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Some Athletes Say "Show Me the Money" and a Union Third Circuit and NLRB General Counsel Lead the Way

By Letitia Silas

Some college athletes are demanding "*show me the money!*" in a way that could upend how we understand college athletics, how certain college sports programs are managed outside of institutional rules, policies, and procedures, and the relationship between college athletes and the institutions and professionals responsible for their education, training, and development.

Recently, the Third Circuit held in *Johnson v. NCAA* that college athletes at NCAA member schools were not precluded from bringing a suit under the Fair Labor Standards Act (FLSA) and may be employees under the Act when applying traditional agency principles. Specifically, the court held that college athletes may be employees under the FLSA when they (a) perform services for another, (b) necessarily and primarily for that party's benefit, (c) under that party's control, and (d) in return for express or implied compensation or in-kind benefits.

The *Johnson* decision is a significant blow to history, precedent, and tradition of college sports that is already fracturing under the pressure of shifting attitudes about work, amateurism in college sports, compensation, and health and safety as well as efforts at the federal level to classify certain college athletes as employees under the FLSA and the National Labor Relations Act (NLRA).

How Did We Get Here?

In 2019, several athletes at Division I member schools filed a complaint against the NCAA and their respective schools asserting violations of FLSA and several state wage laws. The athletes asserted that they are entitled to federal minimum wage compensation for the time that they spend representing their schools in sports activities. The NCAA and member schools filed a motion to dismiss pointing to history and asserting that the athletes are amateurs and not employees.

The court flatly rejected the "amateurism" defense, suggesting that the concept is a fiction created to "'obfuscate the nature of the legal relationship of a growing commercial enterprise'." Likewise, the court rejected the *Glatt* test applied by the district court to determine employee status under the FLSA. That test examines whether the putative employee or employer is the primary beneficiary of the relationship. Consequently, the

court remanded the case for further analysis under traditional agency principles, which the court deemed more appropriate.

The court's rationale for rejecting the *Glatt* test was that it had been applied to cases to determine the employee status of interns and independent contractors. The court stated those cases are not sufficiently analogous because "the work performed during properly designed unpaid internships 'can greatly benefit interns,' as 'the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment'."

Instead, looking to the NLRB's decision in *Columbia University*, which – applying traditional agency principles – held that graduate student assistants are employees under the NLRA, the court stated that the posture of the plaintiff college athletes was more analogous to graduate student assistants. Specifically, it noted, "like the athlete, the graduate student is enrolled in college or university. Like the college athlete, the graduate student's tuition is often covered by the institution as a recruitment incentive. Also similar to the college athlete, the graduate student sometimes performs work for the institution that involves little educational value or direct connection to a course of study."

This Decision is about Labor Policy as Much as it is About Wages

While the *Johnson* court decided whether college athletes may be employees under the FLSA, the decision has implications that reach beyond the FLSA and touch the NLRA. First, the court specifically noted, that the "NLRA and FLSA have distinct policy goals, but their shared history often inspires courts to draw interchangeably from each statute's caselaw to answer fundamental questions related to the equitable regulation of the American workplace."

Second, the court noted that "the National Labor Relations Board . . . is for the first time taking the position that college athletes are employees for purposes of the National Labor Relations Act." Third, the court cited the NLRB's *Columbia University* decision as well as the NLRB General Counsel *Memorandum Employee Status of Players at Academic Institutions* in support of its conclusion that the traditional agency test is more appropriate than the *Glatt* test to determine employee status of college athletes.

Finally, the court noted that – although not officially decided by the NLRB – its decision makers in the regional offices are already applying agency principles to find that college students are athletes under the NLRA, as demonstrated by the processing of a union petition to represent college basketball players at Dartmouth and a subsequent NLRB election.

Big Picture Takeaways

- Broadly changing federal law to classify certain college athletes employees opens the gate for more litigation under federal wage and hour laws as well as, potentially, labor laws.
- Retroactivity of any finding of employee status under the FLSA could expose some institutions to claims for backpay and other damages (such as punitive or liquidated damages) under federal and state wage and hour laws.
- Classifying college athletes as employees could shift their focus from the attainment of higher education

and professional training to maximizing compensation packages at the college level to the detriment of those athletes who are not drafted nor advance to full-time careers in professional sports.
- College athletes may be granted rights under the NLRA, which includes the right to engage in protected concerted activity (including the right to strike) and/or form, join, or assist labor unions.
- As a practical matter, the relationship between student athletes and their coaches and/or trainers would shift from mentor/mentee or advisor/advisee to supervisor/employee (e.g. master/servant).
- Primarily focusing on monetary gains of employee status at the student athlete level could have a variety of unintended consequences at the professional level.

Conclusion

While the court's decision did not conclusively answer the question of whether college athletes are indeed employees under the FLSA, its decision certainly paved a significant right of way for the district court to do so. While the court remanded the case back to the district court to analyze whether those college athletes are employees under FLSA under traditional agency principles, its decision certainly moves these athletes closer to the goal post of being deemed employees under not only under the FLSA but under the NLRA as well.