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College Athletics: Work or Play?

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Amateurism in collegiate athletics is under an unprecedented assault. In the short time since the National Labor Relations Board (NLRB or the Board) unanimously rejected a representation petition from a group of NCAA[1] Division I football players in *Northwestern University*,[2] current and former college athletes have filed suit seeking revenues derived from video game licensing,[3] the elimination of caps on non-cash compensation such as tutoring, paid internships, and post-eligibility scholarships,[4] and claims for minimum wage and overtime under the Fair Labor Standards Act.[5] Most recently, the NLRB General Counsel opened another front in this battle, opining that she believed scholarship football players, "and other similarly

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[1] The National Collegiate Athletic Association (NCAA) is "a voluntary, self-governing organization of four-year colleges, universities and conferences committed to the well-being and development of student-athletes, to sound academic standards and the academic success of student-athletes, and to diversity, equity and inclusion." NCAA Constitution, Preamble (Dec. 14, 2021).

[2] 362 NLRB 1350 (2015).

[3] *See, e.g.*, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

[4] *See NCAA v. Alston*, 594 U.S. ---, slip op. at 12 (2021).

[5] *See, e.g.*, *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019) (rejecting claims that student athletes are employees of either the NCAA or an athletic conference under FLSA and California Labor Code); *Johnson v. NCAA*, 556 F. Supp. 3d 491 (2021) (E.D.Pa. 2021) (Finding plaintiffs had plausibly alleged NCAA was a joint-employer under FLSA in denying a motion to dismiss under lenient standard required by FED. R. CIV. P. 12(b)(1)).

situated Players at Academic Institutions, should be protected by Section 7 [of the National Labor Relations Act (the Act)]."[6] In Section I this paper will review the Board's decision in *Northwestern University*, and other legal developments affecting the employment status of scholarship collegiate athletes. Section II will explore the General Counsel's memorandum. Finally, Section III will discuss what comes next and attempt to address how the NCAA can move forward while protecting the ideals of amateurism and stability in collegiate athletics.

SECTION I

A. *Northwestern University*

While both collegiate athletics[7] and the NCAA[8] predate passage of the Act by decades, the Board did not confront the issue of whether student athletes are entitled to rights under the Act until 2015 when the Board reviewed a decision and direction of election issued by then-Regional Director Peter Ohr.[9] In *Northwestern*, the College Athletes Players Association (CAPA) petitioned to represent a unit of "grant-in-aid scholarship" football players at Northwestern University.[10]

Applying the common law definition of "employee," "a person who performs services for another under a contract of hire, subject to the other's control or right of

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[6] Memorandum GC 21-08, Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act (Sept. 29, 2021).

[7] The first intercollegiate athletic competition was a boat race between Harvard and Yale in New Hampshire in 1852. *See Alston*, 594 U.S. ---, slip. op. at 2.

[8] The organization now known as the NCAA was founded by Harvard, Princeton, and Yale as the result of a series of White House summits with President Theodore Roosevelt in 1906. *Id.*, slip. op. at 4.

[9] *Northwestern University*, 362 NLRB at 1352 ("The Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind.").

[10] *Id.* at 1356.

control, and in return for payment,"[11] the Regional Director held that the scholarship football players were employees under § 2(3) of the Act.[12] First, the football players "perform[ed] valuable services" for Northwestern—generating approximately $235 million from 2003-2012.[13] In turn, the football players were compensated for such services with scholarships valued at upwards of $76,000 per calendar year.[14] The football players were also subject to Northwestern's control over their day-to-day lives both on and off the football field and in their academic studies.[15] Having concluded that the scholarship football players were "employees" under the Act, the Regional Director directed an election.[16]

Holding that the Regional Director's decision presented "novel and unique circumstances,"[17] the Board unanimously declined to assert jurisdiction over the football players' petition:

> because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS[18] football (in which the overwhelming majority of competitors are public colleges and universities over which the Board

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[11] *Id.* at *1362-63 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

[12] *Id.*

[13] *Id.* at 1363.

[14] *Id.*

[15] *Id.* at 1363-64.

[16] *Id.* at 1368. Notably, the Regional Director excluded "walk-on" players from the unit and from eligibility to vote, thus reducing the size of the one-team unit even further. According to the Regional Director, because the "walk-on" players "do not receive compensation for the athletic services they perform" they are not employees. *Id.* at 1364.

[17] *Id.* at 1352.

[18] Northwestern University's football team competes within the Big Ten Conference in the NCAA's Division I Football Bowl Subdivision (FBS), the highest level of NCAA competition in football.

> cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.[19]

The structure of FBS football was of paramount concern to the Board's decision. At the time, just 17 of the 125 institutions competing in FBS football were private and thus subject to the jurisdiction of the Board.[20] The remaining 108 FBS schools were state institutions and thereby not "employers" under § 2(2) of the Act.[21] As the Board correctly noted, it could not assert jurisdiction over public entities, and in fact, at least two states with public institutions in the Big Ten expressly excluded scholarship athletes from collective bargaining.[22] A number of other states either ban collective bargaining by all public employees, or have not expanded such rights to employees (or students) at their higher education institutions.[23]

A single-team bargaining unit raised practical concerns for the Board as well, especially because Northwestern was the *only* school subject to its jurisdiction in the Big Ten.[24] Analogizing the petition to similar petitions in professional sports leagues, the Board noted that it "has never involved a bargaining unit consisting of a single team's players, where the players for competing teams were unrepresented or

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[19] *Id.* at 1350.

[20] *Id.* at 1351.

[21] *See* 29 U.S.C. § 152(2) (Excluding "any wholly owned Government corporation . . . or any State or political subdivision thereof" from the definition of "employer" under the Act.).

[22] *Id.* at 1354 (citing Ohio Rev. Code Sec. 3345.56; Mich. Comp. Laws Sec. 423.201(1)(e)(iii)).

[23] *See* Alexia Fernández Campbell, *Government workers don't have a federal right to unionize. Democrats want to change that.* (June 25, 2019) *available at* https://www.vox.com/2019/6/25/18715531/public-sector-government-workers-union-bill-congress (noting as of 2019, North Carolina, South Carolina, and Virginia ban public sector collective bargaining entirely, and Texas and Georgia only permit the practice for police and firefighters. Other states, including Alabama, Mississippi, Colorado, Wyoming, and Arizona have no laws concerning collective bargaining.).

[24] *Northwestern*, 362 NLRB at 1354.

entirely outside the Board's jurisdiction."[25] By their very nature, team sports are "carried out jointly by the teams in the league or association involved," and "there is no 'product' without direct interaction among the players and cooperation among the various teams."[26] Because the conference (or NCAA) must set common rules for all teams, there is a "symbiotic relationship" between teams, conferences, and the NCAA and as a result, labor issues affective one team would also affect the NCAA and its member conferences.[27] For these reasons, the Board held that asserting jurisdiction over the scholarship football players would "not promote stability in labor relations."[28]

The Board took great pains to avoid answering the question that many saw as central to the dispute—whether the scholarship football players were "employees" under the Act, noting four separate times it was "assum[ing] without deciding" the scholarship athletes were employees.[29] In this regard, the Board's decision was seen as a "punt"[30] by many legal commentators,[31] especially given the Board's Democratic majority. Nevertheless, the Board had spoken, and the NCAA avoided its first players

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[25] *Id.* at 1353.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1354.

[29] *Id.* at 1350, 1352, 1355, and 1356.

[30] "A punt is a kick by a player who drops the ball and kicks it before it touches the ground." NCAA Football Rules Book, Rule 2-16, Art. 2 (2021). Colloquially the term "punt" is used to denote when a decision maker defers rather than making a decision.

[31] *See, e.g.*, Sam C. Ehrlich, The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day, 39 LOY. L.A. ENT. L. REV. 77, 108 (2019); Steve M. Bernstein & Richard R. Meneghello, NLRB Sacks College Football Player Union Organizing Drive (Aug. 8, 2015), *available at* https://www.fisherphillips.com/news-insights/nlrb-sacks-college-football-player-union-organizing-drive.html.

union. This would not be the end of the NCAA's (or its member institutions') employment related legal disputes.

B. Other Legal Developments Affecting Employment Status

The NCAA and member institutions have likewise contended with several lawsuits seeking minimum wage and overtime under the Fair Labor Standards Act in the years following *Northwestern*. First came *Berger v.* NCAA, where two University of Pennsylvania track-and-field athletes sued seeking to represent a class of all Division I men's and women's athletes.[32] In granting defendants' motion to dismiss, the District Court found plaintiffs lacked standing to assert claims against the NCAA or any member school (other than Penn) as they had not alleged an employment relationship with those entities (jointly or otherwise).[33] With respect to Penn, the court dismissed the claims finding as a matter of law that student athletes were not employees under the FLSA.[34] In reaching this conclusion, the court premised its ruling on the "revered tradition of amateurism in college sports,"[35] and because that tradition was part of the "economic reality" of the relationship between the parties. The court was also persuaded by the fact that the U.S. Department of Labor had never sought to apply the FLSA to student athletes despite "the fact that

[32] 162 F. Supp. 3d 845 (S.D. Ind. 2016).

[33] *Id.* at 848.

[34] *Id.* at 857.

[35] *Id.* (citing *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

the existence of thousands of unpaid college athletes on colleges campus each year is not a secret[.]"[36]

On appeal, the Seventh Circuit affirmed,[37] but some have speculated that the concurring opinion by Judge Hamilton opened the door to a successful claim in the future.[38] Judge Hamilton was "less confident" that the panel would have reached the same decision had plaintiffs been scholarship recipients or if they had participated in "so-called revenue sports" like men's basketball or football.[39] In such sports which involve "billions of dollars in revenue" the "economic reality and the tradition of amateurism may not point in the same direction."[40]

Next came *Dawson v. NCAA* in which a former collegiate football player filed suit against the Pacific 12 Conference (Pac-12) and the NCAA, but not his institution (the University of Southern California), seeking redress under the FLSA and the California Labor Code.[41] Relying on the concurrence in *Berger*, Dawson sought to distinguish his case because football was a revenue generating sport.[42] The District Court was unconvinced, finding the concurring opinion in *Berger* to be unpersuasive

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[36] *Id.* at 856 (citing *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007) ("The system of compensation used by Sterling is industry-wide, and of long standing . . . . It is possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing. But a more plausible hypothesis is that the auto repair industry has been left alone because the character of its compensation system has been recognized for what it is—a bona fide commission system.")).

[37] 843 F.3d 285 (7th Cir. 2016).

[38] *See* Ehrlich, *supra* n. 31 at 84.

[39] *Id.* (citing *Berger*, 843 F.3d at 294).

[40] *Id.*

[41] 250 F. Supp. 3d 401 (N.D. Cal. 2017)

[42] *Id.* at 406.

and noting the Seventh Circuit had denied rehearing *en banc*.[43] The court ultimately held—like in *Berger*, "[a] majority of courts have concluded—albeit in different contexts—that student athletes are not employees."[44]

Dawson appealed to the Ninth Circuit which affirmed dismissal of the claim but did so on much narrower grounds.[45] As noted above, USC—Dawson's *alma mater* was not a defendant in his case. Why he neglected to sue what would have been his "direct employer" is a mystery.[46] Unsurprisingly, the Ninth Circuit seized on USC's absence, noting that under applicable NCAA regulations "member schools themselves award and distribute the financial aid Dawson alleges constitutes expected compensation."[47] Nor could Dawson show that the NCAA or the Pac-12 had the authority to "hire and fire" Dawson—a fatal blow to Dawson's joint employer theory. On the facts before it, the Ninth Circuit concluded that "the NCAA and Pac-12 are regulatory bodies, not employers of student-athletes under the FLSA.[48] In closing, however, the Ninth Circuit reiterated the limited nature of its holding: "nor do we express an opinion about student-athletes' employment status in any other context."[49] Between the lines of both the concurrence in *Berger* and majority in

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[43] *Id.*

[44] *Id.*

[45] 932 F.3d 905 (9th Cir. 2019).

[46] *See* Sam E. Ehrlich, "But They're Already Paid": Payments In-Kind, College Athletes, and the FLSA, 123 W. VA. L. REV. 1, 10, n. 34 (2020).

[47] *Dawson*, 932. F.3d at 909.

[48] *Id.* at 911.

[49] *Id.* at 913-14. The Court had earlier disavowed the Seventh Circuit's *Berger* decision too. *See id.* at 908, n. 2 ("We do not adopt *Berger's* analytical premises nor its rationales.").

Dawson is that a claim by a scholarship athlete in a revenue generating sport brought against her actual institution may state a claim for relief under FLSA.

That is exactly what happened in *Johnson v. NCAA* where a group of current and former student-athletes brought claims against their institutions, the NCAA, and 20 other NCAA Division I institutions seeking redress for alleged FLSA and state law wage claims.[50] Relying on *Dawson*, the NCAA moved to dismiss, arguing they are merely a regulatory body that does not jointly employee student-athletes at any of its member institutions.[51] The complaint in *Johnson* contained much more robust allegations against the NCAA, than the complaint in *Dawson*. Under a four-factor test used in the Third Circuit,[52] the *Johnson* court found that with respect to the NCAA, its regulations (as alleged) permit the NCAA to "hire and fire" student-athletes through suspensions for non-compliance, its Bylaws are work rules and the NCAA imposes conditions on the student-athletes payment of compensation and benefits, that the NCAA "is involved in the day-to-day supervision, including discipline, of student athletes who participate in NCAA sports," and the NCAA has

[50] 556 F. Supp. 3d 491 (2021) (E.D. Pa. 2021).

[51] *Id.* at 495.

[52] This test, articulated by the Third Circuit in *In re Enterprise Rent-A-Car*, assesses "1) the alleged employer's authority to hire and fire the relevant employees; 2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and 4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes." 683 F.3d 462, 469-70 (3d Cir. 2012).

sufficient control over student records.[53] Thus, under extant Third Circuit precedent, plaintiffs claims survived the NCAA's motion to dismiss.[54]

Johnson is the first FLSA case in which the NCAA did not prevail on a motion to dismiss, but many predicted in the wake if *Berger* and *Dawson* that such an outcome was nearing fruition. Following its ruling in *Johnson*, the District Court certified the following interlocutory appeal to the Third Circuit:

> Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act, solely by virtue of their participation in interscholastic athletics.[55]

How the Third Circuit will answer the question left open by the Seventh and Ninth Circuits remains unseen. The Third Circuit will hear oral arguments on December 15, 2022.[56] Regardless of the Third Circuit's answer, however, it is likely the issue is ultimately decided by the U.S. Supreme Court—which has not been an ally to the NCAA in recent years.[57] In fact, Justice Kavanaugh's concurring opinion in the Court's 2021 *Alston* decision sent shockwaves through the collegiate athletic community when he stated the "NCAA's business model would be flatly illegal in almost any other industry in America,"[58] and closed his concurring opinion with "[t]he

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[53] *Johnson*, 556 F. Supp. 3d at 500-506.

[54] *Id.* at 506-507.

[55] *Johnson*, Dkt. 19-5230, Order-Memorandum, ECF 98 (E.D.Pa. Dec. 28, 2021).

[56] *See Johnson v. NCAA*, Dkt. 22-1223, Third Circuit Court of Appeals, ECF 60 (Oct. 18, 2022).

[57] *See, e.g.*, *Murphy v. NCAA*, 584 U.S. ---, 138 S.Ct. 1461 (2018) (Declaring the Professional and Amateur Sports Protection Act unconstitutional); *NCAA v. Alston*, 594 U.S. --- (2021) (finding NCAA's limitations on "non-cash education benefits" such as computers, tutoring expenses, study abroad programs, and post-eligibility internships or scholarships" were anti-competitive and violated the Sherman Anti-trust Act.).

[58] *Id.* at 43.

NCAA is not above the law."[59] In sum, developments in FLSA and antitrust litigation should be concerning to those who seek to preserve the status quo in collegiate athletics, or at the very least to those who hope to install change without being ordered to do so by judicial fiat.

SECTION II

Just three months after the *Alston* decision, NLRB General Counsel Jennifer Abruzzo grabbed the baton from Justice Kavanaugh and dealt the NCAA another blow. In GC Memorandum 21-08, the General Counsel announced that it was her "prosecutorial position" that "certain Players at Academic Institutions"[60] are employees under the Act.[61]

GC Memorandum 21-08 announced four points of emphasis the General Counsel hopes to use in her enforcement of the Act to further develop or revisit current Board precedent. First, the General Counsel announced that the mere use of the term "student-athlete" is a violation of Section 8(a)(1) of the Act.[62] In her view, because student-athletes are employees under the Act, referring to them as "student-athletes" apparently leads them to believe they are not entitled to the Act's protection and "has a chilling effect on Section 7 activity."[63] This, of course, is in direct conflict with *Velox Express, Inc.* which unequivocally held "[a]n employer's mere

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[59] *Id.* at 45.

[60] The General Counsel used this phrase in place of the more common "student-athlete" on account of her belief "the term was created to deprive those individuals of workplace protections." GC Memo 21-08, *supra* n. 6 at 1.

[61] *Id.*

[62] *Id.*

[63] *Id.*

communication to its workers that they are classified as independent contractors does not expressly invoke the Act."[64] The Board's conclusion in *Velox Express* properly respected the employer's right under Section 8(c) to express its views, arguments, or opinions.[65] While *Velox Express* is on the General Counsel's wish list of cases to revisit,[66] she has provided no rationale for why such a change is needed.

Second, the General Counsel goes further than the Board did in *Northwestern University*, and expressly states that she believes the football players in that case and "other similarly situated" student-athletes are employees under § 2(3).[67] Thus, some subset of student-athletes has Section 7 rights and protections, while others do not. The problem, of course, is that the General Counsel does not define which groups of student-athletes merit the Act's protection. Is it all Division I athletes? Is it only athletes on scholarship? Is it only Division I athletes in revenue-generating sports? If so, what does revenue generating mean? Will a student-athlete at a mid-major institution fall in and out of the Act's coverage if their football team has no revenue in a given season? The General Counsel's memorandum makes no effort to define the scope of her opinion that student-athletes are employees.

Third, the Memorandum takes an overly expansive view of what actions by student-athletes (or others) will constitute protected concerted activity, and

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[64] 368 NLRB No. 61, slip op. at 6 (2019).

[65] *Id.*

[66] *See* GC Memorandum 21-04, Mandatory Submissions to Advice at 6 (Aug. 12, 2021).

[67] *See* GC Memorandum 21-08, *supra* n. 6 at 4.

seemingly announces new standards for such conduct.[68] While few will quibble with the idea that student-athletes seeking changes in safety protocols, an increased share of revenue, or changes in the rules and policies governing their play would constitute protected concerted activity *if* the student-athletes were employees, GC Memorandum 21-08 goes much further and endorses the idea that student-athletes (or employees generally) engage in protected concerted activity by speaking out against racism and "demand[ing] change" regardless of whether there is *any* connection to the workplace.[69] According to the Memorandum, "[a]ctivism concerning such racial justice issues, including openly supporting the Black Lives Matter movement, directly concerns the terms and conditions of employment, and is protected concerted activity."[70] This is inconsistent with Board law that has historically required the activity in which an employee engages be related to the workplace—it "require[s] the showing of a 'nexus' between the activity and 'employees' interests as employees.'"[71] For political speech, which "Black Lives Matter" plainly is, the Board has long held the speech must be "directly related to working conditions."[72] GC Memorandum 21-08 makes no effort to reconcile these

[68] *Id.* at 7.

[69] *Id.*

[70] *Id.*

[71] *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007); *cf. Five Star Transp., Inc.*, 349 NLRB 42, 44 (2007) (noting that raising "general" concerns rather than specific workplace concerns is not activity with the goal of mutual aid or protection).

[72] *See* Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum No. GC 08-10 (July 22, 2008) (quoting *Motorola, Inc.*, 305 NLRB 580, 580 n.1 (1991)); *see also Union Carbide Corp.-Nuclear Division*, 259 NLRB 974, 977 (1981); *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989).

precedents with her declaration that supporting social movements is somehow protected concerted activity in the absence of any connection to the workplace.[73]

Lastly, GC Memorandum 21-08 decrees that public institutions, which are expressly excluded from the Board's jurisdiction,[74] will nonetheless be subject to the prosecution and organizing efforts under a joint employer theory of liability.[75] While the General Counsel nominally cites to *Big East Conference*[76] in support of this proposition, the Memorandum ignores the key difference between *Big East Conference* and any modern Division I football or basketball conference. At the time of *Big East Conference*, the conference had just two public school members and seven private school members.[77] Thus the Board was comfortable asserting jurisdiction because the public school members were incapable of controlling the conference's operations.[78] Today, there is not a single conference in NCAA Division I FBS Football that has a majority of private school members.[79] *Big East Conference* is therefore

[73] The General Counsel also argues, albeit in a circular fashion, that because student-athletes have engaged in "collective action at unprecedented levels" more recently, this somehow compels a finding of employee status under the Act. GC Memorandum 21-08 at 7. Either student-athletes are employees under the Act, or they are not. Whether and to what extent they engage in collective action is immaterial.

[74] *See* 29 U.S.C. § 152(2).

[75] *Id.* at 9.

[76] 282 NLRB 335 (1986).

[77] *Id* at 340-42.

[78] *Id.*

[79] There are currently 130 Division I FBS football teams, of which only 18 are private institutions. Moreover, no conference has a majority of private institution members. The closest, the Atlantic Coast Conference, has five private members, out a total of fourteen. *See* NCAA Directory, Division I – FBS Football Institutions (Feb. 20, 2022), *available at* https://web3.ncaa.org/directory/memberList?type=12&division=I-FBS&sportCode=MFB.

inapposite on the issue of Board jurisdiction.[80] GC Memorandum 21-08 does not cite a single case finding Board jurisdiction over employees directly employed by a public entity. Whether the Board can assert jurisdiction over public entities by virtue of the student-athletes' alleged joint employment by their athletic conference or the NCAA will likely be the most litigated issue under GC Memorandum 21-08. Afterall, as the Board acknowledged in *Northwestern University*, asserting jurisdiction over just the private members of NCAA Division I FBS Football makes little sense due to the "inherent asymmetry of the labor relations regulatory regimes applicable to individual teams."[81] Attempting to regulate FBS Football (or any other revenue generating sport) does not promote "uniformity and stability . . . because the Board cannot regulate most FBS teams."[82] While of utmost importance to college athletics, GC Memorandum 21-08 takes a sweeping view of employment status, what constitutes protected concerted activity, joint employer liability, and independent violations for merely misclassifying workers. These issues will resonate with all employers and not just private colleges and universities.

SECTION III

In light of the General Counsel's pronouncement, the NCAA and its member institutions face more pressure to reconsider the amateurism model than ever before. While the NCAA has adopted significant reforms in just the past few years, further

[80] *Big East Conference* also concerned basketball referees who undisputedly worked for the Big East Conference (versus student-athletes whose primary employer would be their institution). *Id.* at 341.

[81] 362 NLRB at 1354.

[82] *Id.*

change is on the horizon. The question likely becomes, who implements (or forces) it—the NCAA itself, the student-athletes through litigation, or Congress.

A. *NCAA-Implemented Changes*

Many have argued that the NCAA, its conferences, and its member institutions are in the best position to adapt the current model in response to external pressure. To that end, the NCAA has revised its scholarship, non-cash compensation, and other regulations concerning the amounts of aid institutions can provide. Student-athletes are now eligible for more aid than ever before. Similarly, student-athletes have additional mobility as a result of changes to the rules governing student-athlete transfers. Historically, student-athletes in football, men's and women's basketball, and other sports were ineligible for the first year following their transfer from one institution to another.[83] Beginning in April 2021, however, the NCAA revised its rules to permit a student-athlete to transfer once and be immediately eligible to compete.[84] That change has led and will lead to additional player mobility in the coming years.

The NCAA also relented on its prohibition against student-athletes profiting from their name, image, and likeness (NIL) in July 2021. This change followed in the wake of *Alston* and the patchwork of state laws that had emerged on the subject. As of writing, 26 states have enacted laws detailing when and how student-athletes may

[83] *See* Ross Dellenger, 'It's Going to Change the Landscape': The NCAA's Transfer Revolution Is Here, and Its Impact Will Be Felt Far and Wide, Sports Illustrated (Apr. 14, 2021), *available at* https://www.si.com/college/2021/04/14/ncaa-transfers-rule-change-football-basketball.

[84] *Id.*

profit off of their NIL.[85] To date, thousands of NIL deals have been made, ranging from new cars in exchange for promotion of automotive dealerships,[86] deals with professional teams and players,[87] to video games, clothing, and more.

Most recently, the NCAA convened a constitutional convention to consider whether and how it should change in response to mounting pressure. Most notably, the new constitution transfers more power to each individual Division.[88] Each Division will now have control over its own budget, expenditures, and financial distributions.[89] Student-athletes will also have a greater voice in the administration of college athletics—with both voting and non-voting members of each Division's Board of Governors[90] The NCAA has also announced a Division I "Transformation Committee" to address the Division's "most significant challenges and more effectively meet the needs of current and future student-athletes."[91] The work of this

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[85] *See* Tracker: Name, Image and Likeness Legislation by State, Business of College Sports (Jan. 20, 2022), *available at* https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/.

[86] Auto deals are so popular, that one site has attempted to track them all. *See* Kristi Dosh, Tracking Student Athlete Car Deals in the NIL Era, Business of Colleges Sports (Sep. 3, 2021), *available at* https://businessofcollegesports.com/name-image-likeness/tracking-student-athlete-car-deals-in-the-nil-era/.

[87] *See* Business of College Sports (Feb. 20, 2022), *available at* https://businessofcollegesports.com/tag/nil-pro/.

[88] *See* Barrett Sallee, NCAA member schools approve ratified constitution granting divisions increased governing power, CBS Sports (Jan. 21, 2022) *available at* https://www.cbssports.com/college-football/news/ncaa-member-schools-approve-ratified-constitution-granting-divisions-increased-governing-power/.

[89] *Id.*

[90] *Id.*

[91] *See* Michelle Hosick, Division I Board of Directors announces Transformation Committee roster, NCAA (Oct. 28, 2021) *available at* https://www.ncaa.org/news/2021/10/28/general-division-i-board-of-directors-announces-transformation-committee-roster.aspx.

committee will continue through August 2022.[92] Whether and how the NCAA proposes further reformations may well depend on further pressure from external actors.

B. *External Changes*

General Counsel Memorandum 21-08 goes further than any of its predecessors to define how and when the General Counsel would prosecute colleges and universities for alleged violations of the Act. It is not surprising then, that there have already been a few unfair labor practice charges filed against the NCAA, its conferences, and a few of its members.[93] While these cases have garnered significant interest from the sports media, they remain in the preliminary investigation phase, with no decision from the Region in any of them. In light of GC Memorandum 21-08, one expects that the General Counsel may seek to prosecute one or more of them. One also expects additional filings arguing how the Act may regulate public institutions, which sports are included, and which athletes are included, among other novel issues. Ultimately the case will come before the Board which will likely remain under Democratic Party control until 2025 at the earliest. Assuming any vote over whether student-athletes breaks along party lines, the student-athletes are likely to prevail. However, Board Chair McFerran was on the Board that voted against asserting jurisdiction in *Northwestern University*. In any event, even if the NCAA were

[92] *Id.*

[93] *See, e.g.*, *The National Collegiate Athletic Association*, 25-CA-286101 (Nov. 10, 2021); *The University of Southern California, Pac-12 Conference, and the National Collegiate Athletics Association*, 31-CA-290326 (Feb. 8, 2022); *The University of California Los Angeles (UCLA), Pac-12 Conference, and the National Collegiate Athletics Association*, 31-CA-290328 (Feb. 8, 2022).

unsuccessful at the Board, presumably they would take their case to the Appeals Court, and on to the Supreme Court. Suffice it to say, it will be many years before there is a definitive answer to whether student-athletes are employees under the Act.

We may also see involvement from Congress—in either direction. In May 2021, Senator Chris Murphy introduced the College Athlete Right to Organize Act (CARO Act).[94] This legislation, if enacted, would amend the definition of employer in § 2 of the Act to include "a public institution of higher education with respect to the employment of college athlete employees of the institution."[95] The CARO Act would similarly redefine "employee" to include participants in intercollegiate sport if they receive direct compensation or grant-in-aid conditioned on participation in their sport.[96] The bill would likewise permit multiemployer bargaining units among institutions in the same athletic conference and would eliminate the Board's ability to decline jurisdiction over student athletes.[97] While ambitious, no activity has occurred on the bill since its introduction last May.[98]

On the other side of the aisle, Representative Steve Chabot introduced the Modernizing the Collegiate Student Athlete Experience Act in May 2021 as well.[99] While aimed at creating a nationwide standard for name, image, and likeness rules,

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[94] *See* College Athlete Right to Organize Act, S.1929, 117th Cong. (2021).

[95] *Id.* at § 3(a)(1).

[96] *Id.* at § 3(a)(2).

[97] *Id.* at §§ 3(b)-(c).

[98] *See* Actions Overview, College Athlete Right to Organize Act, S. 1929 (Feb. 20, 2022) *available at* https://www.congress.gov/bill/117th-congress/senate-bill/1929/actions?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=4&s=1.

[99] *See* Modernizing the Collegiate Student Athlete Experience Act, H.R. 3379, 117th Cong. (2021).

and preempting state laws on the subject, the bill goes a step further by declaring that "a student athlete may not be considered an employee of an intercollegiate athletics association, a conference, or an institution of higher education based on the participation of such student athlete in amateur intercollegiate athletic events or amateur intercollegiate athletic competitions."[100] Like Senator Murphy's bill, there has been no activity since May 2021.[101] Whether either of these bills have any chance of success will likely depend on the composition of Congress past the 2022 midterms and beyond. In any event, it seems unlikely that President Biden, self-avowed "most pro-union president you've ever seen" would ever sign a bill limiting student-athletes' rights.[102]

CONCLUSION

General Counsel Memorandum 21-08 is the most serious attack on the NCAA's status quo in many years (and possibly ever). The Memorandum serves as a warning shot and a roadmap to how the General Counsel views the rights of student-athletes and how she hopes to reshape Board law to reach the same conclusions she already has. The ultimate answer to the question—are student-athletes employees—remains unanswered, however, and will likely come down to the Supreme Court or Congress.

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[100] *Id.* at § 8.

[101] *See* Actions Overview, Modernizing the Collegiate Student Athlete Experience Act, H.R. 3379 (Feb. 20, 2022) *available at* https://www.congress.gov/bill/117th-congress/house-bill/3379/actions?q=%7B%22search%22%3A%5B%22%5C%22student+athletes%5C%22%22%2C%22%5C%22student%22%2C%22athletes%5C%22%22%5D%7D&s=3&r=3.

[102] *See* Paige Smith, Biden as 'Most Pro-Union President' Shows in House Spending Bill, BLOOMBERGLAW.COM (Nov. 5, 2021), *available at* https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X6CCANOK000000?bna_news_filter=daily-labor-report#jcite.