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NLRB Rules That Dartmouth Basketball Players Are Employees

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On February 5, the regional director for Region 1 of the National Labor Relations Board (NLRB or Board) ruled that the student-athletes on Dartmouth College's men's basketball team are "employees" under the National Labor Relations Act (NLRA) and, therefore, are eligible to vote on whether to unionize. Applying the Board's common law test, the regional director reasoned that the basketball players are employees "because Dartmouth has the right to control the work performed by the men's varsity basketball team, and because the players perform that work in exchange for compensation." Although this decision is likely to be appealed to the full Board, it could ultimately result in a ruling with a significant impact on the status of student-athletes across all divisions and all sports within higher education.

By way of background, the team's 15 members filed a petition in September 2023 seeking to join the local chapter of the Service Employees International Union in Hanover, NH, which already represents other Dartmouth employees. Dartmouth opposed the petition, arguing that the basketball players were not employees because the college did not exercise sufficient control over them, and also because they did not receive compensation for playing basketball. The college noted that it does not provide athletic scholarships, and it asserted that the basketball program was actually losing money. Dartmouth also argued that the Board should decline to assert jurisdiction over the basketball players because doing so would create instability in labor relations.

In support of its arguments, Dartmouth also cited NLRB's decision in *Northwestern University,* 362 NLRB 1350 (2015), in which the Board ultimately declined jurisdiction over Northwestern's football players. In that case, the regional director determined that players on the university's football team, who received grant-in-aid scholarships were employees within the meaning of the NLRA; however, the regional director did not find that nonscholarship football players (walk-ons) were employees, explaining that they did not receive any compensation. When that case went before the full Board, the Board explicitly avoided deciding whether the football players were employees. Instead, NLRB declined to assert jurisdiction over the scholarship players because, even if they were statutory employees, asserting jurisdiction would not create stability in labor relations. Dartmouth also argued that its position was supported by the Board's decision in *Columbia University,* 364 NLRB 1080 (2016), which held that students are employees under the NLRA only where (1) the student is required to provide services under the direction and control of the university and (2) the student's funding is conditioned on the performance of those services.

In rejecting Dartmouth's arguments, the regional director first found that the basketball players perform work, which benefits Dartmouth in a variety of ways, including alumni engagement, financial donations, and publicity, resulting in increased student interest and applications. The regional director also found that "Dartmouth exercises

significant control" over that work, reasoning, for example, that "Dartmouth determines when the players will practice and play, as well as when they will review film, engage with alumni, or take part in other team-related activities. When the basketball team participates in away games, Dartmouth determines when and where the players will travel, eat, and sleep."

Lastly, the regional director concluded that, although the basketball players did not receive athletic scholarships, they received other forms of compensation for their work, for example: athletic equipment and apparel, tickets to games, lodging, meals, the benefits of Dartmouth's Peak Performance program, and fringe benefits such as "academic support, career development, sports and counseling psychology, sports nutrition, leadership and mental performance training, strength and conditioning training, sports medicine, and integrative health and wellness." Interestingly, the regional director found that the "early read" provided to basketball players in the admission process was also a form of compensation. The regional director also found that the asserted unprofitability of the basketball program was irrelevant to the analysis of employee status.

As a result, the regional director concluded that the basketball players are employees within the meaning of the NLRA and she directed an election in the petitioned-for unit.

Perhaps the most surprising aspect of this decision is the regional director's expansive view of what suffices as compensation for purposes of finding employee status. In September 2021, the Board's general counsel issued a memorandum, stating her opinion that athletic scholarships at NCAA Division 1 schools were a form of compensation sufficient to support a finding of employee status. However, that memorandum did not suggest that compensation could be found in the types of things relied upon by the regional director in the Dartmouth case.

Dartmouth is expected to appeal the regional director's decision to the full Board (and then, potentially, to a federal appellate court and, possibly, a petition to the U.S. Supreme Court). Consequently, the impact of this decision is not yet clear. However, if this decision were to stand, the analysis on which it is based would appear to support organizing efforts by student-athletes in many sports programs at a wide variety of private institutions. Moreover, although the NLRA does not apply to public employers, in a pending matter, NLRB is currently arguing that student-athletes at the University of Southern California are jointly employed by the National Collegiate Athletic Association (NCAA) and the Pac-12 Conference. If such a joint employer argument were to be successful, the impact of the Dartmouth decision might then be expanded to state-run institutions.

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