

## Education

## Labor and Employment

# From Student-Athletes to Employees?: The NLRB General Counsel Deems Student Athletes Employees under the National Labor Relations Act

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Only adding further to the controversy surrounding the status of college athletes created by the Supreme Court's June 2021 decision in [NCAA v. Alston](#), on September 29, 2021, the General Counsel of the National Labor Relations Board (NLRB) issued a [memorandum](#) stating that student athletes at private educational institutions should be considered employees under the National Labor Relations Act (NLRA), and thus should have the right to unionize.

The General Counsel's position would have to be adopted by the NLRB in order for it to have the force of law. However, the fact that the General Counsel is looking for a specific case through which to advance this argument means the NLRB, which currently has a majority of Democratic members likely to favor the General Counsel's position, may adopt the General Counsel's position on this contentious issue.

### **Background**

The NLRA broadly extends its protections, including the right to unionize, demand bargaining, and engage in economic pressure such as work stoppages, to "any employee."<sup>[1]</sup> Under the common-law agency rules used by the NLRB to determine employee status, the NLRA applies to any person "who perform[s] services for another," and is "subject to the other's control or right of control."<sup>[2]</sup>

In 2015, the NLRB declined to address the question of whether student athletes were employees under the NLRA in a case involving Northwestern University.<sup>[3]</sup> The Board reasoned that exercising jurisdiction over student athletes at private educational institutions would not promote the NLRA's goals because of Northwestern's inclusion in an athletic consortium (the NCAA) that was "dominated" by public universities that fall outside the NLRA's statutory scope.<sup>[4]</sup>

### **The General Counsel's Current Position**

Notwithstanding the Board's 2015 decision not to exercise jurisdiction over Northwestern, the current NLRB General Counsel opined that the evidence and reasoning in the *Northwestern* case and other subsequent NLRB decisions strongly supported the conclusion that student athletes were employees of the private institutions in which they are enrolled. The General Counsel reached this conclusion on three primary grounds: (a) student athletes "perform[ed] a service for Northwestern and the NCAA that generated significant revenue and reputational value; (b) the student athletes received significant compensation in the form of tuition, room, board and financial stipends; and (c) Northwestern and the NCAA controlled student athletes' terms and conditions of "employment" through the issuance of various rules and regulations.<sup>[5]</sup>

Based on her assessment of these factors, the General Counsel concluded the Northwestern student athletes, and "other similarly situated Players at [private] Academic Institutions" were entitled to the NLRA's protections.<sup>[6]</sup> As a result, the General Counsel announced her intention to pursue in an

appropriate case the argument that the misclassification of student athletes as non-employees violated the NLRA because it chilled student athletes from exercising their NLRA rights to organize.<sup>[7]</sup>

The General Counsel further justified her position by pointing to “significant developments in the law, NCAA regulations, and the social landscape.”<sup>[8]</sup> Specifically, the General Counsel discussed the Supreme Court’s recent decision in *NCAA v. Alston*,<sup>[9]</sup> which “rejected the NCAA’s antitrust defense based on the notion of amateurism in college athletics” and rejected the NCAA restrictions on student athlete compensation.<sup>[10]</sup> The General Counsel also noted Justice Kavanaugh’s pointed concurrence, which (in terms far stronger than the majority opinion) criticized the treatment of student athletes by the NCAA and educational institutions and suggested that difficult questions concerning student athlete compensation could be resolved through collective bargaining.<sup>[11]</sup>

The General Counsel also noted that in the aftermath of *Alston*, the NCAA suspended name, image and likeness (NIL) rules, paving the way for student athletes to earn additional compensation.<sup>[12]</sup> This development, in the General Counsel’s view, made the student athletes “more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income.”<sup>[13]</sup>

Finally, the General Counsel suggested revisiting the employee status of student athletes was appropriate in light of student athletes’ increasing social justice activism following the George Floyd murder, and health and safety concerns in light of the COVID-19 pandemic.<sup>[14]</sup> These actions, according to the General Counsel, supported providing student athletes engaged in such conduct greater protection from retaliation.<sup>[15]</sup>

The General Counsel’s memo concluded by reiterating her intention to pursue this issue in appropriate NLRB investigations or litigation.<sup>[16]</sup> This might include arguments that private educational institutions and the NCAA were joint employers of the student athletes, given what the General Counsel saw as their dual control over various terms that govern the athletes’ activities.<sup>[17]</sup>

## **Analysis**

There is undoubtedly a sea-change currently taking place in the way that laws and regulations classify student athletes and the concomitant economic benefits to which student athletes will soon be entitled. Just as *Alston* made clear that the NCAA could not prohibit student athletes from receiving (albeit limited) forms of compensation, if adopted by the NLRB, the General Counsel’s memorandum will require private schools to allow student athletes to unionize and collectively bargain when setting the terms of their compensation. Likewise, as “employees” under the NLRA, student-athletes will receive a host of additional protections including, among other things, the right to designate an exclusive bargaining representative to deal with their “employer,” the right to demand periodic bargaining on the terms of their “employment,” and the right to withhold their services in support of their bargaining demands.

Although the NLRB has yet to adopt the General Counsel’s position through a binding decision, institutions would do well to expeditiously consider the consequences that will flow from their athletes being deemed employees. For one, there are significant challenges from complying with federal labor laws within segments of the institution where “management” and “employees” may change frequently. Additional complications may also arise if the General Counsel is able to establish that a particular institution *and* the NCAA jointly employ the student athletes. Given the Supreme Court’s decision in *Alston* (and all the more so Justice Kavanaugh’s concurrence), joint employment and coordination among various institutions on wages could raise antitrust concerns. Adding to the complexity is the ever-evolving panoply of state laws that require schools to provide some form of compensation for their student athletes and/or prohibit limits on compensation. Finally, leaving formal legal issues aside, institutions will certainly need to consider the economic questions of how much to compensate their student athletes and how to best position themselves from a recruiting perspective in an environment that is only becoming more competitive by the day. As was the case with *Alston*, the General Counsel’s

memorandum makes clear that change is coming to big time college sports, but as of now provides plenty of questions and not all the answers.



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[1] 29 U.S.C. § 152(3).

[2] *Boston Medical Center Corp.*, 330 NLRB 152, 160 (1999).

[3] *Northwestern University*, 362 NLRB 1350 (2015).

[4] See generally *Columbia University*, 364 NLRB No. 90, slip op at 7, n.56 (2016).

[5] Gen. Counsel Mem. 21-08 at 3-4.

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.* at 5.

[9] 141 S.Ct. 2141 (2021)

[10] Gen. Counsel Mem. 21-08 at 5.

[11] *Alston*, 141 S.Ct. at 2168 (Kavanaugh, J. concurring).

[12] Gen. Counsel Mem. 21-08 at 6.

[13] *Id.* at 6.

[14] *Id.* at 7.

[15] *Id.* at 7-8.

[16] *Id.* at 9.

[17] *Id.*