



***Are College Athletes Students or Employees? A
Review of the Current Legal Landscape
Surrounding the “Student -- Athlete” Debate***

CCIC MEMBER FORUM

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Of Note

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Agenda

- **Introduction**
- **Review of Recent Developments on the Student-Athlete Debate**
 - Discrimination complaint referred to the EEOC
 - Compensating Student-Athletes
 - US Supreme Court's Decision: *NCAA v. Alston*
 - Third Circuit Case: *Johnson v. NCAA*
 - Name, Image, and Likeness Rules
 - Union Organizing
 - NLRB General Counsel - Memo 21-08
 - College Athlete Right to Organize Act
- **Takeaways and Next Steps**



Introduction



- Over the years, the debate regarding whether college athletes should be deemed employees has been gaining momentum
- The courts and federal agencies like the Department of Education, National Labor Relations Board, and Equal Employment Opportunity Commission have entered the conversation
 - We have also seen legislation proposed at the state and federal level
- The “student-athlete” debate raises several issues, including:
 - Protection under anti-discrimination and other employment laws
 - Compensation/ Wages
 - Name, image, and likeness rules
 - Ability to join labor unions/collective bargaining

The Latest Development: Discrimination Complaint Referred to the EEOC

- The U.S. Department of Education Office of Civil Rights recently referred a discrimination complaint filed by the National College Players Association (NCPA) against NCAA Division I schools to the U.S. Equal Employment Opportunity Commission (EEOC)
 - In a letter sent to NCAA schools, the Department of Education Office of Civil Rights said the complaint did not fall under its jurisdiction since it involves allegations of employment discrimination
 - Title IX vs. Title VII
- The complaint asserts that all NCAA Division I schools are violating Black students' civil rights by colluding to cap compensation
- **What is the significance of this recent move?**



Where Did the Student-Athlete Debate Start to Gain Momentum?



NCAA v. Alston (2021)

- A unanimous United States Supreme Court found that the NCAA's rules limiting education-related benefits violate federal antitrust rules.
 - Specifically, by limiting the education-related benefits schools could offer student-athletes, such as rules limiting scholarships for graduate or vocational school, payments for academic tutoring, or paid post-eligibility internships, the NCAA violated the Sherman Act
- Background
 - What was at issue?
 - NCAA rules limiting education-related benefits schools may make available to student-athletes
 - NCAA challenged the court's decision prohibiting such education-related benefits
 - NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance
 - The district court and court of appeals upheld these limitations. Therefore, the decision of the court does not address those limitations.
- **Why is the case relevant to our discussion today?**

Compensating Student-Athletes: Where Did the Debate Start to Gain Momentum?



NCAA v. Alston (2021)

- Justice Kavanaugh’s Concurring Opinion essentially invites a challenge to limitations on undergraduate athletic scholarships and other compensation related to academic performance:
 - *“Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports.”*
 - *“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.”*

Compensating Student-Athletes: Where Did the Debate Start to Gain Momentum?



NCAA v. Alston (2021)

- 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?
 - Third, he offers answers for these questions:
 - Legislation (e.g., College Athlete Right to Organize Act)
 - Collective Bargaining

Compensating Student-Athletes: Pending Noteworthy Case - *Johnson v. NCAA* (2021)



- Athletes argued that they are employees and should be paid a minimum wage and overtime 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 on the basis that the plaintiff had not stated a cognizable claim, advancing three arguments:
 - 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.’”
 - 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:
 - The defendants failed to plead reliance on the FOH.
 - 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.
 - 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.

Compensating Student-Athletes: Pending Noteworthy Case - *Johnson v. NCAA* (2021)



- The decision is significant because the FLSA views the term “employee” expansively.
 - Defined as “any individual employed by an employer”
 - “Employ” is defined as including “to suffer or permit to work.”
 - The concept of employment in the FLSA is very broad and is tested by “economic reality.”
- The case is proceeding – currently before the Third Circuit Court of Appeals.
 - The Court will hear oral argument on December 15, 2022, to decide whether the district court erred in refusing the defendants’ motion to dismiss on the basis that student-athletes are not employees
- Two pre-*Alston* decisions came to the opposite conclusion.
 - *Berger v. National Collegiate Athletic Association*, 843 F.3d 285 (7th Cir. 2016)
 - Held that “*that student athletes are not employees and are not entitled to a minimum wage under the FLSA.*”
 - “*the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation.*”
 - “*Simply put, student-athletic ‘play’ is not ‘work,’ at least as the term is used in the FLSA.*”
 - *Dawson v. National Collegiate Athletic Association*, 932 F.3d 905 (9th Cir. 2019)
 - Held “*that the economic reality of the relationship between the NCAA/PAC-12 and student-athletes does not reflect an employment relationship.*”
 - “*the NCAA and PAC-12 are regulatory bodies, not employers of student-athletes under the FLSA.*”

Where Do Name, Image, and Likeness Rules Fit In?



- Historically, the National Collegiate Athletic Association (NCAA) has enforced a rule prohibiting college athletes from being paid
 - This included a prohibition on the ability of college athletes to make money off their name, image, and likeness.
 - NCAA's Rationale: Protecting amateurism and distinguishing "student athletes" from professionals.
 - The NCAA defines an "amateur" as "someone who does not have a written or verbal agreement with an agent, has not profited above his/her actual and necessary expenses or gained a competitive advantage in his/her sport."
- However, several states began proposing and passing laws to allow such compensation.

Where Do Name, Image, and Likeness Rules Fit In?



- On July 1, 2021, the NCAA lifted the ban on player compensation and instituted an Interim NIL Policy:
 - Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.
 - College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.
 - Individuals can use a professional services provider for NIL activities.
 - Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.
- In November 2021, the NCAA released guidance clarifying that schools may not use NIL transactions to compensate student-athletes for participating in athletics and/or for athletic achievements (i.e., “pay for play”); use NIL transactions as an improper inducement; or compensate student-athletes for the use of their NIL.
- In May 2022, the NCAA released additional guidance specifying that institutional coaches and staff may not arrange a meeting between an NIL entity and a prospective student-athlete nor communicate with a prospective student-athlete on behalf of the NIL entity.
- On October 26, 2022, the NCAA released updated guidance on its NIL rules clarifying how schools can and cannot interact with and support enrolled student-athletes’ NIL activities.

Union Organizing: Where Does the NLRB Stand on the Student-Athlete Debate?



- 2015 – NLRB held that would not assert jurisdiction over a petition for recognition filed by a group of Northwestern football players who received grant-in-aid scholarships, concluding that “asserting jurisdiction . . . would not serve to promote stability in labor relations.”
- 2016 - NLRB found that student assistants (graduate and undergraduate) are NLRA employees (*Columbia University case*)
 - An individual “may be both a student and an employee; a university may be both the student’s educator and employer.”
- 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.”
- 2021 - The NLRB withdrew its proposed rule regarding undergraduate and graduate students.

Union Organizing: Where Does the NLRB Stand on the Student-Athlete Debate?



- September 29, 2021 - GC Memo 21-08
 - Reinstates General Counsel Memo 17-01, which had been rescinded in 2018.
 - Holds that football players and other athletes or “Players” fit the definition of an “employee”.
 - Concludes that the misclassification of “Players” as student-athletes has a chilling effect on their rights under the NLRA.
 - Citing a dissenting opinion by current Board Chairman McFerran in a decision about employees misclassified as independent contractors.
 - In citing to the facts of the 2015 case involving the Northwestern football players, explains:
 - Athletes perform a service (play football), which generates revenue.
 - Athletes 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)

Union Organizing: Where Does the NLRB Stand on the Student-Athlete Debate?



- September 29, 2021 - GC Memo 21-08 Continued...
 - 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.”
 - “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.”
 - Also raises the issue of misclassification of undergraduate student workers more generally
 - GC 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” (Footnote 13).
 - Contends that the use of the term “student-athlete” is 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.
 - **What is the significance of GC Memo 21-08?**

Union Organizing: Where Does the NLRB Stand on the Student-Athlete Debate?



- November 2021 - 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”.
- February 2022 - The National College Players Association filed unfair labor practice charges with the National Labor Relations Board (NLRB) against the NCAA office, the Pac-12 Conference and California schools USC and UCLA as single and joint employers of FBS football players and Division I men’s and women’s basketball players
- **What of the significance of this recent NLRB activity?**

Union Organizing: Proposed Legislation - College Athlete Right to Organize Act



- 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
- 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.”
- Would extend collective bargaining rights and the other protections of the NLRA 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.
- 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.”
 - 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.
- The legislation is currently at a standstill
 - Was introduced, but never passed by the Senate
 - Notwithstanding, this proposed legislation further fuels the student-athlete debate

Takeaways



- Continue to monitor these developments
 - Labor
 - FLSA
 - EEOC
 - NIL
- Engage with lobbyists about acceptable legislative solutions
 - e.g., College Athlete Right to Organize Act
- Have an honest conversation about your conference and Division alignment based on the implications these will have down the road

Questions?

