From The Playing Field To The Courtroom: The State Of Current Legal Challenges Brought By Student-Athletes

Insights
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As the U.S. Supreme Court stated in a 1984 decision involving the University of Oklahoma, there exists in this country a "revered tradition of amateurism in college sports." Despite this tradition, there have been an increasing number of legal challenges to the institution of amateurism in college athletics over the last few years, many of which are grounded in employment law principles.

The U.S. Department of Labor (USDOL) has long taken the position that student involvement in interscholastic athletics, conducted primarily for the benefit of the participants as part of the educational opportunities provided to them, is not "work" and does not result in an employee-employer relationship between the student and the school or institution. However, with soaring television revenue and coaching compensation in certain sports, the issue of student-athletes as "employees" has become a hotly debated issue that has shifted to the courtroom. This article provides an overview of where many of those legal battles stand.

Student-Athletes And The Fair Labor Standards Act (FLSA)
The cornerstone federal wage and hour statute, the FLSA, defines "employee" as "any individual employed by an employer" and defines "employ" as "to suffer or permit to work." But the FLSA does not define "work." These circular and imprecise definitions have encouraged claims by student-athletes that their "work" as athletes deserves the protections afforded by the FLSA. Thus far, these legal challenges have failed.

For instance, in 2016, the 7th Circuit Court of Appeals rejected a bid by a group of student-athletes to pursue an FLSA collective action against the National Collegiate Athletic Association (NCAA) and 123 member schools (*Berger v. National Collegiate Athletic Association*). The suit was brought by several members of a university track and field team who alleged they were employees entitled to minimum wage. The student-athletes argued that their employment status should be evaluated under the USDOL's intern test, which identifies factors that private sector employers must consider in determining whether interns should be paid.

The court rejected the argument, finding that the intern test was designed to be applied to for-profit, private sector businesses, not activities that take place in an educational setting. Turning to an "economic realities" analysis, the court found that the "revered tradition of amateurism in college sports" was an essential part of the economic reality of the relationship between students and the

university, as was the fact that previous generations of students have vied to be part of that tradition with no thought of compensation.

More recently, in April 2017, a federal court in California rejected a similar FLSA collective action claim asserted by a former linebacker who played for the University of Southern California in the case of *Dawson v. National Collegiate Athletic Association*. To distinguish his case from the 7th Circuit decision involving the track and field student-athletes, the former linebacker pointed out that he played Division I football which, he argued, generated significant revenue for the NCAA. He contended the economic benefit derived from his activities made his participation similar to compensable work-study programs.

The court disagreed, stating "the premise that revenue generation is determinative of employment status is not supported by the case law." The court relied on the 7th Circuit's track and field decision in finding no employee status. The case will likely be appealed to the 9th Circuit Court of Appeals, so we have not heard the last of this issue.

Student-Athletes And The National Labor Relations Act (NLRA)

Most in the academic world are aware of the recent attempt by a group of Northwestern University football players to organize a union for purposes of collective bargaining with their "employer." Their 2015 effort was grounded in the argument that student-athletes were "employees" entitled to protections of the NLRA. The National Labor Relations Board (NLRB) ended the debate for the time being by ruling that the purpose of federal labor laws would not be served if the players were allowed to unionize. That being said, the NLRB did not categorically reject the idea, and avoided resolving the issue of student-athlete "employee" status.

In fact, a recent memorandum from the NLRB re-ignited the debate over whether the NLRA could be applied to student-athletes. On February 2, 2017, the NLRB's General Counsel sent an Advice Memorandum to the Board's regional directors in which he stated "scholarship football players in Division I Football Bowl Subdivision private sector colleges and universities are employees" under the NLRA. The memo relies in part on the Board's recent decision in the *Columbia University* case, which held that graduate assistants were employees even if they were also students. He also provided a lengthy discussion of various factors he believes support the conclusion that Division I football players are "employees" under the NLRA.

The significance of this Advice Memorandum is not entirely clear. On the one hand, it *is* an interpretative position of the Board's General Counsel. However, though it provides an interesting insight into his views on this issue, it is not binding precedent. Moreover, it bears noting that the General Counsel's term ends in November 2017 and there is no indication that the Trump administration is interested in championing the cause of student-athletes.

The Non-Employment Route: Antitrust Litigation

Legal claims seeking compensation for student-athletes have not been confined to challenges grounded in employment law. In February of 2017, the NCAA and 11 athletic conferences agreed to a

grounded in employment law. In February of 2017, the NCAA and 11 athletic conferences agreed to a $208.7 million settlement to compensate student-athletes for "grant-in-aid." The suit alleged student-athletes' scholarships were being suppressed through a cap on grant-in-aid benefits imposed by the NCAA and member institutions.

The NCAA noted that the extra compensation paid to student-athletes pursuant to the settlement was consistent with Division I financial aid rules, which allow athletics-based aid up to the full cost of obtaining a college education. The NCAA further noted that the settlement "maintains cost of attendance as an appropriate dividing line between collegiate and professional sports." The settlement did not resolve all issues in the case, however, and attorneys for the student-athletes predict remaining issues will go to trial next year, involving the amount that student-athletes can be paid above the cost of attendance.

The Non-Employment Route Part 2: Tort Claims

Although institutions have been largely successful in convincing courts and agencies that student-athletes are not employees, the resulting unintended consequence is they are now vulnerable to liability for negligence and other torts. While those causes of action are typically precluded by state workers' compensation laws in the employment context, the preclusion generally does not apply when the affected individuals are not employees.

For example, two student-athletes injured during football practice recently sued Lackawanna College alleging negligence, negligence per se, gross negligence, and recklessness. According to the February 2017 lawsuit filed in Pennsylvania state court, the two athletic trainers on duty were not certified as such, which compounded the injuries. The case has been cleared to proceed to trial.

Similarly, a former student-athlete filed suit against the University of Notre Dame and the NCAA, claiming he was not warned of the debilitating long-term dangers of repeated concussions that can result from playing football. In 2012, at age 57, the former student-athlete was diagnosed with severe cognitive decline, traumatic encephalopathy, Alzheimer's disease, and dementia, which he claims were caused by the repeated head injuries he suffered on the field. An Ohio appeals court recently permitted his claims of negligence, fraudulent concealment, and constructive fraud to proceed past the motion to dismiss phase, despite the fact that the plaintiff passed away in 2015.

Legal Challenges Likely To Continue

The good news for academic institutions is that courts have started creating a consistent body of case law confirming student-athletes are generally not considered employees. However, the massive amount of revenue generated by intercollegiate athletics, combined with a growing awareness of the health and safety issues facing student-athletes, ensures that legal challenges regarding the status of student-athletes will likely continue, and could in fact intensify. Even if institutions do not find themselves caught in the web of various workplace laws, maintaining the amateurism model may simply open them up to exposure for the types of claims "employees" typically cannot bring against their employers.

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