, 2015), the plaintiffs were cosmetology students. To become licensed cosmetologists in California or hair designers in Nevada, students must receive hundreds of hours of clinical training. The students sued the cosmetology school seeking compensation for the time spent in clinics where they performed hair styling and provided other services to paying customers. In analyzing these facts, the court adopted the Second Circuit's rationale in *Glatt* and explained that under the primary beneficiary test, a court must "look at all the circumstances to determine whether the relationship chiefly benefits the student or the entity for which the student is working." *Id.* at *1. The court further stated that to overcome a motion for summary judgment, the students must show that the educational component of the clinic was relegated to secondary status. However, because the interns only asserted vague allegations concerning the lack of instruction they received, the fact that they completed menial tasks while helping the cosmetology clinic earn profits was not sufficient to withstand summary judgment. *Id.* at *3.

Nonetheless, even under the primary beneficiary analysis, "courts have found trainees to be employees when the employers' training consists merely of supervising trainees as they carry out employees' duties." *Reich v. Parker Fire Prot. District*, 992 F.2d 1023, 1028 (10th Cir. 1993). *Marshall v. Baptist Hospital*, 668 F.2d 234 (6th Cir. 1981), is instructive. In that case, the hospital was part of a training program for X-ray technologists. Completion of the program was an important factor in the students' ultimate ability to obtain certification as radiologic technologists ("RTs"). The students worked many regular hours in the hospital, were given "compensatory time" and assigned to evening shifts on weekends and holidays. Several of the hospital's 10 X-ray rooms were staffed solely by students (without a supervising RT) and some first-year trainees were shown how to perform X-ray procedures by other trainees. Further, many trainees "found themselves working alone or with another trainee because of the constant reassignment of both RTs and trainees to rooms or areas where they were most needed." *Id.* at 236 (internal quotations omitted). Based on these and other factors, the court concluded that "within a relatively short period of time the trainees became functioning members of the X-ray Department, performing all duties required of

them in a fashion that displaced regular employees and under conditions in which the hospital obtained a substantial economic benefit from their services.” *Id.* In light of these factors, the court concluded that the hospital was the primary beneficiary in the relationship and that the “trainees were short-changed educationally.” *Id.* As such, the trainees were considered employees for purposes of the FLSA.

In short, although the specific test used by courts to determine whether an intern should be classified as an employee eligible for minimum and overtime wages varies slightly (as demonstrated in these examples), there appears to be a growing consensus across jurisdictions that this inquiry involves a flexible test that looks at all applicable factors and the individual facts pertaining to a specific internship program rather than simply applying the rigid DOL six-factor test to determine employee status.

Psychology Intern Programs And Accreditation Requirements

Separate from the legal standard applicable to intern status, the American Psychological Association (“APA”) has approved Standards of Accreditation for Health Service Psychology (“APA Standards of Accreditation”), which provide details on how internship programs must operate to qualify as accredited programs.¹⁵ The APA Standards of Accreditation explain that the majority of psychology interns engaged in internship programs are concurrently pursuing degrees, have largely completed their coursework, and undertake an internship at a hospital or clinic as the final or close-to-final academic step in obtaining their degree. Indeed, completing such an internship is required in order for the student to receive his or her doctoral degree in an APA accredited program and interns have usually completed several years of post-undergraduate academic study prior to participating in the internship. The APA Standards of Accreditation identify multiple hallmarks of internship programs compliant with an accredited program, including:

- The internship “offers education and training in psychology that prepare interns for the practice of health service psychology.”¹⁶

¹⁵ Standards for Accreditation for Health Service Psychology, American Psychological Association (Feb. 22, 2015), *available at* <http://www.apa.org/ed/accreditation/about/policies/standards-of-accreditation.pdf>. The information contained in the APA Standards of Accreditation provides a basis for understanding how these programs operate and what role interns play in these programs. However, compliance with these materials is not determinative of an intern’s FLSA status. Indeed, the courts and DOL will consider, on a case-by-case basis, the specific circumstances of the intern program and the intern’s responsibilities and goals in assessing whether the intern is an employee under the FLSA

¹⁶ *Id.* at 23.

- The internship program “recognizes the importance of cultural and individual differences and diversity in the training of psychologists” and “has made systematic, coherent, and long-term efforts to attract interns and faculty/staff from diverse background into the program and retain them. Consistent with such efforts, it acts to support and encourage an appropriate learning environment, training, and training opportunities for individuals who are diverse.”¹⁷
- The internship program provides financial support “at a level that is representative and fair in relationship to both the geographic location and clinical setting of the training site.” The program must also “have financial support for faculty/staff and sufficient and dependable training activities for the duration of the year or years of the contract with interns.”¹⁸
- The internship program has adequate training and educational resources, including “training materials, equipment, and access to the current knowledge base in the profession, including access to appropriate technology and resources to stay current with the scholarly literature.”¹⁹
- The internship program has formal written policies concerning “intern recruitment and selection, any required doctoral program preparation and experiences, administrative and financial assistance, requirements for successful internship performance (including expected competencies and minimal levels of achievement for completion); intern performance evaluation, feedback, retention, and termination decisions; identification and remediation of insufficient competence and/or problematic behavior, which shall include necessary due process steps of notice, hearing, and appeal; grievance procedures for interns including due process; supervision requirements; maintenance of records; and documentation of nondiscrimination policies and operating conditions and avoidance of any actions that would restrict program access or completion on grounds that are irrelevant to success in graduate training or the profession.”²⁰
- The internship program should have “Faculty/staff members [that] serve as appropriate professional role models and engage in actions that promote interns’ acquisition of knowledge, skills, and competencies consistent with the program’s training aims.” There also are numerous requirements for supervisors to closely monitor intern progress, provide

¹⁷ *Id.*

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 24.

²⁰ *Id.*

feedback, and ensure the learning goals of the internship program are met.²¹

- The internship program must train interns to demonstrate proficiency in multiple industry-wide core competencies, including: research; ethical and legal standards, individual and cultural diversity; professional values, attitudes, and behaviors; communication and interpersonal skills; assessment; intervention; supervision; and consultation and interprofessional/interdisciplinary skills.²²
- “The program must follow a logical training sequence that builds on the skills and competencies acquired during doctoral training.”²³
- The internship program’s “primary training method must be experiential (i.e., service delivery in direct contact with service recipients) and include sufficient observation and supervision by psychologists to facilitate interns’ readiness to enter into the general practice of psychology on training completion.”²⁴
- “Training for practice must be sequential, cumulative, and graded in complexity in a manner consistent with the program’s training structure.”²⁵
- “The program must demonstrate that intern service delivery tasks and duties are primarily learning oriented, and training considerations take precedence over service delivery and revenue generation.”²⁶
- Supervision must be regularly scheduled and interns must receive at least 4 hours of supervision per week.²⁷

Application of the FLSA to Doctoral Psychology Intern Programs

Whether a psychology intern will be considered an employee will depend on an evaluation of the factors both the DOL and courts have identified in their respective tests for employee status. The following is a discussion of the *Glatt* seven-factor test,

²¹ *Id.* at 25.

²² *Id.* at 26.

²³ *Id.* at 27.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

which largely mirrors the 6 factor test that used by the DOL, as applied to psychology intern programs that follow the APA Standards of Accreditation.

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.

Although the APA Standards of Accreditation state that one aspect of a qualifying internship program is the provision of financial support, which arguably conflicts with this factor, the Standards do not dictate the specific form this financial support must take. As described above, the DOL has repeatedly stated that graduate students engaged in clinical/research programs may be provided a stipend without them being considered employees. Therefore, to the extent the financial assistance provided to a doctoral psychology intern consists of a stipend, as opposed to hourly wages, such appears to mitigate the risk of this factor weighing in favor of employee status. Moreover, under the primary beneficiary test no one factor is determinative. *See Glatt*, 791 F.3d at 384 (“No 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 . . .”).

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.

This factor dovetails with the APA Standards of Accreditation, which require that internship programs offer “education and training in psychology that prepare interns for the practice of health service psychology.”²⁸ The APA Standards of Accreditation specifically require internship programs to provide sufficient “training materials, equipment, and access to the current knowledge base in the profession, including access to appropriate technology and resources to stay current with the scholarly literature.”²⁹ Additionally, the APA Standards of Accreditation state that “[t]he program must follow a logical training sequence that builds on the skills and competencies acquired during doctoral training.”³⁰ Thus, the APA Standards of Accreditation’s focus on training and academic development aligns with legal decisions holding that intern programs should promote an intern’s academic development in order for the intern not to be found an employee under the FLSA.

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.

²⁸ APA Standards for Accreditation, at 23.

²⁹ *Id.* at 24.

³⁰ *Id.* at 27.

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

As these two factors both involve the relationship between the internship and the intern's academic coursework, they are discussed together. The APA Standards of Accreditation state that "[t]he program requires interns to have the equivalent of 1 year of full-time training," which can be completed in either 12 months or 24 months if the training is half-time.³¹ The training also must be structured to support the intern's educational development. Further, throughout the APA Standards of Accreditation, there is an emphasis on the educational aspect of the internship, which even provides that "regardless of a[n internship] program's setting, the program may not constrain academic freedom."³² This emphasis on the use of an internship to complement academic learning is consistent with the legal decisions finding that interns are not employees, and thus there is a clear overlap between these factors and the APA Standards of Accreditation.

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

This factor is intended to prevent the exploitation of interns by an organization that would engage an unpaid intern, provide training and learning opportunities for a limited period, then retain the intern for an extended duration as a part of its workforce without providing compensation or additional development opportunities. Under the APA Standards of Accreditation, there are specific requirements for weekly supervision and the internship must last either one year on a full-time basis or two years on a part-time basis. Throughout the internship, the APA Standards of Accreditation mandate that the program provide numerous support and learning structures, including required weekly supervised hours. Although the APA Standards of Accreditation require an internship program that is longer than the semester-long programs analyzed by most court decisions involving interns, the relevant fact is that the length of the program should be consistent with the requirements of the accreditation program in order for this factor to weigh in favor of nonemployee status of the intern.

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.

APA Standards of Accreditation mandate that psychology interns receive close supervision by faculty who are required to engage in and document actions and procedures designed to encourage timely completion of the internship program. Further, to be an accredited internship, "[t]he program must demonstrate that intern service delivery tasks and duties are primarily learning oriented, and training

³¹ *Id.* at 22.

³² *Id.* at 23

considerations take precedence over service delivery and revenue generation.”³³ This statement strongly suggests that interns do not have any sole or independent responsibility for patients, and that they do not displace employees who are generally focused on revenue-generating tasks. To the extent that interns perform work that arguably displaces staff, they will more likely be considered employees.

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.

To help satisfy this factor, it should be made clear that accepting an internship does not entitle the intern to a post-doctoral position with the program.³⁴ Moreover, the training provided should help the intern develop skills that will be applicable in a variety of settings. Indeed, the APA Standards of Accreditation stress the importance of industry-wide psychology practice-oriented training. These materials specifically require that the internship “program must evaluate the functioning of alumni in terms of their career paths in health service psychology. Each program must provide data on how well the program prepared interns in each of the profession-wide and any program-specific competencies. The program must also provide data on interns’ job placement and licensure status.”³⁵ Thus, provided that the intern understands that he or she is not entitled to post-doctorate employment and that the internship program complies with the APA Standards of Accreditation and provides industry-wide training and development opportunities, this factor should weigh in the favor of the intern not being considered an employee.

Practical Pointers for Psychology Intern Programs

To help demonstrate that an internship program provides a bona fide learning experience that aligns with the factors the DOL and courts examine when making intern classification determinations, doctoral internship programs might want to consider the following suggestions:

1. Treat interns as distinct from employees throughout the course of the internship. The primary goal of the internship program should be for the interns to observe, learn, and participate in structured practical opportunities that prepare interns for the practice of health service psychology. This means the internship program must provide different opportunities than those provided to employees and

³³ *Id.* at 27.

³⁴ Interns can choose to accept a post-doctoral position with the program, but discussions regarding such a position should take place near the end of the internship or at a later date.

³⁵ *Id.* at 28.

interns cannot be expected to just “learn to work.” Psychology doctoral interns should not be thought of as extra employees, but as *students* operating in an independent and educational internship program. This allows interns to gain educational experiences that enrich their personal, professional, and continuing academic development, and also dovetails with the Second Circuit’s opinion in *Glatt* and the cases adopting the *Glatt* primary beneficiary test. Further, by following APA accreditation guidelines internship programs can demonstrate a direct integration to the intern’s academic program. This is strong support for the existence of a bona fide unpaid internship under the law and the APA Standards of Accreditation. Overall, the ability to show a nexus between the skills, training and experiences psychology interns develop during their internships and the academic work and classes they have largely completed before the internship is likely to serve as a powerful indicator that the intern is not an employee.

2. Clearly communicate the expectations and goals of the internship at the outset. As required by the APA Standards of Accreditation, internship providers should ensure that the expectations of the internship program are clearly communicated to and understood by the psychology doctoral interns and the faculty who will supervise and train the interns. These expectations can be communicated through an offer letter, written policy, orientation/trainings, evaluations, and other written materials. One way to accomplish this is to provide interns with an *intern-specific* handbook or guidelines, outlining the goals of the internship, including any applicable policies (which is a requirement under the APA Standards of Accreditation), and providing interns with information that will help them successfully complete the internship and their doctoral studies. These same expectations and goals should be communicated to all intern supervisors, and internship programs should reinforce the understanding that interns are not there simply to supplement the company’s existing workforce.
3. Provide interns with learning experiences and activities. As emphasized in the APA Standards of Accreditation, hands-on learning and practical skill-building is critical to a successful internship program. Therefore, interns should be primarily engaged in experiential learning such that they gain practical experience developing the skills and concepts learned in their academic coursework and are well-suited to begin the general practice of psychology upon completion of the internship. There are several concrete ways internship programs can achieve this:
 - a. Shadowing and “Tag-Along” Activities. Interns should be provided regular and closely supervised practical training opportunities, such as service delivery in direct contact with service recipients. These training sessions should include observation as well as direct participation and the internship program faculty should be on hand wherever possible to provide oversight and feedback following the service delivery. Affording

interns these types of opportunities allows them to observe the practice first-hand, ask questions, learn the skills necessary to succeed when they join the psychology practice themselves, and develop mentoring relationships with employees. Further, provided that these activities are well supervised with sufficient preparation and debriefing following any direct service delivery to patients, interns are not performing the exact same work of an internship provider's full-time employees and thus are not supplanting its existing workforce. Indeed, in many respects, the internship program faculty may be inconvenienced or burdened due to their supervisory obligations. Notably, under both the APA Standards of Accreditation and legal case law, close faculty supervision is required and is indicative of nonemployee status. Thus, internship programs should encourage full-time employees to provide these training and development opportunities for interns, and foster mentor relationships between interns and employees (e.g., by assigning each intern an employee mentor or supervisor).

- b. Intern Projects. To the extent feasible, have interns complete an internship project over the course of the program. For instance, a project can entail giving an intern a hypothetical research issue to solve or provide an analysis of a hypothetical ethical question. Internship programs may even require the intern to prepare a presentation on their project, with a written deliverable, and then present the results to internship program faculty for feedback and constructive criticism. By implementing this type of project, internship programs are helping interns develop analysis, counseling, presentation, writing, and other professional skills, at a cost (of materials and time) to the internship provider and with no direct benefit expected in return.
- c. Intern Journals. Require interns to keep a "journal" or "weekly log" of their activities, describing what they are learning. These materials and practices can bolster the educational focus of the program while also developing a strong written record of the benefits participation in the internship program provides.
- d. Seminars/Lunch and Learns. Another helpful additive to an internship program is to provide interns with periodic presentations or "lunch and learns." Topics may include how to succeed in the psychology industry, real-life stories of how others built their careers, and chats with company management and full-time employees about their work experiences and career choices. Optimally, interns would be provided with a chance to ask questions and network with presenters after the events.
- e. Skills Workshops. One of the best ways to demonstrate both the burden of the internship on the internship program and the benefits received by

the intern is to hold skills workshops. One example, which can be done with little cost (other than time), is to hold a counseling skills workshop. You can ask the interns to participate in role play activities based on real patient scenarios and then have them practice the skills learned in conjunction with a shadowing or direct patient counseling opportunity.

- f. Close Supervision. Finally, as specified in the APA Standards of Accreditation, each intern should be assigned a professional psychologist as a supervisor and/or mentor who is responsible for training the intern and ensuring that all internship program requirements are met. This individual would be ultimately responsible for the intern's patients and cases and the intern would be required to consult with this individual in making treatment or any other client decisions. Another concrete way to improve an internship program is to provide intern mentors with a small budget to take interns to lunch (even if it is just once per month or per semester). This will create yet another way for supervisors or mentors to meet with interns, provide feedback, and discuss potential specialties within the general health service psychology field.
4. Give interns feedback and allow interns to critique the internship program themselves. A formal feedback or evaluation process is helpful in establishing a bonafide internship. We recommend at least a midinternship evaluation, an end-of-internship evaluation (annual evaluations and feedback are required under the APA Standards of Accreditation), and informal feedback throughout the course of the internship. Allowing employees and supervisors to provide interns with feedback and constructive criticism reinforces the educational and skill-building aspect of the program, while simultaneously giving interns a way to voice any concerns, complaints, or suggestions to make the program better.
5. Ensure that the duration of the internship corresponds with interns' academic schedules. The duration of an internship should correspond with the requirements of the APA Standards of Accreditation, which require the equivalent of one year of full-time experiential learning through an internship following the completion of the majority of each student's academic component of the degree program. If an internship extends for a longer period, it is more likely to be viewed as work, particularly if it extends well-beyond the one to two year (for part-time interns) time frame included in the APA Standards of Accreditation. Similarly, there is less risk of a court finding that an internship program is not educational when interns are limited to completing a single internship rather than returning for consecutive years.
6. Audit to ensure that the program as implemented matches its design. It is important to have some procedure in place to ensure that management (including of different units/positions) is actually implementing and running the program in a manner that matches its design and the APA Standards of

Accreditation. The self-evaluation programs are required to complete as part of the process for renewing accreditation may be useful in this regard.

Overview of the Revisions to the FLSA's White Collar Exemptions

If interns do not meet the classification factors discussed above, they likely will be considered employees under the FLSA. The FLSA contains a broad rule that employees are to be paid overtime at a premium rate for all hours worked over 40 in a given workweek. 29 U.S.C. § 207(a)(1). However, this general rule does not apply to employees who are "exempt" under the specific and detailed requirements of the DOL's regulations. 29 U.S.C. § 213. Thus if interns are considered to be employees, an analysis must be made about whether they may then be classified as exempt from overtime requirements.

For most employees to be considered exempt, the employees must be paid a minimum compensation amount per year. On May 18, 2016, the DOL announced that the minimum salary level needed to qualify for the "white collar" exemptions, would increase from \$455 per week or \$23,660 annually, to \$913 per week or \$47,476 annually. This change will go into effect on December 1, 2016. Because many doctoral interns receive stipends equaling less than \$47,476 per year, they do not meet the salary level requirement and would not be exempt from being paid overtime wages, if they are classified as employees.

If, however, an intern were paid at least an amount sufficient to satisfy the salary level requirement, in order to qualify as exempt, the intern would still have to satisfy the applicable duties test. Because psychology interns do not supervise other employees, nor is their primary job duty the performance of work directly related to the management or business operations of their employer or their employer's customers, they are not likely to be exempt under the executive or administrative exemption duties tests. The most applicable exemption for psychology interns appears to be the learned professional exemption, which requires that an individual, among other things, perform work that requires advanced knowledge in a field of science or learning and that requires "the consistent exercise of discretion and judgment." 29 C.F.R. § 541.300 et seq. According to the DOL, the best evidence that an employee's duties require advanced knowledge is possession of the appropriate academic degree. 29 C.F.R. § 541.301(d). A degree is not required in all cases, however, and an argument could be made that an individual who had four to six years of postundergraduate specialized education meets the advanced learning requirement. Additionally, in assessing whether the learned professional exemption applies, the training purpose of the internship would need to be considered in evaluating exempt status. See 29 C.F.R. § 541.705 (noting that trainees are not exempt unless they actually perform exempt duties). Thus, given the highly fact-specific determination required to properly assess whether any of the

white collar exemptions could apply to psychology interns, we strongly recommend that these programs consider obtaining legal advice regarding FLSA applicability.³⁶

Conclusion

In the past several months there have been a number of legal developments that are highly relevant to whether doctoral psychology interns are considered employees entitled to wages and, if so, whether they can qualify as exempt from being paid overtime. By complying with the legal factors identified in this memorandum and the APA Standards of Accreditation, internship programs can make informed decisions to mitigate the risk of intern misclassification. Because the proper classification of interns requires a highly case-specific analysis, intern programs should carefully consider the above factors as applied to their programs and seek legal guidance to help them successfully navigate through these issues.

³⁶ The DOL recently published guidelines specifically to help higher education institutions understand and apply the white collar exemptions. Those guidelines can be found at <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>