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NLRB's General Counsel Seeks to Allow Athletes to Form a Union and Require Universities to Bargain

CCIC MEMBER FORUM

Natale V. DiNatale, Robinson & Cole LLP
Emily A. Zaklukiewicz, Robinson & Cole LLP

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Of Note

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Agenda

- **NLRB General Counsel Memo 21-08**
  - Background & GC Memo 17-01
  - Student Assistants
  - Athletes
  - Undergraduate Student Workers
  - Misclassification & the term “Student Athletes”
- **US Supreme Court’s Decision in *NCAA v. Alston***
- **College Athlete Right to Organize Act**
- **Athletes as Employees under the FLSA**
- **GC Memo 21-08: Undergraduate Student Workers**
  - Kenyon College

GC Memo 21-08

New General Counsel

- Issuance of GC Memo 21-08

What does GC Memo 21-08 do?

- First, and very simply, it reinstates General Counsel Memo 17-01, which had been rescinded in 2018.

What did GC Memo 17-01 do?

- For our purposes, GC 17-01 did two things:

1. Tracked the history of the NLRB decisions dealing with students and the NLRA with respect to “representation” and
2. Established the then GC’s priorities in the Unfair Labor Practice arena for dealing with students

GC Memo 21-08: History

- The history concerning representation is important because representation issues and unfair labor practice proceeding run on two separate tracks.
  - (2016) *Columbia University* overturned *Brown University* and found that student assistants (graduate and undergraduate) are NLRA employees
  - (2004) *Brown University* overturned *NYU*. In *Brown University*, the Board found that graduate student assistants are "primarily students and have a primarily educational, not economic, relationships with their university."
  - (2000) *NYU* had found that graduate assistants meet the definition of an employee under the Act. In *NYU*, the Board rejected the notion that graduate assistants should be denied the Act's protects because their work is primarily educational and instead explained that "obtaining educational benefits from employment is not inconsistent with employee status. In coming to that conclusion, the Board relied on *Boston Medical Center*.
  - (1999) Boston Medical Center found that interns, residents and fellows at a teaching hospital were statutory employees under the Act, event though they were also students.

GC Memo 21-08: History

What was happening between 2016 and Sept, 2021?

- (2017) Recall that GC Memo 21-08 reinstated GC memo 17-01. That happened because GC Memo 18-02 had rescinded GC Memo 17-01.
- (2019) NLRB published a proposed rule that "would have established that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are **not** "employees" within the meaning of the National Labor Relations Act."
- (March 15, 2021) The NLRB withdrew its proposed rule regarding undergraduate and graduate students.

Where does that leave us?

- *Columbia University* (2016) is currently the law.
- An individual "may be both a student and an employee; a university may be both the student's educator and employer."

GC Memo 21-08: “Student-Athlete” Unlawful

What else does GC Memo 21-08 do? GC’s Priority

- GC announces that certain “Players” at Academic Institutions are employees under the NLRA and that “misclassifying such employees as mere ‘student-athletes’ leads them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act.”

Why is the use of the term “student-athlete” illegal?

- Coined to avoid paying workers compensation claims to injured athletes,
- Used to deprive these “employees” of “workplace” rights, and
- Used to perpetuate a myth that athletes pursue sports as a hobby.

GC Memo 21-08: What is an Employee?

What is an Employee? Section 2(3) of the Act:

"The term 'employee' shall include any employee"

- The NLRB embraces an expansive interpretation of the term employee.
- The text of the Act does not exclude or exempt "university employees, football players, or students."
- The Common Law definition of employee is someone who performs services for another and is subject to the other's control or right of control.
- Football players and other athletes or "Players" fit that definition.
- The GC also cites the facts of the case for representation brought by the Northwestern football players. That petition was dismissed without addressing the issue of whether the athletes were employees.
  - Perform a service (play football), which generates revenue.
  - Receive compensation (tuition, etc…), as "consideration" and "payment, is strongly indicative of employee status"
  - Athletes are subject to NCAA control (number of practices, scholarship eligibility, GPA requirements)

GC Memo 21-08: Misclassification

- Citing a recent dissenting opinion by current Board Chairman McFerran in a decision about employees who were misclassified as independent contractors, the GC concludes that the Misclassification of "Players" as student-athletes has a chilling effect on their rights under the NLRA.
- In a footnote (n. 13), the GC also states that she will pursue misclassification cases involving "student assistants, medical interns and non-academic student employees who are led to believe that they are not entitled to the Act's protections . . . ."
- GC Memo is not just about athletes.

GC Memo 21-08: Why Change

Developments Supporting the Coverage under the NLRA

1. *NCAA v. Alston* –Supreme Court decision finding limits on education-related compensation unlawful.
2. Justice Kavanaugh's concurring opinion in *Alston* suggesting that colleges and students could resolve issues around compensation via collective bargaining.
3. College Athlete Right to Organize Act introduced in the Senate by Senators Sanders and Murphy.
4. NIL – Suspension of Name Image Likeness rules, which the GC says makes Players akin to professional athletes.
5. Player activism, such as in the wake of George Floyd's murder and related to COVD-19 related issues, amounts to concerted activity, which should be protected from retaliation.

GC Memo 21-08: Notice & a ULP Charge

GC Announcement – 9/29/21

"Players at Academic Institutions[] are employees … and this memo will notify the public ... that I will be taking that legal position .... I will also consider pursuing a misclassification violation."

ULP Charge Filed – 11/10/21

On November 10th, an unfair labor practice charge was filed against NCAA in Indianapolis alleging that the NCAA "has violated section 8(a)(1) by classifying college athletes as "student-athletes".

ULP Charge

a. Name of Employer The National Collegiate Athletic Association		b. Tel. No. 317-917-6222
		c. Cell No.
		f. Fax. No. 317-917-6888
d. Address *(Street, city, state, and ZIP code)* 700 W. Washington Street P.O. Box 6222 Indianapolis, IN 46206-6222	e. Employer Representative Mark Emmert	g. e-mail
		h. Number of workers employed 1000+
i. Type of Establishment *(factory, mine, wholesaler, etc.)* Member Organization	j. Identify principal product or service	

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Within the last 6 months the above-named employer has violated section 8(a)(1) by classifying college athletes as "student-athletes".

NCAA v. Alston

Generally, a unanimous United States Supreme Court found that the NCAA's rules limiting education-related benefits violate federal antitrust rules.

Why is the case relevant to our discussion today?

Background:

- In the lower court, before the case got to the US Supreme Court, the athletes had also challenged rules limiting undergraduate athletic scholarships and other compensation related to academic performance.
- The lower courts upheld those limitations.
- The athletes chose not to pursue that part of the ruling to the US Supreme Court.
- Therefore, the decision of the court does not address those limitations.

NCAA v. Alston: Kavanaugh, J Concurring

Justice Kavanaugh's Concurring Opinion essentially invites a challenge to those limitations.

What are those limitation?

"Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports."

NCAA v. Alston: Kavanaugh, J Concurring

- "I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."
- "[T]he NCAA's remaining compensation rules should be subject to ordinary rule of reason scrutiny."
  - What that means is a higher level of scrutiny.
- "[T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification."

NCAA v. Alston: Kavanaugh, J Concurring

But what Justice Kavanaugh does next is potentially even more impactful.

- First, he notes that the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.
- Second, after a lengthy denunciation of a system that generates billions for universities by suppressing income for students "many of whom are African-American and from lower-income backgrounds," he recognizes several issues and questions that could follow.
  - How would paying greater compensation to student athletes affect non-revenue-raising sports?
  - Could student athletes in some sports but not others receive compensation?
  - How would any compensation regime comply with Title IX?
  - If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered?
  - And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

NCAA v. Alston: Kavanaugh, J Concurring

- Third, he offers answers for these questions.
  - Legislation

    (College Athlete Right to Organize Act)
  - Collective Bargaining:

"Or colleges and student athletes could potentially engage in **collective bargaining** (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues." (Emphasis added.)

College Athlete Right to Organize Act (Proposed Legislation)

On May 27, 2021, Senators Chris Murphy (D-CT) and Bernie Sanders (I-VT) and several members of the House of Representatives introduced the "College Athlete Right to Organize Act."

After denouncing the NCAA and its member institutions' practices as "exploitive and unfair," the College Athlete Right to Organize Act

- Would extend collective bargaining rights and the other protections of the National Labor Relations Act (NLRA or Act) to any athlete who receives any form of compensation from their **public or private** college or university and is required to participate in an intercollegiate sport.

  *Currently, the NLRA broadly excludes government entities.

- Broadly declares that college athletes meet the common law definition of an "employee" because they "perform a valuable service... under a contract for hire in the form of grant-in-aid agreement."

College Athlete Right to Organize Act (Proposed Legislation)

Mandatory Multiemployer Bargaining Within an Athletic Conference

- The College Athlete Right to Organize Act also introduces multiemployer bargaining as a matter of right by stating that "college athletes must be able to form collective bargaining units across institutions of higher education that compete against each other."
- The "Board shall recognize multiple institutions of higher education within an intercollegiate athletic conference as a multiemployer bargaining unit, but only if consented to by the employee representatives" of the players.

  Impact: Multiemployer bargaining may proceed without the consent and over the objection of the colleges and universities.

Significant implications for colleges and universities operating within the same athletic conference. Could require institutions with different resources, priorities and goals to approach negotiations with players in a generally uniform manner, perhaps not suitable for a particular institution.

Athletes as Employees under the FLSA

Johnson v. NCAA & the August 25, 2021 Decision

- Athletes argued that they are employees and should be paid a minimum wage under both federal law and the law of numerous states.
- The defendants are the NCAA and numerous universities, including one in CT.
- In the early stages of case, the defendant filed a Motion to Dismiss, claiming that the plaintiff had not stated a cognizable claim.

Athletes as Employees under the FLSA

- The defendants advanced three arguments:
  1. They are Amateurs

     The Court rejected that argument based on the *Alston* decision, citing Justice Kavanaugh's concurring opinion: "the argument 'that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid . . . is circular and unpersuasive.'"

  2. Good faith Reliance of the DOL's Field Operations Handbook:

     "Activities of students in [interscholastic athletics], conducted primarily for the benefit of the participants as a part of the educational opportunities to the students by the school or institution, are not work of the kind contemplated by . . . the Act and do not result in an employer-employee relationship between the student and the school or institution."

     The Court rejected this argument for two reasons.

     i. The defendants failed to plead reliance on the FOH.

     ii. The plaintiffs plausibly argued that the FOH is not applicable because these interscholastic sports provide no educational benefits to students and the activities are not conducted primarily for the benefit of the participants, citing, among other things, revenue generated for the schools.

Athletes as Employees under the FLSA

3. Economic Realities for determining Employee Status

After a detailed factor-by-factor analysis, the Court found that the students alleged sufficient facts, if proven, to satisfy the definition of employee status.

- The decision is significant because the NLRA and FLSA each view the term “employee” expansively.
- The case is proceeding.
- The decision is not the last word on the issue; it was only a very early motion in the case and will depend on much more to come.
- Even if the plaintiffs are successful before the trial court, expect appeals.
- The case is worth watching.

GC Memo 21-08: Undergraduate Student Workers

Remember Footnote 13? GC Memo 21-08 is not just about Athletes

"Cases involving the misclassification of student assistants, medical interns, and non-academic student employees, who are led to believe that they are not entitled to the Act's protection, similarly should be submitted to Advice."

Kenyon College – October 18, 2021

Undergraduate Student Workers filed a petition seeking union representation.

Facts:

- Exclusively undergraduate students working as part of financial aid program with federal work-study funding
- Only students are eligible for the positions
- Students do not fill operational positions

GC Memo 21-08: Undergraduate Student Workers

Kenyon College has Objected on Numerous Grounds

- Undergraduates are fundamentally different then graduate students
- FERPA Privacy Issue vs. Election rule disclosure issues.
- Transitory nature of employment, including high turnover

Government's Possible/ Expected Position:

- GC Memo 21-08 (fn. 2) notes that the 2016 holding in the Columbia University decision gives the Board jurisdiction over student assistants, medical interns and non-academic student employees.
- The Columbia University decision includes both graduate and undergraduate students. Others have done the same. (*University of West Los Angeles*, 321 NLRB 61, 61 (1996) (Board found a unit of student and non-student library clerks appropriate).
- GC Memo 17-01 states that "students performing non-academic university work are clearly covered by the NLRA . . ." and then lists a number of roles that undergraduate students perform for universities—"maintenance or cafeteria workers, lifeguards, campus tour guides, or administrative assistances in the campus financial aid or alumni affairs offices."

What's Next?

We are Seeing Frequent Developments

- Awaiting Decisions on Existing Cases
- More Litigation Likely
- More Unfair Labor Practices are Coming
- More Petitions for Representation Likely to be Filed
  - Athletes
  - Graduate Students
  - Undergraduate Students
- Meanwhile:
  - Student Activism is Elevated
  - Columbia University Students are on Strike, again
  - Other Universities are Reaching Contracts with Graduate Students to Avert a Strike

Questions?

Presenters

Natale V. DiNatale
ndinatale@rc.com
860.275.8329

Emily A. Zaklukiewicz
ezaklukiewicz@rc.com
860.275.8262