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How Organizing Collegiate Student-Athletes Under the National Labor Relations Act with the NCAA as a Joint Employer Can Lead to Significant Changes to the Student-Athlete Compensation Rules

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How Organizing Collegiate Student-Athletes Under the National Labor Relations Act with the NCAA as a Joint Employer Can Lead to Significant Changes to the Student-Athlete Compensation Rules

Abstract

This paper will provide an overview of how National Labor Relations Board cases of Northwestern University and Browning Ferris combined with the analysis presented in the National Labor Relations Board General Counsel Memorandum GC 17-01: General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context could impact the laws behind unionization, the contracts of university athletes, and, ultimately through contract negotiations, reintroduce the discussion regarding compensation of student-athletes.

Keywords

college sports, NLRB, labor law, employment law, student athletes, NCAA, employment law

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HOW ORGANIZING COLLEGIATE STUDENT-ATHLETES UNDER THE NATIONAL LABOR RELATIONS ACT WITH THE NCAA AS A JOINT EMPLOYER CAN LEAD TO SIGNIFICANT CHANGES TO THE STUDENT-ATHLETE COMPENSATION RULES

ANDREW GRUNA

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INTRODUCTION

American colleges and universities have a long history of organized sports that stems nearly 150 years.[1] In 1869, Rutgers University and Princeton University took part in the first collegiate football game. The game at this time was unorganized and lack an institutional structure to maintain rules and safety procedures.[2] By 1905, President Roosevelt addressed the concerns over injuries of these collegiate games, resulting in the presidents of 62 colleges and universities to create the Intercollegiate Athletic Association; the name was later changed to the National Collegiate Athletic Association ("NCAA").[3]

Since that time the NCAA has grown to 1,100 member schools.[4] Within the NCAA rules, there are the requirement that the athletes be considered to be amateurs and that the athletes can receive financial assistance from the institutions not in excess of the cost of university attendance.[5] Additionally, student-athletes, due to their amateur status, have been barred from profiting from their name, likeness through outside compensation.[6]

This paper will provide an overview of how National Labor

[1] O'Bannon v. NCAA, 802 F.2d 1049, 1052 (9th Cir. 2015).
[2] *Id* at 1053.
[3] *Id*
[4] *Id*.
[5] *Id* at 1054.
[6] *Id.*

Relations Board cases of *Northwestern University* and *Browning Ferris* combined with the analysis presented in the National Labor Relations Board General Counsel Memorandum GC 17-01: *General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context* could impact the laws behind unionization, the contracts of university athletes, and, ultimately, through contract negotiations, alter NCAA rules regarding student-athlete compensation.

NORTHWESTERN UNIVERSITY AND THE NLRB'S DECLINING TO EXERCISE JURISDICTION

In *Northwestern University*, the Northwestern University football players attempted to form a labor union under the NLRA.[7] Northwestern University is a university with its main campus in Evanston, Illinois.[8] During the time of organizing attempts, the 2013-2014 academic year, there were 112 students that played for the university's Division 1 Football team.[9] Of these 112 students, 85 received a grant-in-aid scholarship.[10] The scholarship is worth around $61,000 a year, in order to cover tuition, fees, room, board, and books.[11] Scholarship players are required to devote substantial hours to football activities, but they are also full time students.[12]

Northwestern University is a member of the NCAA and the Big Ten

[7] *Northwestern University*, 362 NLRB No. 167 (2015).
[8] *Id* at 5.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

Conference ("Big Ten").[13] Currently, only 125 school compete at the NCAA Division One level; only 17 of these schools are private universities or colleges.[14] Northwestern University is the only private university or college in the Big Ten.[15] Both the Big Ten and the NCAA set standards on the universities and the players, which both agree to be bound by.[16] The terms that are imposed on the students include, but are not limited to: maintain full-time student status, maintain a certain grade point average, control the terms and content of the scholarship, defines amateur status that players must maintain, prohibiting agents, profiting from their likenesses or name, and regulates the number of mandatory practice hours that can be imposed on the players.[17] Additionally, the NCAA controls how many players can travel to a football team's away game and there are bans on the student making profit from their likenesses or name.[18]

The NLRB determined that there was no dispute that Northwestern University is an employer under Section 2(2) of the NLRA.[19] Additionally, there is no dispute that Northwestern University is engaged in commerce within the meaning of the NLRA.[20] The main issue argued by the parties

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[13] *Northwestern*, *supra* note 12 at 6.
[14] *Id* at 7.
[15] *Id.*
[16] *Id* at 6.
[17] *Id.*
[18] *Id.*
[19] *Id* at 10, note 5.
[20] *Id*.

and amici have focused on was the question whether the scholarship players in the petitioned-for unit are statutory employees.[21] If the scholarship players are not employees under NLRA, then the NLRB lacks authority to direct an election or certify a representation.[22]

However, the question of if a scholarship players was an employee was not answered in the *Northwestern University* case, as the NLRB declined to exercise jurisdiction over the case.[23] The NLRB has the ability to decline to exercise jurisdiction when doing so would go against the policies of the National Labor Relations Act.[24] It is important to note the rationale behind the Board's decision to decline jurisdiction. First, the NLRB had never before been asked to assert jurisdiction in a case involving college athletes.[25] Second, the NLRB noted that scholarship players had little resemblance to the graduate student assistants or student janitors and cafeteria workers whose employee status the NLRB has considered in other cases.[26] Finally, the NLRB also noted that since Northwestern University is the only private university in the Big Ten and one of the few within the greater NCAA Division 1 system, the decisions made with Northwestern University's players would also directly involve other universities and

[21] *Northwestern*, *supra* note 20 at 9.
[22] *42 U.S.C. § 152(2).*
[23] *Northwestern* at 9.
[24] *Id.*
[25] *Id.*
[26] *Id.*

colleges.[27]

Ultimately, the NLRB decided that asserting jurisdiction in this case would not promote stability in labor relations.[28] Within the NCAA Division One universities and colleges, the vast majority of institutions are in public universities; Northwestern University is currently the only private university.[29] While these public institutions are, generally, subject to state collective bargaining laws, there are two states in which three NCAA Division One universities are located, have been determined by statute to not be considered employees under state collective bargaining laws.[30] By imposing jurisdiction on one university, there would be indirect impacts on other teams, players within the NCAA, the Big Ten, and the member institutions.[31]

It is important to note that the NLRB's decision to decline to exercise jurisdiction was based on the facts in the record before them in *Northwestern University* and that changes in circumstances on how scholarship players are treated could later outweigh the considerations that motivated the decisions to decline jurisdiction.[32]

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[27] *Northwestern*, *supra* note 26 at 9.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id* at 19.
[32] *Id.* at 6.

GENERAL COUNSEL MEMORANDUM GC 17-01: GENERAL COUNSEL'S REPORT OF THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT

While the question regarding employee-status of the Northwestern players was not settled by the NLRB, the discussion on the issue has hardly settled down. On January 31, 2017, the General Counsel to the NLRB issues Memorandum GC 17-01: General Counsel's Report of the Statutory Rights of University Faculty and Students in the Unfair Labor Context, which covered a range of legal issues regarding University faculty and students.[33] Important to this conversation, the memo addressed the case of *Northwestern University*. The General Counsel reported that, while not concluded in *Northwestern*, Division One Football players in private colleges and universities would be consider to be employees under the NLRA, as the argument is supported by statutory language in the cases *Boston Medical Center* and *Columbia University*.[34]

Columbia University overturned its prior divided holding to the contrary in *Brown University*, ultimately determining that graduate assistants enrolled in graduate degree programs met the definition of

[33] Memorandum GC 17-01 from Office of General Counsel, NLRB, *General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context*, https://www.nlrb.gov/reports-guidance/general-counsel-memos (January 31, 2017)

[34] *See Boston Medical Center*, 330 NLRB 152 (1999); *Columbia University*, 364 NLRB No. 90 (2016).

"employee" in Section 2(3) of NLRA.[35] Graduate students meet the common-law test of agency in that they "perform their duties for, and under the control of" their university that pays for their services.[36] Additionally, *Boston Medical Center* determined that medical interns, residents, and hospital fellows are also considered to be employees under Section 2(3) of the NLRA.[37]

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AS A JOINT EMPLOYER OF UNIVERSITY DIVISION ONE TEAMS

The NCAA would be required to come to the bargaining table with organized student-athletes' unions in a variety of sports, private colleges and universities. Using the *Browning-Ferris* joint-employer standard, the NCAA can be considered a joint employer of the student-athletes of NCAA Division One affiliated colleges and universities. A joint employer status exists if both entities are employers within the meaning of common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.[38] The NLRB case, *Browning-Ferris*, determined that when reviewing whether two employers share of codetermine matters governing the essential terms and conditions of employment it will review the control an employer has over: hiring, firing, discipline, supervisor, direction, determining the number of employees to be

[35] *Statutory Rights of Students*, *supra* note 29 at 18.
[36] *Id.*
[37] *Id.*
[38] *Browning Ferris Newby Island Recyclery,* 362 NLRB No. 186 (2015).

supplied, scheduling, seniority, overtime, assignment of work and determining the manner and method of work performance.[39] The standard has changed overtime regarding the amount of control over these factors the joint employer has to actually exercise to be considered a joint employer.

In 2015, the *Browning-Ferris* case, relaxed the joint employer standard; the NLRB decided that it will "no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority.[40] Reserved authority to control terms and conditions of employment, even if not exercised, would be sufficient to show establish a joint employer relationship."[41]

APPLYING THE JOINT EMPLOYER STANDARD TO *NORTHWESTERN UNIVERSITY*

In using this joint employer test with the facts given in, the Board may find that the National Collegiate Athletic Association is a joint employer of the Northwestern University's Division One student-athletes. To reiterate the joint employer test, it states that: (1) two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and (2) if they share or codetermine those matters governing the essential terms and conditions of employment."[42]

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[39] *Browning-Ferris*, *supra* note 38 at 70.
[40] *Id.*
[41] *Id.*
[42] *Id* at 69.

First, Northwestern University is both an employer under Section 2(2), which was discussed earlier.[43] NCAA is an employer under Section 2(2) of the NLRA. The term "employer" includes any person acting as an agent, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof…[44] As a nonprofit organization that is not partly or wholly owned by the United States government, the NCAA is an employer. Also, the student-athletes would be considered the "workforce" under this test, as by applying the analysis in the NLRB *General Counsel's Memo GC 17-01: Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context*, student-athletes would be considered employees.

Second, both Northwestern University and the NCAA both share and/or codetermine the matters governing the essential terms and conditions of employment. The NLRB uses an inclusive approach to defining "Essential terms and conditions of employment," which can include, but is not limited to, hiring, firing, discipline, supervision, direction, determining wage and hours, and determining mandatory conditions of employment over one set of workers.[45]

Regarding mandatory conditions of employment, according to

[43] *Northwestern*, *supra* note 32 at 20.
[44] 29 U.S.C. §§ 152.
[45] *Id* at 70.

Section 14 Academic Eligibility of the NCAA Division One 2016-17 Rules, the NCAA sets rules determining that student-athletes cannot compete if the student falls below certain academic performance.[46] If a student falls below certain academic performance standards, the student would not be eligible to play for the upcoming or current season.[47] These conditions are mandatory for all students and universities to adhere to.[48] Additionally, in Section 12.7.3 Drug-Testing Consent Form, a student is not eligible for taking part in any sports without signing the drug-testing consent form.[49]

Regarding firing and discipline, according to Section 19 Enforcement of the NCAA Division One 2016-17 Rules, the NCAA sets standards to appeal violations of their laws, which can lead to the student no longer being able to compete.[50] These rules allow for the NCAA to discipline and effectively fire students from their team.[51]

For the above stated reasons, the NCAA can be considered to be a joint employer for Division One athletes at private university.

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[46] *National Collegiate Athletic Association Division One Manual* http://www.ncaapublications.com/productdownloads/D117.pdf (last visited May 11, 2017).
[47] *Id* at 143.
[48] *Id.*
[49] *Id* at 69.
[50] *Id.*
[51] *Id.*

CONTRACT NEGOTIATIONS WITH THE NCAA AND DIVISION ONE UNIVERSITIES CAN LEAD TO SIGNIFICANT CHANGES IN STUDENT ATHLETE COMPENSATION RULES

The NCAA has a ban in place on athletes profiting off of the names and likeness of collegiate student athletes.[52] For example, NCAA prohibits the selling of official jerseys with players' names on them.[53] Many colleges and universities instead sell either blank number jerseys, or, as Ohio State does, either "#1" or last two digits of the year.[54] However, this rule against profiting would be on the chopping block through contract negotiations between Unions, the NCAA, and the university.

Consider the following scenario: by using the General Counsel's employee analysis of collegiate athletes in combination with the joint-employer standard qualifying the NCAA as a joint-employer of student-athletes, many of the NCAA Division One Universities become unionized and are organized through either the same union or through unions with common long-term goals. In determining new contracts and rules for the student-athletes, these unions could, through strikes or public campaigning, challenge the rule prohibiting the students from monetizing from their name or likeness.

The question regarding profiting off of the student-athletes is one of

[52] Marc Tracy, *Days of Selling Popular College Players' Jerseys Seem Numbered,* NEW YORK TIMES, https://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html (last visited Mar. 11, 2017).

[53] *Id.*

[54] *Id.*

recent and constant debate. Specifically, in the case of *O'Bannon v. NCAA*, an antitrust case, the United States Court of Appeals for the Ninth Circuit determined that the NCAA rules barring compensation to student-athletes for the use of their names, images, and likenesses were subject to antitrust laws. [55] The case began when O'Bannon sued the NCAA and the Collegiate Licensing Company, the entities which licenses the trademarks of the NCAA for commercial use, in federal court.[56] In 2008, Ed O'Bannon, a former All-American basketball player for UCLA, discovered that his likeness was used in a video game; the virtual player was designed to look like him, wear his number, and play in his position.[57] O'Bannon never gave consent for his likeness to be used in this game.[58] At the same time, Sam Keller, former starting quarterback for Arizona State University and University of Nebraska, filed suit for his likeness being used in a NCAA branded video game.[59] The cases were consolidated and eventually "all current and former student-athletes…whose images, likenesses and/or names may be, or have been, included or could have been included…in game footage or in videogames licensed or sold by the Defendants…" were added as class action plaintiffs.[60] Ultimately, however, the Supreme Court

[55] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

declined to consider the case, leaving the 9th Circuit's dual ruling is left intact.[61]

Despite the Supreme Courts declining to consider the case, if the rule regarding compensation becomes a target of organized student-athlete unions, we could soon be seeing a significant change in the rules regarding student-athlete compensation without the need for judicial ruling.

[61] *O'Bannon*, 802 F.3d 1055.