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U.S. Senate Committee Hears Testimony About the Need for Uniform NIL Regulation That Would Exempt Student-Athletes From Federal and State Employment Laws

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On October 17, the U.S. Senate Judiciary Committee heard testimony from witnesses about the need for reform in college athletics, including the possibility of establishing a national standard for regulating Name, Image, and Likeness (NIL). The hearing was part of recent efforts to develop a framework that might preempt a future determination by the U.S. Supreme Court, that finds student-athletes are employees of their institutions of higher education under the Fair Labor Standards Act (FLSA) and analogous state laws. During the nearly three-hour hearing, committee members expressed bipartisan agreement on the need for reform the patchwork state law framework that currently exists, but conveyed wide differences in their opinions around the appropriate scope of congressional involvement.

The impetus for the hearing grew out of the U.S. Supreme Court's 2021 antitrust decision *NCAA v. Alston*, where the Court's opinion characterizing student-athletes as participants in a labor market prompted the NCAA to abandon its strict stance on amateurism and change its rules to permit student-athletes to remuneration for their NIL. Many have pointed to the *Alton* decision — and Justice Kavanaugh's blistering concurrence, in particular — as a path toward an eventual Supreme Court decision finding student-athletes are employees under the FLSA. In fact, the Third Circuit Court of Appeals is currently considering this very question, and its ruling may be the vehicle by which this question appears before the Supreme Court. As the issue of student-athlete employment status has been making its way through the federal judiciary, the NCAA, representatives of higher educational institutions, and student-athletes have been regular visitors in Washington to lobby for federal action.

During the Senate Judiciary hearing, committee members and witnesses alike expressed near universal agreement that congressional inaction was not a viable option. Lawmakers acknowledged a sense of urgency that the Supreme Court was going to rule, and that Congress' failure to intervene would result in an "unworkable" patchwork of state labor laws (not unlike what currently exists, with respect to NIL). NCAA President Charlie Baker recommended that Congress codify current FLSA regulatory guidance into law to confirm student-athletes are not employees of their schools, and he expressed his understanding that many student-athlete groups do not wish to be regarded as employees.

Jill Bodensteiner, vice president and director of athletics at Saint Joseph's University, testified that the "threat of athletes becoming employees is the number one threat" to her institution. Bodensteiner, among other witnesses, listed her assessment of the potential impact arising from such a legal determination, including negative tax implications for student-athletes, immigration law restrictions on international students, an increase in the costs of

collegiate athletics, and the consequent reduction in the number of sports programs that institutions of higher education could offer.

Republican members on the committee, including Senators Graham and Tillis, voiced concerns that employment status would damage NCAA Division II sports as well as sports programs that do not generate revenue, which could negatively impact the Olympic training and professional sports leagues that recruit collegiate athletes. Democratic members largely kept silent about their opinions of student-athlete employment status except for Senator Blumenthal, who expressed skepticism about the feasibility of the line-drawing that would be required to define some segment of student-athletes as employees but not others.

Ramogi Huma, executive director of the National College Players Association, recommended to committee members that student-athletes participating in FBS football and Division I Men's and Women's basketball *should* be regarded as employees. However, his views did not appear to have support from anyone on the committee. Senator Hawley also offered a lone opinion that student-athletes should be able to collectively bargain with their institutions to overcome the asymmetry in bargaining power.

The committee discussed other legislation under consideration, including a proposal by Senator Blumenthal to establish a medical trust fund for student-athletes, require schools to provide scholarships for injured student-athletes, support athletes' insurance costs and out-of-pocket medical expenses, and setting enforceable student safety standards. The proposal was not met with any perceptible opposition.

This is the 10th such hearing that Congress has held in recent months on the issue of college athletics. The committee members' remarks suggest that, in conjunction with enacting a framework of NIL regulation, Congress is likely to exempt student-athletes from being considered employees of their institutions. If Congress proceeds this way, the status quo remains. If not, institutions will likely need to comply with any requirements introduced by the U.S. Supreme Court.

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