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UNIONS FOR COLLEGE ATHLETES - SOME FOOD FOR THOUGHT

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The Dartmouth College Men's Basketball Team recently petitioned the National Labor Relations Board (NLRB) for recognition of their rights as "employees" of the College to form a union and bargain over their relationship to the School. On February 5, 2024, the Regional Director of the NLRB ruled[1] that these students are employees and have the right to demand recognition and to bargain as a group over their scholarship and related arrangements with the College. The basis for this decision was that players perform a service for compensation under the control of the School.[2]

The purpose of this article is to illustrate the complex implications of recognizing student athletes as employees. Each topic in this overview would benefit from in-depth research and further evaluation. The goal is to simply remind those considering this change that there's a lot to be thought through.

That NLRB decision has been challenged by the College and is expected to receive attention from the judicial system, perhaps eventually the United States Supreme Court. The debate over the question of employee status is well covered elsewhere. This article is about some of the consequences of employee status for college athletes, should employee status ultimately be recognized.

NCAA and ANTI-TRUST

College sports are regulated by the National College Athletic Association (NCAA). On June 21, 2021, the United States Supreme Court unanimously ruled that the NCAA's restrictions on school provided student athlete post graduate benefits violated Federal anti-trust law.[3] The Court's 45 page Alston opinion discussed the history of limits on payment to players, reflecting on the tradition of emphasizing their amateur status and the need to avoid commercialization of college athletics. The Court noted the vast sums of money now taken in by colleges from televising games and the huge salaries paid to coaches. The power of the NCAA to divert all this revenue away from players' pockets was seen as the exercise of a monopoly.

The court did not address the question of employee status, however this and all other aspects of the NCAA's control over college sports will likely come into question as a result of this decision. For example, the NCAA promulgates the "CARA" Rules.[4] The NCAA requires participating schools to limit "countable athletic related activity" to, for example, 4 hours per day and 20 hours per week for certain sports. On and off season periods have different limits. Football has its own time standards.

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[1] Based on Office of General Counsel Memorandum CG 21-08, available at nlrb.gov: "Guidance."

[2] Two additional cases are pending before the NLRB alleging joint employer status by the school and the NCAA: Notre Dame, 25-CA-340413, April19, 2024 and USC-Pac12, 31-CA-290326.

[3] National Collegiate Athletic Association v. Alston, Case No. 20-512, 141 S. Ct. 2141, June 21, 2021. (Available @ supremecourt.gov).

[4] For an excellent example of how one school explained the CARA rules see Georgia Tech's @ ramblinwreck.com/wp-content/uploads/2018/06/ defining cara.pdf (5 pages).

A CARA activity includes supervised training, practice, workouts and any required and supervised instruction. Athletes may want a different approach.

The NIL (name, image and likeness) rules have been promulgated by the NCAA. Those rules require that this compensation from commercial sources be in return for actual work, not an incentive to join a particular team or a reward for good performance. There are limits on product endorsement and appearances, for example the ban on endorsement of gambling. School authorization is required to wear the uniform in advertising. These standards may appear too restrictive to athletes.

The process of regulating NIL payments began with the enactment of legislation in California on September 19, 2019. The NCAA was strenuously opposed to this law. Florida followed with legislation on June 12, 2020 then Georgia and by the end of June, 2021, twenty-seven states had enacted NIL laws.

Then came the Alston decision on June 21, 2021. During the following period, the NCAA increasingly backed away from specific national mandates and moved toward recommendations.[5] This culminated with the NCAA's decision on January 10, 2024 to begin to make further "recommendations" to member schools on recruitment, contract content, disclosure of NIL terms and contract advice for students.[6]

The transfer portal arrangement is a creation of the NCAA. Athletes were required to sit out one year until the recent elimination of that rule. It is well established in American law, with notable exceptions such as the District of Columbia, that an employer can use a non-compete clause to bar a move to a competitor. Schools may seek to limit transfers within their conference. The entire process for recruiting players and changing teams could be a subject of legal challenge and of bargaining, as it is in some 25 pages of the NFL Player Agreement.

Since the current NCAA Board of Governors consists of a majority of college presidents and senior school management, it would be seen as speaking for the employer, the colleges. There appears to be no reason that a college athlete union could not demand:

- changes in the scholarship rules;
- different minimum GPA;
- change in bar on compensation to retain "amateur" status;
- different time limits on training, workouts and any required participation event;
- equitable distribution of all or part of NIL payments to the entire team;
- forfeiture of all or part of NIL payments if a player leaves for another team;
- team prior approval of all NIL deals;
- different course or GPA requirements; or,
- redefine "amateur" status.

[5]See "Interim NIL Policy" and "NIL Questions and Answers" @ ncaa.orgs3amazonaws.com.
[6] See NCAA.org news Name, Image & Likeness.

Given the Supreme Court's concern regarding the monopoly power of the NCAA in the Alston decision, any setting of national standards and coordination among the schools regarding agreements with student unions within the NCAA or by the schools as a group, might prove very problematic.

Two additional statutes beyond the Anti-Trust laws bear directly on this issue: the National Labor Relations Act (NLRA)[7] and the Fair Labor Standards Act (FLSA). As noted above, the jurisdiction of the NLRB is limited to private employers. The FLSA includes state employees. [8]

NLRB

On August 17, 2015, the full National Labor Relations Board unanimously rejected a petition by the Northwestern University football team for recognition as a union.[9] The core basis for the decision was that the Board does not have jurisdiction over the 108 state-run colleges and universities out of the 125 Division 1 FBS teams. Leagues such as the Big 10, with one exception, are all state schools. The right of those athletes to become represented by a union is governed by 17 different state laws. Among those state laws, there is considerable variation. The Board said that asserting jurisdiction over this small number of schools "...would not promote labor stability." Query whether the current Board will affirm or revise this decision.

The NLRA protects the right of employees to bargain over "wages, hours and working conditions." A central basis for the 2024 NLRB ruling is that student athletes are under school control and given compensation. Thus, under the Act, any aspect of the benefits included in athletic scholarships would be fair game for bargaining.

One example of how this could play out is the 456 page collective bargaining agreement between the NFL Players Association and the League. [10] A typical collective bargaining agreement (CBA) covers job descriptions and the associated hourly rate of pay. So perhaps a tight end would get more than a non-starter guard; that would be open to negotiation. The NFL permits an array of individual deals with players including superstar quarterbacks. Will schools do the same?

Perhaps a college team would see matters in a more egalitarian manner and seek to limit individual perks, including NIL, for top players, such as a 50/50 sharing with the team. The CBA must be voted on by all members of the bargaining unit so those who barely made the team have the same say as the record setters. An exemption for "franchise" players might be needed.

Under the NLRA, student athletes would have the protection of the Act for organizing activity, job actions and other collective action, including strikes. A school may have to permit union organizing activity on campus, particularly in areas open to visitors. The NLRA does not have different basic rules for various employment settings. Under the Act, any aspect of the benefits and controls associated with athletic scholarships would be fair game for bargaining.

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[7] "National Labor Relations Act, 29 U.S.C. 151-169, Chapter 7, Subchapter II, United States Code.
[8] The Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq. United States Code; See 29 CFR §783.7.
[9] Northwestern University, NLB Case No.13RC12139, August 17, 2015.
[10] See NFLpowers, NFL Collective Bargaining Agreement, 2020.

FLSA

If the decision of the NLRB is that college athletes are employees under Federal law, the Fair Labor Standards Act would also apply. The test for "employee" status is not fundamentally different.[11] The FLSA requires minimum wage or the employee's regular rate of pay for all hours of "work."[12] Payment is required whether the employee is doing work assigned or, for example, staying late, on his own to finish a project. This can mean that an especially enthusiastic athlete who spends many extra hours in the weight room, logging in and out, may claim at the end of the season that he's entitled to compensation for all that time. Record keeping requirements of the FLSA would mandate weekly time sheets. Extra time in a week, such as an away game, could result in more than 40 hours of work requiring overtime pay. Travel time when away overnight is "work" under the FLSA.

The effect of athletes being seen as employees in non-revenue producing sports can be predicted with this example: the 30 member lacrosse team spends the weekly 20 hours of CARA time during the year. At the current Federal minimum wage of $7.25 the members of that team are due a total of $217,500. (In Virginia, it's $12.00 and California, $16.00.) Add coaching, travel, field preparation and equipment cost and the team budget could reach $500,000. Do this for all the sports with open no ticket fan access and some schools would have to reconsider supporting some of those sports.

Assuming that all CARA time is "work" and that this totals 1,000 hours a year per athlete. Then using $10 as the hourly rate, every athlete, scholarship through walk, on would be due at least $10,000. Since Division 1 schools typically have 18 teams and 500 players, the average basic FLSA cost per school would be $5 million.

The FLSA could be interpreted to require that all athletes who receive any compensation in the form of a full or partial scholarship be paid at least the minimum wage for all team activity time. Whereas, non-scholarship athletes could be considered unpaid "volunteers" under the current Department of Labor Advisory on that point.[13] Volunteer service to non-profit and public sector organizations, including schools, is expressly recognized as outside the scope of FLSA minimum wage. The effect on small dollar value and partial scholarships is obvious. The Equal Pay Act and Title IX present additional compensation issues as one compares men's and women's teams.

IRS

Current IRS policy,[14] is that the value of educational benefits provided by scholarship to athletes are exempt from income taxation. Additional benefits such as housing are taxable. Since tuition, books, fees and other related benefits are in-kind, there would be no withholding and scholarship athletes would need cash for those taxes. Further, the IRS position is that scholarships are exempt provided they are not in return for services required "…as a condition for receiving the scholarship." The IRS

[11] See 29 U.S.C. Chapter 8, "Definitions" 203 (e)(2)(C).
[12] See Department of Labor, Wage & Hour Division Fact Sheet #22 at dol.gov.
[13] See dol flsa "Volunteers" webapps.dol.gov.
[14] See IRS Publication 970@irs.gov, "Scholarships."

position could change if scholarship athletes were considered employees, entitled to benefits only if they remained as players on the team, as is the case presently.

S.E.I.U.

Finally, the Service Employees International Union has been chosen by the Dartmouth athletes as their bargaining representative. This large union represents employees throughout the United States. It can be anticipated that an effort would be made to organize all college athletes and perhaps form a national organization with individual units responding to guidance and directives from the national office. The NFL Players Union is organized in that manner, with varying degrees of autonomy available to individual team units.

CONCLUSION

The point is that "employee" status for Federal law purposes is not a single dimension issue. It appears that every aspect of student – athlete status may be about to be reconsidered.

The player-college relationship has been a "top down" unilateral one, with the terms pretty much dictated by the NCAA. What's evolving is the participation of many more parties: players organizations, state legislatures, school boosters, the NCAA as an advisory body, the Federal Government and the courts providing anti-trust scrutiny and, potentially, the United States Congress.

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