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# Attorney Explains Legal/Legislative Landscape Surrounding Classifying Student-Athletes as Employees

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Andrew Henson

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Andrew Henson, an associate in Troutman Pepper's Labor + Employment Practice Group, was quoted in the August 18, 2023 *Thomson Reuters* article, "Attorney Explains Legal/Legislative Landscape Surrounding Classifying Student-Athletes as Employees."

The U.S. Department of Labor (DOL) looks at the "economic realities" of the working relationship between the employer and employee when determining a worker's status under the FLSA, explains Andrew Henson, an associate with the national law firm Troutman Pepper. "Federal courts have crafted different multi-factor tests to determine whether the economic realities of a given relationship are consistent with employment status," Henson began. "However, there is currently no consensus about which test should be used."

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Henson says that the tests developed by federal courts regarding worker classification under the FLSA typically focus on analyzing if an employer-employee relationship exists by determining whether the worker is economically dependent on the employer for work (employee) or is in business for themselves (independent contractor).

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However, Henson points out that "it has been less common for litigation to raise a question of whether an employment relationship exists where an individual is engaged in an ostensibly recreational, educational, or other non-commercial purpose." He adds that "the courts have struggled to fashion the correct test in that instance."

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Regarding the DOL's current position on how student-athletes are to be classified under the FLSA, Henson says that "there is no explicit carveout for student-athletes" but notes that the DOL published a field operations manual "in which it opined that students are generally not deemed employees under the FLSA when they engage in 'extracurricular activities' and 'interscholastic athletics.'"

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On the legal end, Henson explains that "it has been well-settled law, until recently, that student-athletes were not

employees of their schools merely by engaging in college athletics." In *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.* , 468 U.S. 85, 120 (1984), Henson points out that the highest court in the nation observed that there existed "a revered tradition of amateurism in college sports."

In 2016, the Seventh Circuit Court of Appeals rejected an FLSA claim brought by former track and field student-athletes and cited the Supreme Court's 1984 ruling that the tradition of amateurism defined the economic reality of the relationship between student-athletes and their schools (*Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016)). Henson explains that "from the *Berger* court's perspective, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."

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Despite several prior legal rulings against claims that student-athletes should be treated as employees, the tide began to turn in 2021 with an antitrust case where student-athletes successfully challenged the NCAA's rules limiting education-related benefits that participating schools were allowed to provide (*NCAA v. Alston*, S. Ct., Dkt. No. 20-512, 06/21/2021 ). "Prior to *Alston*, there was a general consensus that student-athletes were not employees as far as the FLSA was concerned," Henson said.

He further explains that the Supreme Court's unanimous decision siding with the student-athletes in *Alston* "signaled how the Court would likely rule if the question of student-athletes employment status had been before it." Key language that Henson points to from the Court's ruling involves referring to student-athletics as a "profitable enterprise" and that the NCAA was "depressing wages" of "student-athlete labor."

Henson also spoke to the Court's casting off the "so-called 'tradition of amateurism' that it had previously recognized as merely a 'passing comment'" and added it "made clear its view that the economic realities of at least some portion of student-athletics are that of a labor market." He notes that the Court "left little reason to doubt that it would conclude student-athletes could be employees under the FLSA."

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According to Henson, the *Alston* ruling "paved the way for the latest FLSA challenge" where several "student-athletes brought suit against 25 NCAA Division 1 member schools and the NCAA itself." Currently, the case is pending an appeal in the Third Circuit after the Eastern District of Pennsylvania concluded that the student-athletes plausibly alleged they are employees of the schools for purposes of the FLSA *(Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021))."[The case] may be the vehicle by which this question is finally answered by the Supreme Court," Henson stated.

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Henson said that Cruz's proposal "would remove the specter of student-athletes being deemed employees of their institutions under federal law and would also preempt any state law to the contrary." He added that from the NCAA's perspective, it would provide legal clarity, and if such a bill was passed, Henson does "not see a high likelihood of success in a hypothetical legal challenge."

Henson believes more federal legislative action on this topic should be expected and that a resolution to the question may come from an act of Congress in one form or another.

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However, if the Supreme Court rules on the classification of student-athletes as employees before any pending legislation on the matter has been signed into law, Henson says “that would necessarily require the schools to comply with the FLSA, including by paying overtime and minimum wage.” He noted that DOL “guidance for employers of student-athlete-employees is unlikely to be different than it is for other employees.”

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