



Don't Believe Everything You Read: Labor Board Has Not Ruled College Athletes Are Employees (Yet)

Insights

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ESPN recently reported that the National Labor Relations Board (NLRB) had “ruled” that Northwestern University’s football players were actually “employees,” and that the University’s policing of its football players’ social media accounts and media appearances, as well as its ban on athletes’ talking about their health, were unlawful. While the story was sensational and received considerable media attention, this summary is not entirely accurate. The Labor Board has made no such “ruling,” and therefore private colleges and universities should treat such reports with a grain of salt.

Instead, and as discussed below, the Board’s Office of General Counsel issued an “Advice Memorandum” which assumed, **without a formal legal finding**, that the student-athletes were employees on its way to ultimately recommending that the unfair labor practice charges against the university be dismissed.

A Summary Of The Advice Memorandum

The Advice Memorandum was issued two weeks ago by the Board’s Office of General Counsel. It stemmed from an unfair labor charge filed in August 2015 against Northwestern, alleging that the school’s football players were employees under the National Labor Relations Act (NLRA), and that the school’s Football Handbook was unlawfully overbroad in violation of the players’ rights to engage in concerted activity.

The Regional Director considering the charge sought advice from the Board’s General Counsel on how the matter should be handled in light of the NLRB’s 2015 decision involving Northwestern University football players seeking to unionize. In that 2015 case, the Board effectively punted on the issue of whether the players were “statutory employees” for purposes of the NLRA, and instead concluded that asserting jurisdiction would not effectuate the policies of the law.

While concluding that the charge should ultimately be dismissed because Northwestern “modified the rules to bring them into compliance with the NLRA,” the Advice Memorandum makes a series of significant assertions of which private educational institutions and their athletics departments should be aware.

Most notably, in a footnote, the Office of General Counsel “assume[d], for purposes of this memorandum, that Northwestern’s scholarship football players are statutory employees.” For the

sake of clarity, this footnote contains no analysis supporting this assumption, and the Board has certainly not formally adopted this position.

From this assumption, the memorandum indicated that, in the opinion of the Board attorneys, various portions of the Football Handbook's "social media policy" violated the players' rights under the NLRA. These included the following sections:

- indicating that the university was concerned "about... protecting the image and reputation of Northwestern University and its Department of Athletics and Recreation;"
- noting the school "regularly monitored" social media posts of student athletes; and
- encouraging student athletes not to post "inappropriate" or "embarrassing" information on social media.

Along the same lines, the Memorandum said the following provision in the Football Handbook dealing with "Sports Medicine & Player Policy Communication Rule" violated the student athletes' rights under the NLRA:

"Confidential: Never discuss any aspects of the team, the physical condition of any players, planned strategies, etc. with anyone. The team is a family and what takes place on the field, in meetings or in the locker room stays within this family."

The Advice Memorandum also concluded that a dispute resolution procedure in the handbook "would reasonably be construed as prohibiting Section 7 activity by prohibiting discussions with fellow players and third parties concerning workplace grievances." It also took exception to various portions of the "Athletics Communications for Student Athletes Rule," including such instructions as: "Be positive when talking about your teammates, coaches and team," and "Avoid the negatives, as they breed discontent and trouble."

Practical Application Of Memorandum

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's office. While it provides an interesting insight into their views on this issue, it is not binding precedent. Moreover, it is worth noting that the ultimate advice was to dismiss the unfair labor practice charges because "it would not effectuate the policies and purposes of the NLRA to issue a complaint." This was precisely the deferential approach the Board took with respect to involving itself in intercollegiate athletics in its 2015 Northwestern decision.

With that said, the NLRB concluded in late August that both undergraduate and graduate student workers at Columbia University were statutory employees under the NLRA. A concern raised by the dissent, in that case, was whether treating students as employees would subject student codes of

conduct and other student-oriented policies to NLRB scrutiny. This Advice Memorandum suggests the answer may be “yes.”

Moreover, in the original Northwestern decision, the Board was very clear that its decision not to assert jurisdiction did not “preclude a reconsideration of this issue in the future” and that the “Board may revisit its policy in this area.” While the Advice Memorandum should not be read to suggest that such a reconsideration is imminent, it is worth noting that the Board’s original decision created ambiguity about whether intercollegiate athletes are employees. This Advice Memorandum further muddies the waters and may warrant a review of applicable athletics department policies to ensure none run afoul of the NLRA.

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