LEGAL UPDATES

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Back to School: What You Need to Know as the NLRB Pursues Unfair Labor Practice Charges on Behalf of College Athletes

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College athletes will return to competition in a few weeks. They will also return to the courtroom. This time, it relates to the treatment of student-athletes under the National Labor Relations Act (NLRA). On May 18, 2023, the National Labor Relations Board's (NLRB) Los Angeles Regional Office (Region 31) filed a single complaint against three respondents—the University of Southern California (USC), the Pac-12 Conference, and the National Collegiate Athletic Association (NCAA)—alleging certain USC athletes are statutory employees of each of the three respondents under the NLRA. If successful, students who play men's basketball, women's basketball, or football at any NCAA member institution will be granted full rights as "employees" under the NLRA, including the right to organize a union, join a union, or engage in protected concerted activity, among other rights.

Following the complaint, NLRB General Counsel Jennifer Abruzzo stated misclassifying college athletes as "student-athletes" instead of employees "deprives these players of their statutory right to organize and to join together to improve their working/playing conditions if they wish to do so. Our aim is to ensure that these players can fully and freely exercise their rights."

GC Memo 21-08: Factors supporting finding college athletes are employees

Readers who follow Husch Blackwell's Labor Law Insider podcast or who have been following NLRB developments will not be surprised by Abruzzo's 2021 Memorandum, GC Memo 21-08, where she criticized the NCAA's use of the phrases "student-athlete" and "amateurism." Abruzzo, relying on the Board's

unanimous decision in Northwestern University, 362 NLRB 1350 (2015), cited the following factors to support a finding that college athletes are employees under the Act:

The athletes play football (perform a service) for both the university and the NCAA, generating tens of millions of dollars in profit and providing an immeasurable positive impact on the university's reputation, which in turn boosts student applications and alumni financial donations;

Football players receive significant compensation, including up to $76,000 per year covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare;

The NCAA controls the players' terms and conditions of employment, including the maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept, and ensures compliance with those rules through its "Compliance Assistance Program" and;

The university controls the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules. For example, the university maintains detailed itineraries regarding the players' daily activities and training, enforces the NCAA's minimum GPA requirement, and penalizes players for any university or NCAA infractions, which could result in removal from the team and loss of their scholarship.

According to Abruzzo, "the scholarship football players at issue in Northwestern clearly satisfy the broad Section 2(3) definition of 'employee and the common-law test,'" and "football players, and other similarly situated players at academic institutions, should be protected by Section 7 when they act concertedly to speak out about their terms and conditions of employment, or to self-organize, regardless of whether the Board ultimately certifies a bargaining unit."

In Northwestern University, the Board did not rule on the issue of whether college football players are employees. Instead, the Board declined to exercise jurisdiction because of NCAA complexities, including potential issues concerning public schools in the NCAA over which the Board has no jurisdiction, and the potential for labor unrest.

The USC case

In addition to the issue of whether college athletes are statutory employees under the Act, the USC case is the first to consider whether the Pac-12 and the NCAA are joint employers. Finding joint employer status for NCAA players opens the possibility of union representation of athletes from both

private and public NCAA member institutions. Such a decision would allow over 100,000 college athletes playing football and men's and women's basketball—including approximately 41,000 players in Division I alone—to join a union. The complaint alleges the parties are joint employers because the NCAA and the Pac-12 have control over USC's labor relations polices and/or administer a common labor policy with USC with respect to college athletes. If found to be joint employers, the parties can be held liable for each other's actions and violations under the NLRA. The USC case is set to be heard by an administrative law judge on November 7, 2023.

Considerations for the new school year

Colleges and universities should be aware of the issues presented in the USC case and consider how a NLRB decision finding college athletes to be statutory employees under the NLRA could impact their organization and consider steps to ensure NLRA compliance.

Protected concerted activity

Assuming they are statutory employees as the Board alleges, many college athletes participate in protected concerted activities as defined in Section 7 of the Act through their participation in Student-Athlete Advisory Committees (SAACs) and other department leadership councils. SAACs are NCAA-mandated organizations formed at each NCAA member institution. SAACs allow athletes to offer input on NCAA legislation, advocate to administration about concerns, and promote athlete engagement. Other concerted activities include communications and acts to prepare for group actions, such as those seen during the 2020 Big Ten United and Pac-12 #WeAreUnited campaigns, where college athletes demanded enhancements to COVID-19 protocols and firmer commitments to racial justice from their universities and conferences. If college athletes are found to be statutory employees under the act, coaches and administrators will not be able to speak with players about concerted activities, including asking common questions about involvement in campus protests or planned protest activities.

Other activity likely to be considered protected includes athletes' reports made through systems like RealResponse or other anonymous campus climate and reporting mechanisms. If an athlete brings a concern directly to a coach or administrator implicating a team-wide issue, such activity would be protected and coaches and administrators would need to take steps to ensure adverse actions, and those perceived as such, are not taken. Adverse actions might include reduced playing time, schedule changes, and other team-membership—i.e., employment-related perks. Whether statutory employees are members of a union or not, they have the right to participate in protected concerted activities under the Act.

Handbooks

As one of her first acts as general counsel, Abruzzo issued GC memo 21-04 to all regional directors outlining her areas of focus, including employer handbooks. Abruzzo directed regional directors to impose additional scrutiny on handbook policies such as perceived overly broad social media rules allegedly restricting employees' Section 7 rights.

Providing statutory protections to college athletes will open any employee handbook issued by a covered university to NLRB scrutiny, regardless of whether the athletes are represented by a union. Under The Boeing Company, handbook policies are evaluated by the nature and extent of their potential impact on NLRA rights and legitimate justifications associated with the rule. Schools should review their policies in light of this standard. Social media policies prohibiting athletes from posting negative opinions about athletics programs or general monitoring of accounts for disciplinary action could be seen as unlawful. Policy limitations on athlete access to the media—such as preventing, for example, freshmen athletes from attending press conferences or not allowing media access after a loss—could also be viewed as an unreasonable restraint on Section 7 rights.

What this means to you

Although the USC case is about football and men's and women's basketball players, the decision will impact thousands of college athletes in other sports as well. If players can form a union and are able to command significant pay, athletic departments may be forced to cut scholarships or sports, a prevalent post-COVID-19 trend. The decision also could clarify next steps for those non-football and non-basketball athletes, who, based on the scope of the decision, might be able to organize. Schools should consider taking steps now to educate and protect themselves against unfair labor practice charges in advance of the November 7, 2023, hearing. Education on concerted activities and updated, legally compliant personnel and handbook policies may help shield NCAA schools from the NLRA's costly penalty flags and personal fouls.

Contact us

If you have questions regarding the intersection of labor law and college athletics, please contact Tyler M. Paetkau, Trecia Moore, or your Husch Blackwell attorney.