



4-2024

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Recommended Citation

Schmutz, Nathan and Hanks, Joseph (2024) "Student Athlete or Student Employee? Considering the Future Implications of Recent College-Athletics Decisions Regarding Employee Classification," *BYU Education & Law Journal*: Vol. 2024: Iss. 1, Article 6.

Available at: https://scholarsarchive.byu.edu/byu_elj/vol2024/iss1/6

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1] Student Athlete or Student Employee?

STUDENT ATHLETE OR STUDENT EMPLOYEE?
CONSIDERING THE FUTURE IMPLICATIONS OF
RECENT COLLEGE-ATHLETICS DECISIONS
REGARDING EMPLOYEE CLASSIFICATION

By Nathan Schmutz and Joseph Hanks

Nature often provides warning signs of oncoming danger. For example, a generally recognized phenomenon associated with a tidal wave caused by an oceanic earthquake is the major withdrawal of water resembling an extreme low tide.¹ Universities take note, a similar phenomenon might be occurring in relation to college sports. Recent decisions might be signaling a receding of waters before a surge of litigation that results in college athletes being considered employees of the university. This paper considers recent court and administrative decisions that might be indicative of this major shift and discusses possible implications of such a change.

¹ International Tsunami Information Center, *Frequently Asked Questions*, UNESCO (OCT. 7, 2021), http://itic.ioc-unesco.org/index.php?option=com_content&view=article&id=1133&Itemid=2155.

I. *Development and Past Support of the Notion of “Student Athlete”*

For decades, the National Collegiate Athletic Association (NCAA) has defended the status of college athletes as amateurs based on their being students first. Walter Byers is often credited for crafting the term “student-athlete” as part of the move to protect college institutions from responsibilities to its athletes upon being found employees of the institution.² Part of the impetus for this came in the wake of court rulings such as *University of Denver v. Nemeth (Nemeth)*.³ In *Nemeth*, the Supreme Court of Colorado upheld the Industrial Commission’s finding that Nemeth was employed by the university in an on-campus job, as well as for being a football player of the university, and that he was entitled to worker’s compensation for his back injury sustained during spring football practice.⁴ Four years later, however, the same Court denied worker’s compensation death benefits awarded by the same Industrial Commission to a widow of a Fort Lewis A & M College

² See Bruce Weber, *Walter Byers, Ex-N.C.A.A. Leader Who Rued Corruption, Dies at 93*, N.Y. TIMES (May 27, 2015), <https://www.nytimes.com/2015/05/28/sports/walter-byers-ex-ncaa-leader-who-rued-corruption-dies-at-93.html>.

³ See *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

⁴ *Id.* at 399.

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football player who suffered a fatal injury during a football game.⁵

Notably, the Court stated that “[w]e cannot believe that the legislature, in creating the [worker’s] compensation fund, intended that it be in the nature of a pension fund for all *student athletes* attending our state educational institutions.”⁶

More recently, a Texas court similarly found that a college football player was not eligible for the Worker’s Compensation award that the Commission had granted him. The court reasoned that “if Waldrep played football for pay, he would have been a professional, not an amateur. The evidence reflects that the actions of both Waldrep and TCU were consistent with a joint intention that Waldrep be considered an amateur and not a professional.”⁷ This was based on what the court found to be an understanding “that his recruitment and future football career at TCU would be governed by and subject to the rules of the NCAA.”⁸ Notably, the court recognized that “the NCAA’s policies and rules in effect at that time exhibited a concerted effort to ensure that each school governed by these rules made certain that student athletes were

⁵ State Compensation Ins. Fund v. Indus. Com’n, 135 Colo. 570, 574 (1957).

⁶ *Id.* (emphasis added).

⁷ Waldrep v. Texas Emps. Ins. Ass’n, 21 S.W.3d 692, 699 (Tex. App. 2000).

⁸ *Id.* at 700.

not employees,”⁹ and that “the NCAA rules provided that student athletes would be ineligible if they used their skill for pay in any form” while allowing a student athlete to “accept scholarships or educational grants-in-aid from his institution.”¹⁰

The *Waldrep* case highlights both the use of the term “student athlete” and the coinciding theory of the college athlete as an amateur. This theory dates back as an underlying policy to the inception of the NCAA, which “expressed a view at its founding about compensating college athletes—admonishing that ‘no student athlete shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession.’”¹¹ *Waldrep* also makes reference to the efforts made by the NCAA to promote this theory of amateurism, of which theory the United States Supreme Court has recently been openly critical.¹² However, before discussing *Alston*, in order to highlight the layers of complexity inherent in this issue of student athlete versus student employee, it is important to examine the National Labor Relations Board’s (NLRB) decision regarding whether college athletes qualify as statutory employees under

⁹ *Id.*

¹⁰ *Id.*

¹¹ Nat’l Collegiate Athletic Ass’n v. Alston, 141 S.Ct. 2141, 2148 (2021).

¹² *Id.*

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the National Labor Relations Act¹³, and are thereby entitled to unionize for the purpose of collective bargaining.¹⁴

II. NLRB and the Attempt to Unionize Northwestern University

Athletes

On March 26, 2014, Mr. Peter Ohr, the Regional Director of Region 13 of the National Labor Relations Board found that “players receiving scholarships from the Employer (Northwestern University) are ‘employees’ under Section 2(3) of the Act.”¹⁵ First, Director Ohr found that the relevant players who received grant-in-aid scholarships “perform services for the benefit of the employer for which they receive compensation.”¹⁶ This was based on the finding that because of the players’ services, the “football program generated revenues of approximately \$235 million” during a nine-year period.¹⁷ Also, the athletes’ contract, which they are required to sign before each scholarship period, was considered “tender” that “serves as an

¹³ National Labor Relations Act, 29 U.S.C. § 152(2)(3).

¹⁴ See *Northwestern Univ.*, 362 NLRB 167, Case 13-RC-121359 (2015).

¹⁵ *Northwestern Univ. Emp. and Coll. Athletes Players Ass’n (CAPA) Petitioner*, 198 L.R.R.M. (BNA) 1837, 1, Case 13-RC-121359, 2014 WL 1246914, *1 (2014).

¹⁶ *Id.* at *12.

¹⁷ *Id.*

employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them.”¹⁸ And although the NCAA now allows for four-year scholarships, which “certainly might make players feel less pressure to perform on the field,” it was found that “the scholarship is . . . tied to the player’s performance of athletic services as evidenced by the fact that scholarships can be immediately canceled if the player voluntarily withdraws from the team or abuses team rules.”¹⁹

In addition to performing valuable services for the university, it was found that the football players “are under strict and exacting control by their Employer throughout the entire year.”²⁰ The Director went on to describe the itineraries of the players, citing the fact that the players engage in football-related activities for fifty to sixty hours per week during training camp, and then “continue to devote 40 to 50 hours per week to their football duties all the way through to the end of the season, which could last until early January.”²¹ Additionally, the coaches were found to “have control over nearly every aspect of the players’ private lives”²², often for the purpose of protecting the players and the university

¹⁸ *Id.* at *13.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at *14.

²² *Id.*

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“from running afoul of NCAA rules.”²³ Finally, despite showing interest in the players’ academic education, “it is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent,” citing, as an example, scheduling conflicts (e.g., team practices) with desired classes.²⁴

From these findings, the Director found that the athletes were employees under the common law definition. He also determined that the football players were not similarly situated to the graduate assistants in *Brown University*.²⁵ For one, he found that the football players were not “primarily students” like the graduate students were, where significantly more time is spent in football activities as compared to studying.²⁶ Second, in contrast to the graduate students, the football players’ athletic duties were not a core element of the academic degree.²⁷ Third, academic faculty did not supervise the football players’ athletic duties.²⁸ And finally, the football players’ compensation is not considered financial aid, contrasting the scholarships with need-based financial aid received

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at *16. See *Brown Univ. and Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW AFL-CIO*, 342 NLRB 483 (2004).

²⁶ *Northwestern*, 198 L.R.R.M. at *16.

²⁷ *Id.*

²⁸ *Id.* at *17.

by walk-on athletes, who are free to stop playing football without losing their financial aid.²⁹

The next year, however, the National Labor Relations Board took up the appeal made by Northwestern University, and ultimately declined to find that college football players “or similarly situated individuals” were employees under the Act and under their jurisdiction.³⁰ The NLRB did so on policy reasons, even if they were to find that the football players were statutory employees.³¹

The NLRB recognized that the scholarship players did not resemble other students in the cases they had considered to that point, including graduate student assistants, janitors, or cafeteria workers, but noted also that the football players are unlike professional athletes since they are required to be enrolled full-time as students.³² In addition, the college athletes “are prohibited by NCAA regulations from engaging in many of the types of activities that professional athletes are free to engage in, such as profiting from the use of their names or likenesses.”³³ At the same time, there were similarities with professional sports,

²⁹ *Id.* at *18.

³⁰ Northwestern Univ., 362 NLRB 1350, 1355 (2015).

³¹ *Id.*

³² *Id.* at 1352.

³³ *Id.* at 1353.

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including the substantial revenue generated from staging football games and the cooperation with other teams to stage athletic events.³⁴

The NLRB ultimately focused, however, on why asserting jurisdiction over the particular Northwestern University scholarship football players “would not serve to promote stability in labor relations.”³⁵ The Board explained that all their previous cases dealing with professional sports had involved bargaining units that were leaguewide. Instead, this was a single-team case from a private institution.³⁶ The Board stated that it could not exert jurisdiction over the majority of colleges and universities because they were state-run, public institutions, meaning they were not “employers” as recognized under Section 2(2) of the Act.³⁷ Furthermore, where Northwestern is the only private school in the Big Ten, the Board would not be able to assert jurisdiction over its main competitors.³⁸ And finally, because states differ in their statutory scheme regarding labor laws and collective bargaining, some allowing collective bargaining for public employees and others not, the Board stated that “there is an inherent asymmetry of labor relations regulatory regimes applicable to individual teams.”³⁹ Therefore, instead

³⁴ *Id.*

³⁵ *Id.* at 1350.

³⁶ *Id.* at 1354.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

of promoting uniformity and stability, since the NLRB is unable to regulate most FBS teams, the Board found that “asserting jurisdiction would not promote stability in labor relations.”⁴⁰

As a qualification of that holding, however, the NLRB noted that “recent changes, as well as calls for additional reforms, suggest that the situation of scholarship players may well change in the near future.”⁴¹

Therefore, “even if the scholarship players were statutory employees (which the Board does not here decide), we have concluded that it will not effectuate the policies of the Act to assert jurisdiction *in this case*.”⁴²

The NLRB may have been alluding, to invoke the metaphor used to begin this paper, to what was beginning to be perceived as receding waters. A Ninth Circuit case earlier the same year strengthened this assertion by finding that the NCAA’s compensation rules were indeed subject to regular antitrust scrutiny based on rule of reason analysis, and that the college athletes were injured by NCAA’s compensation rules. The court additionally found that the schools should be able to award grants-in-aid up to the full cost of attendance, but that allowing students

⁴⁰ *Id.*

⁴¹ *Id.* at 1355.

⁴² *Id.* at 1356 (emphasis added).

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to receive NIL (Name, Image, and/or Likeness) payments untethered to education expenses was not a viable alternative.⁴³

III. O'Bannon v. National Collegiate Athletic Association (NCAA)

As the Ninth Circuit stated, the District of California's 2014 decision, *O'Bannon v. NCAA*,⁴⁴ was "the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."⁴⁵ While in the court's view "many of the NCAA's amateurism rules are likely to be procompetitive, [it] [held] that those rules are not exempt from antitrust scrutiny" under Rule of Reason analysis.⁴⁶ Notably, the court was unpersuaded by the NCAA's appeal to the Supreme Court's *Board of Regents* statement in dicta, which supported the idea of college football as "a particular brand of football," and that

... in order to preserve the character and quality of this
"product," athletes must not be paid, must be required to attend

⁴³ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015).

⁴⁴ *Id.* at 1053; *see O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955 (N.D. Cal. 2014).

⁴⁵ *O'Bannon*, 802 F.3d at 1053.

⁴⁶ *Id.*

class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.⁴⁷

The NCAA appealed to this *Board of Regents* language to argue that its amateurism rules were valid as a matter of law. However, the court disagreed, explaining that the *Board of Regents*, instead of finding that the NCAA’s amateurism rules and restraints on trade were “categorically consistent with the Sherman Act,”⁴⁸ determined that since there were procompetitive benefits to the NCAA’s unique product, the restraints should not be considered per se unlawful under the Sherman Act. Instead, the restraints should be considered under a Rule of Reason analysis. Thus, the NCAA’s attempt to use this language to create a blanket exception to antitrust scrutiny was rejected by the court, and, as a

⁴⁷ *Id.* at 1062 (quoting Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984)).

⁴⁸ *Id.* at 1063

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result, its rules restricting student benefits were scrutinized under a Rule of Reason analysis.

The court also rejected the NCAA's argument that its restraints were merely rules about eligibility, and had no relation to commerce, thus exempting them from Sherman Act jurisdiction.⁴⁹ Where an athlete agrees to provide labor and NIL rights in exchange for a scholarship, this was seen as an "activity from which the actor anticipates economic gain,"⁵⁰ both for the athlete and for the school. Furthermore, the *Board of Regents* analysis of procompetitive benefits under the Rule of Reason analysis presumes that the Sherman Act applies to NCAA rules of amateurism.

Six years later, the United States Supreme Court would take up similar issues in *Alston*, establishing a clear precedence of Rule of Reason analysis regarding NCAA's restrictions, and bringing on a surge of speculation surrounding their legality under the Sherman Act. Of especial importance is the fact that, as a result, the argument based on student-athlete amateurism was severely crippled.

⁴⁹ *Id.* at 1065.

⁵⁰ *Id.*

IV. National Collegiate Athletic Association (NCAA) v. Alston

The recent U.S. Supreme Court case considering the NCAA's restrictions on universities marks a significant landmark in the college athlete compensation jurisprudence. The NCAA decided to appeal the lower court position that the Sherman Act applies to them as an organization. In 1984, the Court stated that

... [t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.⁵¹

In *Alston*, however, the Court made the distinction that *Board of Regents* was a case analyzing whether the NCAA's restrictions on televising games was lawful under the Sherman Act, in contrast to the issue in *Alston* involving student compensation.⁵² Furthermore, while

⁵¹ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

⁵² Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2158 (2021).

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“*Board of Regents* may suggest that courts should take care when assessing the NCAA’s restraints on student-athlete compensation. . . these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA’s compensation restrictions.”⁵³

In essence, by a unanimous decision, the Supreme Court supported and adopted the Ninth Circuit’s *O’Bannon* rationale, considering the issue before them under the lens of Rule of Reason analysis. The Court was unwilling to grant the NCAA any “judicially ordained immunity from the terms of the Sherman Act” because its restrictions “happen to fall at the intersection of higher education, sports, and money.”⁵⁴ Instead, the Court made clear that the law before them was the Sherman Act, and unless Congress carved out an exception for the NCAA, which it has done on occasion for other industries, the statutory assumption that “competition is the best method of allocating resources in the Nation’s economy” would inform their scrutiny of commercial activities under the Act.⁵⁵

Due to the fact that only the NCAA (and not the athlete plaintiffs) appealed the lower court’s decision, the Supreme Court chose to only review NCAA limits on educational benefits, thus leaving intact

⁵³ *Id.* (emphasis in original).

⁵⁴ *Id.* at 2159.

⁵⁵ *Id.* at 2160.

the lower court's decision that the NCAA could still restrict sports-related compensation. That being the case, the *Alston* decision did not recognize athletes as employees of the colleges and universities they play for. However, the Court proceeded to support two critically important findings: (1) the NCAA's restrictions were not just restricting competition for procompetitive purposes, they were "patently and inexplicably stricter than is necessary",⁵⁶ and (2) the NCAA's labeling of college sports as amateurism is inappropriate product feature labeling.

First, the reality that the NCAA's restrictions were seen as excessively restrictive harkens back initially to its rationale that the NCAA's restraints required more than a "quick look."⁵⁷ The Court recognized that for procompetitive reasons, there may be situations that make some restrictions necessary, but that this does not mean that any and all restrictions would be considered necessary under a rule of reason analysis. The Court stated that the "NCAA's rules fixing wages for student-athletes fall on the far side of this line."⁵⁸ As indicated above, the Court struck this balance by recognizing that the NCAA can still impose restrictions. For example, the NCAA is still "free to reduce its athletic

⁵⁶ *Id.* at 2162.

⁵⁷ *See id.* at 2156-57.

⁵⁸ *Id.* at 2157.

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awards,”⁵⁹ as well as establish academic criteria for granting academic awards.⁶⁰ However, it also upheld the lower court’s injunction limiting the NCAA’s ability to restrict the education-related benefits that schools can provide college athletes (which had previously been capped at the cost of attending the school), which may include a multitude of benefits, such as scientific or technology equipment (e.g., computers), tutoring, academic awards and internships, study abroad experiences, and postgraduate academic scholarships. Individual athletic conferences were left free by the court’s decision to impose such limits if they so desire, and it is likely that many universities will take advantage of this decision by offering additional education-related benefits to their athletes – especially to their men’s football and men’s basketball players, whose “work” generates billions of dollars per year for coaches, colleges and universities, conferences, and the NCAA. Indeed, the NCAA argued that such an outcome would result in a de facto “professional salary”⁶¹ for some athletes, speculating that schools will “pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA.”⁶²

⁵⁹ *Id.* at 2165.

⁶⁰ *See id.*

⁶¹ *Id.*

⁶² *Id.*

Second, although the Court recognizes that businesses should have “substantial latitude to fashion agreements that serve legitimate business interests,”⁶³ it also is not willing to extend this reasoning to mean that “a party can relabel a restraint as a product feature and declare it immune from §1 scrutiny.”⁶⁴ Justice Kavanaugh’s concurring opinion critiques this relabeling directly, calling it “circular and unpersuasive,”⁶⁵ and stating that “[b]usinesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.”⁶⁶ Tellingly, although recognizing the tradition of college sports in America, Justice Kavanaugh states that “[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate.”⁶⁷

V. *Alston Aftermath*

Three days after *Alston* was decided, a federal district court in California reiterated the new antitrust scrutiny under which the NCAA

⁶³ *Id.* at 2163.

⁶⁴ *Id.* (citation omitted).

⁶⁵ *Id.* at 2167 (Kavanaugh, J., concurring).

⁶⁶ *Id.* at 2168.

⁶⁷ *Id.* at 2169.

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rules are to be subjected to.⁶⁸ Citing Ninth Circuit cases that allowed for the NCAA to regulate and limit compensation to student-athletes in some measure, the *Grant House* court recognized that future litigation could possibly reach a different conclusion based on what the parties present.⁶⁹ The court stated that “because the analysis demanded by the Rule of Reason requires the evaluation of dynamic market conditions and consumer preferences and is inherently fact-dependent, courts must continue to subject NCAA rules, including those governing compensation, to antitrust scrutiny.”⁷⁰

Two months later, a federal district court in Pennsylvania denied the NCAA’s motion to dismiss a claim by student athletes that they were employees and should be paid for the time they spent engaging in interscholastic athletic activity for their colleges or universities.⁷¹ The court ruled that the “complaint plausibly alleges that NCAA D1 interscholastic athletics are not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of

⁶⁸ *Grant House v. Nat’l Collegiate Athletic Ass’n*, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021).

⁶⁹ *Id.* at 811.

⁷⁰ *Id.* at 812 (citations omitted).

⁷¹ *Johnson v. Nat’l Collegiate Athletic Ass’n*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

the NCAA and the colleges and universities that those student athletes attend.⁷²

Three years prior to *Johnson*, the same court heard a similar case and granted the NCAA's motion to dismiss because of the failure to allege facts sufficient to establish that there was an employer to employee relationship based on the economic reality of the relationship.⁷³ The plaintiff also failed to allege facts that would "allow the Court to ignore the impact of the FOH guidance suggesting that student athletes who compete in interscholastic athletics are not 'employees' under the Fair Labor Standards Act (FLSA)."⁷⁴ The defendants argued that the court should rely on the recent Seventh Circuit case *Berger v. NCAA*,⁷⁵ and the Northern District of California case *Dawson v. NCAA*,⁷⁶ to reject a multi-factor test in favor of a holistic approach, which defendants argued would "[reveal] that the true nature of this relationship"⁷⁷ ... is defined by "the 'tradition of amateurism' in college sports,"⁷⁸ and therefore is not an "employer-employee

⁷² *Id.* at 506.

⁷³ *Livers v. Nat'l Collegiate Athletic Ass'n*, No. CV 17-4271, 2018 WL 2291027, at *16 (E.D. Pa. May 17, 2018).

⁷⁴ *Id.*

⁷⁵ *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016).

⁷⁶ *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F.Supp.3d 401 (N.D. Cal. 2017).

⁷⁷ *Id.* at 405.

⁷⁸ *Id.*

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relationship.”⁷⁹ The defendants also argued that the Department of Labor’s (“DOL”) guidance in its Field Operations Handbook (“FOH”), “provides clear guidance that student athletes are not employees under the FLSA,”⁸⁰ and constitutes persuasive authority that should be followed by the court.⁸¹

While the court did not take a position on whether an economic reality, multi-factor test should or should not be used regarding college athletes and their university and the NCAA, it acknowledged both that 1) a holistic approach *might* be more appropriate than an “economic reality” test in determining an alleged employment relationship involving student athletes,⁸² and 2) it was possible that

... an appropriate multi-factor test could be identified for evaluating the question of whether a student athlete who receives an Athletic Scholarship is an ‘employee’ for FLSA purposes. Any such test would likely lean on the factors outlined by the

⁷⁹ *Id.* at 407.

⁸⁰ *Id.* at 406.

⁸¹ *Id.*

⁸² *Id.* at 407 (discussing the approach taken in *Berger*, 843 F.3d at 291 (rejecting the use of a multifactor test because it would not capture the nature of the relationship between student athletes and their school based on “‘the long-standing tradition’ of amateurism ‘that defines the economic reality of the relationship between student athletes and their schools’”) and *Dawson*, 250 F.Supp.3d at 401).

Third Circuit. . . a standard thus far used for the purpose of distinguishing between employees and independent contractors.⁸³

In *Johnson*, the defendants, including universities and the NCAA, argued that the claims should be dismissed because the student athletes are not employees of the university.⁸⁴ This argument was based primarily on the FOH guidance articulating the DOL’s perspective that student athletes are not employees under the FLSA, and the theory that “student athletes cannot be employees. . . because they participate in interscholastic athletics for those schools without any expectation of payment and this amateurism ‘defines the economic reality of the relationship between student athletes and their schools.’”⁸⁵ However, based on its analysis of the economic reality of the facts alleged, and

⁸³ *Id.* (citing the six-factor test established in *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985) to distinguish between an employee and independent contractor, including “1) The degree of the alleged employer’s right to control the manner in which the work is to be performed; 2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer’s business.” *Livers*, at 13).

⁸⁴ *Johnson v. Nat’l Collegiate Athletic Ass’n*, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021).

⁸⁵ *Id.* at 506.

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considering this against the backdrop of the *Alston* ruling, the court found that the complaint had plausibly alleged that the interscholastic activities in question were not those referred to in the FOH “that do not result in an employer-employee relationship between the student and the school or institution,”⁸⁶ and that the court was not required to find “as a matter of law that Plaintiffs cannot be employees of the ASD.”⁸⁷

The defendants also petitioned the court to reject the use of any multifactor economic reality test because such tests do not account for the nature of amateurism in the relationship.⁸⁸ However, based on *Alston*, including Justice Kavanaugh’s concurring opinion, in which he stated that “the argument that ‘colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid’ . . . is circular and unpersuasive,”⁸⁹ the court rejected the argument that student athletes could not be employees based on a “long-standing tradition of amateurism in NCAA interscholastic athletics.”⁹⁰ Significantly then, and building on the same court’s earlier dicta in *Livers* regarding whether to use a holistic approach or a multi-factor approach,⁹¹ because of this rejected notion of amateurism, the

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 509.

⁸⁹ *Id.* at 501 (citing *Alston*, 141 S. Ct. at 2167).

⁹⁰ *Id.*

⁹¹ *See Livers*, 2018 WL 2291027.

court also rejected the argument that a multi-factor test should not be used in favor of a holistic approach to account for amateurism.

Thus, where it was previously unclear whether to utilize one of the existing multi-factor tests to determine economic realities of an employee-employer relationship, *Alston*'s rejection of the amateurism concept seems to make clear that college athletes should be considered under this analysis just like any other potential employer-employee relationship. Notably, the *Johnson* court quoted the Supreme Court, in reference to finding that individuals were employees although they were "vigorously" asserting their status as volunteers, stating that

... the purposes of the [FLSA] require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.⁹²

⁹² *Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 19-5230, 2021 WL 3771810, at *11 (E.D. Pa. Aug. 25, 2021) (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985)).

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In other words, without the shield of amateurism, this same reasoning would now be applied to college athletes. And, as in *Tony & Susan Alamo Foundation*, despite athletes having signed a contract stating that they were not employees and did not have an expectation for compensation, the court was now willing to look at the economic realities of the relationship. This time the court was ready and willing to consider the relationship based on a typical multi-factor test.

A. *Multi-Factor Analysis*

The *Johnson* court recognized a few different multi-factor approaches, including the Third Circuit *Enterprise Rent-A-Car* four-factor test used to determine whether an entity is a joint employer;⁹³ the *Donovan* six-factor analysis for distinguishing between an employee and independent contractor, which it had discussed previously in *Livers*;⁹⁴

⁹³ In *Re Enter. Rent-A-Car Wage & Hour Emp. Prac.s Litig.*, 683 F.3d 462 (3d Cir. 2012); see *US Department of Labor Announces Final Rule to Rescind March 2020 Joint Employer Rule, Ensure More Workers Minimum Wage, Overtime Protections*, U.S. DEP'T OF LAB. (July 29, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210729-0> (explaining that “[a] strong joint employer standard is critical because FLSA responsibilities and liability for worker protections do not apply to a business that does not meet the definition of employer”).

⁹⁴ See *Livers*, 2018 WL 2291027.

and the *Glatt* non-exhaustive seven-factor test for distinguishing between a student intern and an employee.⁹⁵

The defendants argued that of the three that might be used, the *Glatt* multi-factor test would be the most appropriate to analyze the economic realities between student athletes and the universities they attend. The *Johnson* court proceeded, therefore, to make its analysis based on the seven factors of the *Glatt* test to determine who was the primary beneficiary of the relationship.⁹⁶

The first factor, which considers to what extent the intern and employer understood that the work was to be with or without expectation of compensation, was found by the court to weigh in favor of finding that the athletes were not employees.⁹⁷ This was based on the defendants' assertions that

Student Athletes do **not** have any options to choose any opportunities to play NCAA sports for wages at any NCAA D1 member school. Student Athletes also do **not** have any options to bargain for such wages with any such school. . . [And] all NCAA

⁹⁵ *Johnson*, 2021 WL 3771810, at *12 (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2016)).

⁹⁶ *Johnson*, 2021 WL 3771810, at *12 (explaining that the relevant question under *Glatt* is “whether the intern or the employer is the primary beneficiary of the relationship,” quoting *Glatt*, 811 F.3d at 536).

⁹⁷ *Id.* at *13.

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member schools have mutually agreed **not** to offer wages for participation in intercollegiate Varsity sports, and they have adopted bylaws prohibiting schools from offering wages and Student Athletes from accepting wages.⁹⁸

The second and fifth factors were found to both be neutral. The second factor considers “the extent to which the internship provides training that would be similar to that which would be given in an educational environment,”⁹⁹ and the fifth factor considers whether the duration of the internship is limited to the time in which the intern is provided with beneficial learning.¹⁰⁰ Although the defendants argued that the Complaint alleges some educational benefit from the athletes’ participation in sports, including “discipline, work ethic, strategic thinking, time management, leadership, goal-setting, and teamwork,”¹⁰¹ the court explained that this allegation does not specifically speak to the comparison between the sports program and the educational environment, nor whether it was limited to when their participation provided them “beneficial learning.”¹⁰² Without on-point allegations,

⁹⁸ *Id.* (emphasis in original) (citation omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (citation omitted).

¹⁰² *Id.* at 14.

these factors were therefore neutral regarding the potential employer-employee relationship.

The third factor, which considers “the extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit,”¹⁰³ was found to be in favor of the athletes being employees. This was based on the defendants’ admission that “NCAA sports are not tied to the student’s formal education program by integrated coursework or receipt of academic credit.”¹⁰⁴

The fourth factor also weighed in favor of finding an employee relationship.¹⁰⁵ This factor considers to what extent “the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.”¹⁰⁶ The defendants conceded that there is an “arguably-imperfect correspondence between some athletic seasons and the academic calendar,” but that the universities tracked the athletes’ time devoted to sports and provided academic support.¹⁰⁷ On the other hand, the plaintiffs argued that they were required to spend more than thirty hours per week devoted to sports related activities, and that these

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 13.

¹⁰⁷ *Id.* at 14.

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activities prevented them from taking courses that they wanted to enroll in, as well as preventing them from majoring in subjects that they were interested in.¹⁰⁸ Considering these allegations, the court found that the athletes' participation in college athletics interfered with their academic pursuits, which weighed in favor of finding that they were employees.

The sixth factor contains two separate elements. It considers whether the intern displaces or complements the work of other paid employees, and includes the additional proviso, "while providing significant educational benefits to the intern."¹⁰⁹ The defendants argued that athletes do not displace any paid employee. But the court focused on the athletes' argument that they did not receive any academic credit or benefit for playing sports and that sports interfere with their academic options. As such, the court found that athletes did not receive "significant educational benefits" from their participation in athletic programs.¹¹⁰ Therefore, despite acknowledging that athletes may not displace paid employees, the court found that the sixth factor weighed in favor of the athletes being employees.

Finally, as with the first factor, the seventh factor, which considers whether "the intern and the employer understand that the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

internship is conducted without entitlement to a paid job at the conclusion of the internship,” weighed in favor of the athletes not being employees.¹¹¹ The defendants asserted, and the court accepted, that the alleged facts showed that college athletes had no expectation of paid work upon graduation.¹¹²

In sum, in balancing the factors of the *Glatt* test, the court found that the plaintiffs had plausibly alleged that they were employees of the defendant-universities and denied the defendants’ motion to dismiss. This was based primarily on allegations that the athletes received no academic benefit or credit from participating in athletics, that their participation in sports hampered their choices for and scope of educational offerings, and that there was no integrated coursework involved in their participation. However, the defendants’ arguments were successful on the factors regarding the expectation for compensation and future paid work. Additionally, depending on whether facts could be alleged regarding the second and fifth factors (which were found to be neutral here), the court may have found that the balance weighed in favor of dismissing the case.

¹¹¹ *Id.* at 15.

¹¹² *Id.*

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VI. *September 29, 2021, NLRB General Counsel Memo*

Significantly, and harkening back to the NLRB’s qualifying 2015 pronouncement stating that developments might change its position,¹¹³ Ms. Jennifer Abruzzo, General Counsel to the National Labor Relations Board, submitted a memo in 2021 indicating that the common law “fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated players at Academic Institutions, are employees under the NLRA.”¹¹⁴ Furthermore, she stated the view that “because those Players at Academic Institutions are employees under the Act, misclassifying them as ‘student-athletes’, and leading them to believe that they are not entitled to the Act’s protection, has a chilling effect on Section 7 activity.”¹¹⁵ Thus, “misclassifying employees as mere ‘student-athletes’, and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act.”¹¹⁶

¹¹³ See discussion, *supra* at pp. 6-7.

¹¹⁴ Jennifer A. Abruzzo, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, NACUA, 3 (Sept. 29, 2021), https://www.nacua.org/docs/default-source/new-cases-and-developments/2021/statutory-rights-of-players-at-academic-institutions-_student_athletes_-under-the-national-labor-relations-act.pdf?sfvrsn=991440be_2.

¹¹⁵ *Id.* at 4.

¹¹⁶ *Id.* at 1.

Although not a document that grants employee status and the ability to unionize under the FLSA, this memo seemed likely to be “highly influential with the five-member NLRB panel that decides issues of federal labor law for the private sector.”¹¹⁷ It added weight to Mr. Ohr’s 2014 decision regarding Northwestern football athletes, which was ultimately overturned by the Board in 2015, as discussed above,¹¹⁸ and made future changes in college athletes’ employment status appear even more likely.

VII. Recent Developments in California and the NCAA

Such changes were not long in coming. The Fair Pay to Play Act (officially titled Senate Bill 206), passed by the California state legislature, went into effect in 2021, making California the first state to give student-athletes the legal right to receive compensation for the commercial use of their NIL, such as by endorsing products, signing autographs, and participating in merchandising and other commercial ventures.¹¹⁹ Over 20 other states have since followed suit.¹²⁰

¹¹⁷ Alex Kirshner, *College Athletes Just Got Much Closer to Becoming Employees*, SLATE (Sept. 29, 2021, 6:57 PM), <https://slate.com/culture/2021/09/nlr-memo-student-athletes-employees-ncaa-college-sports-pay.html>.

¹¹⁸ See discussion, *supra* at pp 3-7.

¹¹⁹ A.B. 1518, 2019-2020 Cal. State Legis, Reg. Sess. (Cal. 2019).

¹²⁰ Nancy Skinner, *Skinner and Bradford Move Up Effective Date of Fair Pay To Play Act To Sept. 1, 2021*, NANCY SKINNER (June 21, 2021),

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To the surprise of many, in 2021 the NCAA responded to this dramatic move on the part of state legislatures by lifting its ban on athletes receiving compensation from outside parties for their NIL,¹²¹ which has been widely hailed as a giant step forward for student athletes. However, this rule change still did not allow athletes to make such NIL deals directly with their colleges, nor did it extend to formally granting them “employee” status (i.e., student athletes are still not paid wages in exchange for their athletic “work”).

This unprecedented move was followed two years later by still further evidence that the NCAA has become serious about addressing this issue, although it appears that the NCAA still does not intend to go so far as to consider student-athletes as employees in the sense that they are paid wages. In a December 5, 2023, letter to Division 1 colleges, NCAA president Charlie Baker proposed four additional changes to the rules governing compensation for student-athletes.¹²² These proposed changes include: (1) allowing all Division 1 colleges and universities to

<https://sd09.senate.ca.gov/news/20210621-skinner-and-bradford-move-effective-date-fair-pay-play-act-sept-1-2021>.

¹²¹ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:30 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

¹²² Charlie Baker, *Letter from NCAA President Charlie Baker*, DOCUMENT CLOUD 2 (Dec. 5, 2023), <https://s3.documentcloud.org/documents/24190589/letter-from-ncaa-president-charlie-baker.pdf>.

provide their student-athletes whatever level of educational benefits they consider to be appropriate, (2) allowing any Division 1 school to offer NIL contracts directly to their student-athletes, (3) requiring the highest-resourced schools to invest at least \$30,000 per year into a trust fund for at least half of their Title IX eligible student-athletes, and (4) requiring the highest-resourced schools to work with their peer institutions to create rules that may differ from the rules for the rest of Division 1 colleges. While President Baker is optimistic that these rule changes (if implemented) will have beneficial effects for student-athletes, it is not clear how these rule changes will avoid the many potential pitfalls that will likely plague any decision to consider student athletes as employees. It is to such potential consequences that we now turn.

VIII. Possible Implications if College Athletes are Considered

Employees Under the FLSA

All these developments seem to be indicative of further impending changes in the classification of college athletes. *Johnson*, in particular, signals an important shift resulting from *Alston*'s rejection of the NCAA's underlying amateurism argument. Without amateurism as a shield, not only are collegiate athletics considered under the Sherman Act like everyone else, but the employer-employee relationship is more

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likely to be found based on multi-factor analysis, as opposed to a holistic approach. When combined with the changes in recent years by state legislatures and the NCAA to the rules governing student rights to compensation for their NIL, the likelihood of finding that college athletes are employees under these multi-factor tests seems to be greatly enhanced. Thus, it seems increasingly likely that, even with the recent changes to student-athlete rights to NIL compensation, the future will likely bring a tidal-wave-like surge of litigation from college athletes seeking compensation and benefits as regular employees of the colleges they play for, in exchange for their athletic “work.” This seems especially likely, given the fact that the vast majority of student-athletes do not possess the celebrity status that would allow them to procure a NIL deal, as well as the fact that the NIL deals that most student-athletes do succeed in securing do not involve significant amounts of money (so far, only about 17% of Division 1 student-athletes have secured NIL deals, with the median deal worth approximately 65 dollars).¹²³ Such status, and the large payouts that go with it, appear to be generally reserved for a small minority of “star” athletes. Thus, most student-

¹²³ Bill Carter, *Seven Data Points That Will Tell the Story of NIL in 2023*, SPORTS BUS. J. (Jan. 17, 2023), <https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/17-Carter.aspx>.

athletes are not realistically in a position to benefit financially from the recent rules changes to their legal right to profit from their NIL. For most student athletes to actually profit monetarily, in a meaningful way, from any kind of rules change, it seems they will need to actually be considered employees of the colleges they play for, under the FLSA, and be paid regular wages for their athletic “work.”

If such a future does, in fact, come to pass, it is not immediately clear what all the consequences will be. Being considered employees under FLSA would, arguably, yield a number of clear benefits for college athletes, such as required minimum salaries (likely including overtime payments),¹²⁴ worker’s compensation for injuries suffered while “at work,” and other workplace protections. However, there might also be other possible implications, not all of which would necessarily be beneficial for college sports.

First, if college athletes are considered employees, the expenses for running each individual athletics program will likely increase for

¹²⁴ See *Johnson v. Nat’l Collegiate Athletic Ass’n*, No. 19-5230, 2021 WL 3771810 at *2 (referring to forty or more hours engaged in athletic-related activities during each week, particularly during the sports season). It should be noted that this does not consider whether any of the overtime exemptions would be applied to athletes, although likely not. See *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB.: WAGE & HOUR DIV. (Sept. 2019), <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime>.

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universities. Traditionally, the only sports programs that generate more revenue than expenses are men's football and men's basketball.¹²⁵ Perhaps the analysis used to determine athletes' status could be different for athletes not engaged in men's football or basketball, where the university is arguably not benefiting from their participation, at least not at a financial profit. However, if a multi-factor test is used for all college athletes, and they are all found to be employees, it may be difficult for universities to continue offering the same athletics programs they have in the past, based purely on economics. This is further complicated by the fact that there exist significant financial and operational disparities across colleges and universities, in terms of the size of their budgets and how much money they have available to spend on athletics – and this gap is growing, not shrinking. Thus, where most college athletics programs already operate in the red,¹²⁶ increased expenses would likely cause many (especially the less-resources) colleges to determine either that they cannot afford the increased cost in the future or that they must find the funding elsewhere, such as through increased tuition. Where college

¹²⁵ See *Finances of Intercollegiate Athletics Database: Median Athletics Expenses vs. Institutional Expenses for 2020*, NCAA (Dec. 2023), <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database>.

¹²⁶ See *id.*

tuition has already seen a dramatic increase in recent years,¹²⁷ a further increase in tuition to fund college sports might put college attendance out of reach for many families.

Losing college sports programs would be an unfortunate result, for athletes, fans, and universities alike. And such an outcome would also likely introduce an additional potential issue involving women's sports. Title IX of the 1972 Education Amendments had the effect of greatly expanding athletic opportunities for women.¹²⁸ However, Title IX specifically prohibits discrimination based on sex from participation in, or denial of the benefits of, "any education program or activity receiving Federal financial assistance."¹²⁹ Unlike Title VII of the Civil Rights Act of 1964,¹³⁰ Title IX does not address the employer-employee employment context. If college athletes are considered as employees of the university, college sports would arguably cease to fall within the jurisdiction of Title IX. Where Title IX has traditionally been interpreted

¹²⁷ See Abigail Johnson Hess, *The Cost of College Increased by More Than 25% in the Last 10 Years—Here's Why*, CNBC (Dec. 13, 2019, 9:00 AM), <https://www.cnbc.com/2019/12/13/cost-of-college-increased-by-more-than-25percent-in-the-last-10-years.html>.

¹²⁸ Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (Aug. 16, 2023), <https://www.history.com/news/title-nine-womens-sports>.

¹²⁹ 20 U.S.C. § 1681(a).

¹³⁰ 42 U.S.C. §2000e.

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to require “equal athletic opportunities for member of both sexes,”¹³¹ it is conceivable that this requirement might no longer be in force in the future as it pertains to university athletics. Combined with increased costs of sports, and the fact that the only revenue generating sports are men’s football and basketball, it is also conceivable that women’s sports could potentially take a non-proportional hit, negating in large measure the positive effects of Title IX over the past fifty years. This would indeed be an unfortunate result of seeking greater compensation and protections for college athletes. NCAA president Baker indicated his optimism, in his Dec. 5, 2023, letter to Division 1 colleges, that his proposal to require the highest-resourced schools to invest at least \$30,000 per year into a trust fund for at least half of their Title IX eligible student-athletes will yield positive benefits for those athletes.¹³² However, it is not at all clear how such a requirement will avoid the potential issues for Title IX described above.

IX. Possible Methods for Reducing Negative Implications

¹³¹ *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, DEPT. OF EDUC.: OFF. FOR C.R. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

¹³² *See Baker, supra* note 122.

While there are numerous potential scenarios for how college athletics might be impacted by such an outcome, there are a few specific ways in which the courts have hinted that decision-makers could mitigate some of what seems to be an approaching surge of immense changes in college athletics.

For one, the NCAA and university defendants can seek legislation through Congress that both exempts them from Sherman Act rule of reason analysis and statutorily exempts college athletes from being considered employees under the FLSA. The Supreme Court hinted at this in *Alston*, stating that

The orderly way to temper that Act's policy of competition is by legislation and not by court decision. The NCAA is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to Congress.¹³³

¹³³ *Alston v. Nat'l Collegiate Athletic Ass'n*, 141 S.Ct. 2141, 2160 (2021).
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If not an across-the-board exemption, Congress might be tasked with establishing a regulatory scheme appropriate for college athletics that could help limit some of the extra costs that would accompany employee status. This could take a variety of forms, such as statutory salary caps, the broadening of Title IX to ensure coverage of college athletics despite employee status, the establishment of limits to the hours that college athletes can “work” (whether in practices, training sessions, competitions, or other activities associated with participation in college athletics), or the creation of exemptions to overtime pay for college athletes. Additionally, where the FOH states that student athletes are not employees under the FLSA, Congress could follow-up with legislation consistent with agency interpretation and specifically exclude college athletes from FLSA protections and benefits. In fact, the NCAA has already begun to call on Congress to “meet the ‘urgent’ need for a ‘federal framework’ around NIL.”¹³⁴ Ultimately, in addition to NIL implications, as discussed above, it will likely behoove the NCAA and universities to seek further guidance and regulation regarding FLSA and the Sherman Act.

¹³⁴ Maria Carrasco, *Congress Weighs in on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Sept. 20, 2021), <https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law>.

X. Conclusion

Even with the recent developments in state and NCAA rules surrounding the compensation of student athletes (or perhaps because of them), where college athletics goes from here is uncertain. Recent legislative, judicial, and administrative decisions seem to signal a clear receding of waters before a surge of additional changes that could significantly alter the college athletics landscape. Attaching employee status to college athletes, under the FLSA, would almost certainly impact universities in dramatic ways, likely by limiting the number of athletics programs they would be able to offer. So, while there exists a strong argument that college athletes are employees, especially for men's football and men's basketball programs (which bring billions of dollars to universities and the NCAA each year), it is important to recognize the possible negative implications that these changes might bring to college sports as well. Only the future will tell what changes these decisions will bring, and what response may follow from legislative, judicial, and administrative entities as we all adapt.