Articles + Publications | October 20, 2021

NLRB's Top Attorney Says College Athletes Are Employees: Here's What That Means

Labor & Employment Workforce Watch

WRITTEN BY

Lani Blake | Jeffrey M. McPhaul

On September 29, the top attorney for the National Labor Relations Board ("NLRB") issued a memorandum opining that certain collegiate athletes at private institutions should be considered employees under the National Labor Relations Act (the "Act"), which would grant them certain statutory protections, including the right to unionize and speak out about the terms and conditions of their employment with the universities they attend.

This opinion comes just months after the United States Supreme Court's opinion in *NCAA v. Alston*, which uprooted years of NCAA policies prohibiting collegiate athletes from receiving certain education-related compensation on anti-trust grounds. With a unanimous (9-0) opinion in *Alston*, the Supreme Court struck down certain of the NCAA's "no-pay for play" rules, easing some of the barriers to student athlete compensation. Shortly after the *Alston* decision, the NCAA adopted new rules permitting athletes to receive compensation for their name, image, and likeness (NIL)—such as for endorsements and public appearances.

Capitalizing on *Alston*'s and the NCAA's pro-compensation momentum, the NLRB's latest memorandum makes clear the Democrat-controlled board intends to treat collegiate athletes at private institutions, who perform services in return for compensation, as "employees" under the Act—meaning, they have the statutory right to "act collectively to improve their terms and conditions of employment" and are protected from retaliation, among other things.

What is less clear is which athletes meet the employee threshold, and which athletes do not. The NLRB General Counsel's opinion does not provide clarity in the form of a bright-line rule, but instead, outlines certain considerations and a factor-based test, keeping in mind that the term "employee" will be, and has always been, interpreted broadly under the Act.

As an example, the General Counsel references a prior memorandum involving Division I football players at a large, private university. There, the athletes performed alleged services for the university (football), received purported compensation for such services from the university (tuition, room, board), and were allegedly controlled by the NCAA and the university (eligibility, maximum practice and competition hours, daily itineraries, penalties for infractions or rule violations). The new General Counsel memorandum makes clear that, under these circumstances, the private university football players, and other private university athletes that are similarly situated to them, should be classified as employees under the Act.

As of now, it is unclear how the employee classification opinion would treat athletes in alternative circumstances, such as those who receive only partial athletic scholarships, who are redshirting, injured, or otherwise not

performing any services, who receive only academic scholarships, or who compete in Division II or Division III athletics.

Though many questions remain outstanding, the General Counsel's opinion is a step towards understanding how the current Board will view the hotly contested issue of student athlete employment and compensation, which will continue to be an area of focus for legislators and courts. Two competing bills have been proposed at the federal level on this issue. Twice in the past few months, a federal judge rejected the NCAA's motion to dismiss lawsuits seeking to have college athletes declared school employees under the Fair Labor Standards Act—a federal law that establishes minimum wage and overtime for employees.

Additional litigation relating to student athlete employment could lead to follow up issues, such as the scope of the employment relationship, employee discipline, leave, taxation, and termination. Private universities should continue to monitor the landscape surrounding student athlete employment, monetization, and compensation in the wake of *Alston* and the NLRB's latest guidance.

RELATED INDUSTRIES + PRACTICES

- Labor + Employment