Will College Athletes Soon be Classified as Employees?

Client Alert by Curry Sexton

The collegiate athletics landscape has already undergone one recent monumental shift concerning name, image, and likeness (NIL) rights. Effective July 1, 2021, the National Collegiate Athletic Association (NCAA) removed its longstanding restrictions prohibiting student-athletes from receiving compensation for their NIL and implemented an interim policy that permits student-athletes to receive compensation for their NIL. Since then, the focus has shifted to the question of whether student-athletes should be characterized as employees.

The massive revenue growth in college sports has, at least in part, triggered more discussion on whether college athletes should be given employee status, and there have been a few notable legal developments worthy of tracking very closely.

EEOC Expected to Investigate Whether College Athletes Are Being Discriminated Against

Recently, *Sports Illustrated* reported that the United States Equal Employment Opportunity Commission (EEOC) could soon commence an "aggressive investigation" into whether unpaid college athletes are being discriminated against based on unfair compensation. The EEOC was recently referred to an employment and civil rights complaint filed by the National College Players Association (NCPA) to the Department of Education in March, which asserts 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.

In response to the NCPA complaint, Anamaria Loya, the Department of Education Office of Civil Rights chief attorney, recently sent a letter to NCAA schools stating that the complaint did not fall under the Department of Education's jurisdiction and referred the complaint to the EEOC's San Francisco district office.

Illinois Law Professor Michael LeRoy told *Sports Illustrated* that the referral move means the complaint is being "taken really seriously" and is a "big deal" for some who have pushed for college athletes to be considered employees. Leroy further stated that "it will trigger an aggressive investigation" and that he would "anticipate the EEOC will file a complaint casting this as part of employment discrimination, and schools will fall back on their 116-year-old argument that this is about amateur athletics. It will be one more thorn in the side of NCAA athletic programs."

Relying on the position that college athletes should not be given employment status because of the revered tradition of amateurism could be problematic for the NCAA and its member schools. In the highly publicized United States Supreme Court decision in *NCAA v. Alston*, Justice Brett Kavanaugh wrote a blistering concurring opinion, which called the NCAA's "amateurism" argument into question. In part, Justice Kavanaugh stated:

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region

cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

Thus, there is a justifiable skepticism regarding the NCAA's ability to employ and rely on the age-old "amateurism" argument in support of a claim that college athletes should be treated as employees.

NCPA Complaint Should be Heard by NLRB in Coming Months

The aforementioned NCPA complaint is just one part of a larger athletes' rights movement, as it follows the NCPA's February filing of unfair labor practice charges with the National Labor Relations Board (NLRB) against the NCAA, the PAC-12 Conference, and California schools, University of Southern California (USC) and University of California, Los Angeles (UCLA). The NCPA's goal is to affirm employee status for NCAA Division I (DI) basketball players and NCAA Division I Football Bowl Subdivision (FBS) football players. An NLRB hearing is expected as early as this fall.

Furthermore, the NLRB's General Counsel, Jennifer Abruzzo, has already issued a memorandum stating that it is her prosecutorial position – not the express position of the NLRB – that certain college athletes are "employees" under the National Labor Relations Act (NLRA) and, as such, are afforded all statutory protections. The memorandum zeroes in on scholarship student-athletes that generate substantial revenue, such as football players at the FBS/Power 5 level and men's and women's basketball players at certain institutions, and signals further legal/political support for college athletes being recognized as employees.

Notably, the NLRA generally does not apply to public sector employees employed by state governments, and the NLRB generally only has jurisdiction over private colleges and universities. On its face, this would seem to limit the impact of the memorandum to private colleges and universities. However, in the memorandum, Ms. Abruzzo stated an intention to attempt to expand jurisdiction to public institutions, under a theory of joint employment by those institutions and the NCAA and/or their athletic conferences. Ms. Abruzzo reasoned that where an athletic conference is an independent, private entity, created by the member schools, exerting jurisdiction over the conference is appropriate, even where some member institutions are public. Thus, it is not safe to assume that the NLRB/NLRA will not soon reach public universities and employees, in addition to private colleges and universities and employees.

Third Circuit Set to Hear Appeal Regarding College Athletes as Employees

In February, the United States Court of Appeals for the Third Circuit agreed to hear an interlocutory appeal on the question of whether Division I student-athletes can be employees of their schools solely by their participation in intercollegiate athletics. In *Johnson, et al. v. National Collegiate Athletic Association, et al.,* which is pending in the U.S. District Court for the Eastern District of Pennsylvania, the plaintiffs allege that Division I student-athletes are employees of the NCAA and certain of its member colleges and universities under the Fair Labor Standards Act ("FLSA") and various state wage and hour laws. After the district court denied a motion to dismiss the complaint, holding that the plaintiffs had plausibly alleged they are employees within the meaning of the FLSA, the Third Circuit agreed to hear the interlocutory appeal.

The district court certified the following issue for an appeal to the Third Circuit: "Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics." If the Third Circuit

permits the student-athletes' case to move forward, it will return to the district court for proceedings as to whether: 1) student-athletes are employees of the NCAA and their respective institutions; and 2) by characterizing athletes as student-athletes instead of employees, the NCAA, and member institutions have violated the FLSA and various state wage and hour laws. An ultimate ruling on those issues, if the case is permitted to move forward, is likely several years away.

In recent years, two federal appellate courts have ruled 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 pre-NIL) and relied, in part, on the "revered tradition of amateurism," which drew criticism in *Alston*, as 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 prior to NIL, which could diminish the persuasive value of these cases.

Conclusion

Ultimately, there are four avenues for college athletes to obtain employment status. Those are: 1) the EEOC; 2) the NLRB; 3) the court system; and, 4) Congress. As described, there are challenges currently pending in each of the first three. There is no known legislation pending in Congress on this issue, but this is an issue Congress has previously considered. In late May 2021 (approximately one month before NIL rules changed), Senators Chris Murphy (D-Conn) and Bernie Sanders (D-Vt), and Representatives Jamaal Bowman (D-NY), Andy Levin (D-Mich), and Lori Trahan (D-Mass) introduced the "College Athletes Right to Organize Act," which, if passed, would have resulted in scholarship athletes being classified as employees. Although it did not pass, the recently proposed legislation signals that this is an issue that members of the US Congress have considered.

If college athletes are deemed to be employees, it would have wide-ranging impacts on the athletes, their universities, and collegiate athletics as a whole. Athletes would enjoy the benefits and risks of being an employee. Schools could lose their Section 501(c)(3) designation, which would 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 college athletes as employees and other subjects affecting intercollegiate athletics.

This article is general in nature and does not constitute legal advice. The author of this article, Curry Sexton, is a member of Seigfreid Bingham's Sports and Entertainment Group and routinely represents clients in collegiate athletics. If you or your organization have questions about the impact of the NCAA's most recent announcement, please contact Curry Sexton at 816.421.4460.