Push for Collegiate Athletes to be Recognized as Employees Moves Forward

By: Tate Thompson and Curry Sexton

The push for collegiate athletes to be classified as employees recently took a significant step forward. As we discussed in October 2022, there are several ongoing legal battles related to the issue of collegiate athletes' employee status, including:

(1) a National Labor Relations Board ("NLRB") claim alleging that certain athletes at the University of Southern California ("USC") should be classified as employees under the National Labor Relations Act ("NLRA");

(2) a lawsuit currently before the United States Court of Appeals for the Third Circuit on interlocutory appeal, in which it is alleged that Division I athletes are employees of the National Collegiate Athletic Association ("NCAA") and certain of its member colleges and universities under the Fair Labors Standard Act ("FLSA"); and

(3) a potential U.S. Equal Employment Opportunity Commission ("EEOC") investigation into whether collegiate athletes are being discriminated against based on unfair compensation.

NCPA Claim Moves Forward in NLRB Process

In February 2022, the National Collegiate Players Association ("NCPA") brought a claim to the NLRB on behalf of USC football and basketball athletes, alleging that USC, the Pac-12 Conference (the "Pac-12"), and the NCAA have misclassified revenue-generating athletes as "non-employees" and suppressed their rights under Section 7 of the NLRA.

Last month, the NLRB officially announced it will be pursuing these charges. In support of the decision, NLRB General Counsel Jennifer Abruzzo said in a statement that USC, the Pac-12, and the NCAA have together "maintained unlawful rules and unlawfully misclassified scholarship basketball and football players as mere 'student-athletes' rather than employees entitled to protection under our law."

The next step for this particular claim will be a trial before an Administrative Law Judge in the coming months. The judge will likely address a number of issues, including:

(1) the employee status of collegiate athletes under the NLRA;

(2) whether the Pac-12 and NCAA are liable for misclassification under a "joint employer" theory of employment; and

(3) whether USC, the Pac-12, and the NCAA are in violation of the NLRA based on their classification of collegiate athletes as "non-employees."

The losing party will have an opportunity to appeal the decision to the NLRB, with additional and significant appellate litigation likely to follow. In the event the NLRB and/or the courts grant the USC athletes employee status, collegiate athletes at private institutions across the country will receive full employee rights, including the right to unionize and collectively bargain.

In a statement, NCPA Executive Director Ramogi Huma elaborated on the NCPA's goal in bringing the claim: "Gaining employee status and the right to organize is an important part in ending NCAA sports' business practices that illegally exploit college athletes' labor. We are working to make sure college athletes are treated fairly in both the education and business aspects of college sports."

The NCPA's claim follows a memorandum issued by NLRB General Counsel Jennifer Abruzzo in September 2021 (the "Abruzzo Memo"). In a statement, Abruzzo explained her prosecutorial position that collegiate athletes should be granted employee status: "The broad language of Section 2(3) of the Act [NLRA], the policies underlying the NLRA, Board [NLRB] law, and the common law fully support the conclusion that certain Players at Academic Institutions are statutory employees, who have the right to act collectively to improve their terms and conditions of employment."

Additionally, the Abruzzo Memo called into question the precedent of the NLRB's 2015 decision involving Northwestern University, wherein the NLRB effectively balked at the issue of student-athletes being classified as employees, reasoning that doing so "would not effectuate the policies of the [NLRA]." However, the Northwestern decision made clear that its refusal to assert jurisdiction, in that case, did not prevent it from doing so in the future. The Abruzzo Memo and the NLRB's recent actions appear to do just that.

Third Circuit to Hear Oral Argument in *Johnson v. NCAA*

As we reported in October, the U.S. Court of Appeals for the Third Circuit agreed to hear an interlocutory appeal on the question of whether Division I athletes can be employees of their respective schools solely by their participation in intercollegiate athletics.

In *Johnson v. National Collegiate Athletic Association, et al.*, the plaintiffs allege that Division I athletes are employees of the NCAA and certain member institutions, and are therefore protected under the FLSA and various state minimum wage laws. After the district court denied a motion to dismiss the complaint, holding the plaintiffs plausibly alleged that college athletes are employees within the meaning of the FLSA, the Third Circuit agreed to hear the interlocutory appeal.

The Third Circuit is set to hear oral arguments on January 18, 2023, with a decision on the interlocutory appeal likely to follow a few months thereafter. If the plaintiffs are permitted to proceed, an ultimate ruling on the issues before the court is likely several years away. The case is still pending in the U.S. District Court for the Eastern District of Pennsylvania.

To provide additional context, two federal appellate courts have ruled in recent years that student-athletes are not "employees" under the FLSA. Specifically, in *Berger v. NCAA*, the U.S. Court of Appeals for the Seventh Circuit considered the "economic reality" relationship between student-athletes and their schools and concluded that the Department of Labor did not intend the FLSA to apply to intercollegiate athletics, which were "extracurricular" and "interscholastic" activities. Granted, this case was pre-*Alston* (and prior to the name, image, and likeness ("NIL") era) and relied, in part, on the "revered tradition of amateurism," which drew heavy criticism in *Alston*, as we have previously discussed.

Similarly, in *Dawson v. NCAA*, the U.S. Court of Appeals for the Ninth Circuit ruled that student-athletes were not employees of the NCAA or their athletic conferences because the NCAA is more akin to a regulator than an employer. Like *Berger*, this decision was issued before *Alston* and before NIL, which could diminish or alter the persuasive value of these cases.

EEOC Could Investigate Potential Discrimination of College Athletes

As we also reported in October, the EEOC could soon commence an "aggressive investigation" into whether unpaid college athletes are being discriminated against based on unfair compensation. This

potential investigation became a possibility after the EEOC was referred to an employment and civil rights complaint filed by the NCPA to the Department of Education in March 2022. The complaint asserted that all 350 Division I schools are violating black student-athletes' civil rights by colluding to cap compensation. Presently, the NCAA limits what schools can offer athletes in terms of scholarship money and largely prohibits any direct payments to athletes.

Since this report, there have been no public developments concerning an EEOC investigation of alleged college athlete discrimination. To the extent developments as to an investigation become public, we will provide appropriate updates.

Conclusion

It remains to be seen what the outcome of these various legal challenges will be, but one thing is certain—if college athletes are deemed to be employees, it would have wide-ranging impacts on the athletes, their schools, and collegiate athletics as a whole. Athletes would enjoy the benefits and risks of being an employee. Schools could potentially lose their Section 501(c)(3) designation, which could impact taxation on bond financing and charitable gifts. And schools, conferences, and the NCAA might have to share portions of revenue with the athletes.

Stay tuned for further development on the topic of collegiate athletes as employees and other subjects affecting intercollegiate athletics.

This article is general in nature and does not constitute legal advice. The authors of this article, Tate Thompson and Curry Sexton are members of Seigfreid Bingham's Sports and Entertainment Industry Group and routinely represent clients in collegiate athletics. If you or your organization have questions about the impact of these developments, please contact Tate or Curry at 816.421.4460.