Articles + Publications | October 5, 2021

NLRB General Counsel Contends That Scholarship Athletes at Certain Private Universities Are Employees Under NLRA

WRITTEN BY

Christopher J. Moran | Sean P. McDevitt

On September 29, National Labor Relations Board (NLRB) General Counsel Abruzzo instructed NLRB officials nationwide that scholarship athletes at private universities within NCAA Division I FBS (Football Bowl Subdivision) are "employees" under the National Labor Relations Act (NLRA). Consequently, the NLRB should view such athletes as protected "when they act concertedly to speak out about their terms and conditions of employment, or to self-organize." In her memo (GC 21-08), Abuzzo also maintains that universities can commit unfair labor practices by "misclassifying them as 'student-athletes,' and leading them to believe that they are not entitled to the [NLRA's] protection."

GC Abuzzo's recent memo relies heavily on, and largely reinstates, an earlier memorandum (GC 17-01), which the Trump NLRB rescinded. In GC 17-01, the former NLRB's GC concluded that scholarship football players at Division I FBS private colleges and universities are employees under the NLRA "because they perform services for their colleges and the NCAA, subject to their control, in return for compensation." The discussion in GC 17-01 involved a case in which the NLRB declined to assert jurisdiction over a representation petition filed by Northwestern University's scholarship football players, but it noted that it might reach a different result in a later case. *See* https://www.jdsupra.com/legalnews/nlrb-punts-on-first-down-declines-to-94120/. GC Abruzzo appears to have invited the filing of just such a case.

What Does the Memo Mean to Colleges and Universities?

An Unlevel Playing Field. Private colleges and universities fall under the NLRB's jurisdiction, whereas public colleges and universities — *i.e.,* state colleges — generally do not. Further, given the financial stakes that state universities have in major college sports, it is unlikely that state schools will push to allow student athletes to form labor unions under state law to level the playing field with their private university conference members. If private institutions must negotiate with their athletes, and state institutions do not, this may place private institutions at a disadvantage.

Other Employment Law Implications. If the NLRB designates athletes at private colleges and universities as employees under the NLRA, then one must ask if they are presumed to be employees for other federal and state law purposes. For example, should they be covered by workers compensation? Will this have any impact on the pending wage claims being pursued on behalf of some student athletes?

Impact on NCAA Rules. GC Abuzzo also stated that she believes the NCAA and athletic conferences may be

joint employers and thereby, also subject to NLRB jurisdiction. Does this mean that student athletes can bargain over the NCAA rules and regulations, such as the requirement that they maintain full-time student status?

Income Tax Implications. Currently, athletic scholarships, room, board, books, and expenses do not constitute taxable income to the student athlete. If the student athlete is an employee, will those benefits constitute reportable W-2 wages like other employees of the institution? Heretofore, compensation for athletic performance that requires tax reporting would likely violate NCAA rules concerning amateur status and disqualify the student from competition.

***Title IX Implications*.** If student athletes collectively bargained for wages to reflect their team's contribution to athletic department receipts, how would that affect a private university's compliance obligations under Title IX?

What Impact Will Religious Exemptions Play?

In *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979), the Supreme Court held that the NLRA does not authorize the NLRB to exercise jurisdiction over teachers in a church-operated school, no matter whether the school is "completely religious" or merely "religiously associated." In *Duquesne University of Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), the U.S. Court of Appeals for the District of Columbia Circuit considered the NLRA's religious exemption and held that where an institution (1) holds itself out to the public as a religious institution; (2) is nonprofit; and (3) is religiously affiliated, "the [NLRB] must decline to exercise jurisdiction." (quoting *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002)). The *Duquesne* Court held "that the NLRA does not empower the [NLRB] to exercise jurisdiction in cases involving schools with three particular features, none of which depend on the roles played for by the petition-for faculty members." Thus, *Duquesne* suggests that a religious exemption applies at the organizational level, not to the specific task performed by an employee within that religious organization.

Duquesne indicates that the religious exemption carves out another category of collegiate participants, the religious institution, whose student athletes might not be subject to the NLRA. Notably, in her memo, GC Abruzzo reiterated that NLRB regions must refer cases applying the religious exemption to the NLRB's Division of Advice before making a decision.

As If That Were Not Enough

In a footnote, GC Abruzzo also notes that she plans "to maintain the prosecutorial position that student assistants, as well as medical interns and non-academic student employees, are protected by the [NLRA]." She also directs that all cases involving those issues be submitted the Division of Advice.

Where Do We Go From Here?

GC Abuzzo directs regional offices to submit for advice cases where athletes within NCAA Division I FBS institutions claim employee status under the NLRA. This will undoubtedly happen. It also seems inevitable that such an NLRB decision will be appealed to the federal appellate courts, perhaps most likely in the District of Columbia.

Institutions should be sensitive in how they respond to concerted actions by student athletes to reduce the likelihood of possible retaliation charges. Likewise, institutions should consider developing talking points, explaining why they refer to their players as “student athletes” to reduce the likelihood of alleged misclassification charges.

RELATED INDUSTRIES + PRACTICES

- Labor + Employment