

## **STUDENT-ATHLETES AS EMPLOYEES: Northwestern, Columbia, and Unionization**

### **I. Introduction**

The NCAA's amateurism model has come under intense scrutiny, and with it the employment status (or lack thereof) of the student-athletes over which it governs. Since the rise of the Bowl Championship Series in the early-2000s, the NCAA's multi-billion dollar March Madness broadcasting deal in 2010, and the recent advent of the College Football Playoff, the tension between amateurism and student-athlete employment is an increasingly contested topic. Both public opinion and scholarship have virtually wed the two issues at this point, and the modern revenue sport landscape has dictated heated discussion but yielded none of the drastic changes for which proponents of reform have called. Contrary to the perception that the decision in *Northwestern*<sup>1</sup> by the National Labor Relations Board ("NLRB" or "Board") stifled unionization efforts in collegiate athletics, both *Northwestern* and the recent *Columbia*<sup>2</sup> decision may have actually *created* an opportunity for employment recognition and the unionization efforts of college athletes.

### **II. The NLRB's Northwestern and Columbia Decisions**

#### **A. The Narrow Holding of Northwestern**

In what looked to be the latest body-blow to the efforts of student-athletes to attain employment rights, the push by the Northwestern University football team for the right to unionize and thus collectively bargain was brought to a sudden halt in the NLRB's 2015 *Northwestern* decision. As the basis for its decision, the Board declined to address the status of Northwestern football players as statutory employees, instead relying on the "symbiotic relationship" between Northwestern—notably, a private school—and the Big Ten athletic conference.<sup>3</sup> The Board also relied on "stability" of labor relations in college sport between the member institutions and the NCAA and member conferences, declining to assert jurisdiction because the majority of NCAA member institutions are state universities and are subject to state labor laws, which may conflict with each other.<sup>4</sup>

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<sup>1</sup> *Northwestern University*, 362 NLRB No. 167 (2015).

<sup>2</sup> *Columbia University*, 364 NLRB No. 90 (2016).

<sup>3</sup> "There is thus a symbiotic relationship among the various teams, the conferences, and the NCAA. As a result, labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions." *Northwestern*, 362 NLRB at \*4.

<sup>4</sup> At least two states—which, between them, operate three universities that are members of the Big Ten—specify by statute that scholarship athletes at state schools are not employees. . . . Accordingly, asserting jurisdiction would not promote stability in labor relations." *Id.* at \*5 (citations omitted).

However, the Board limited its decision to Northwestern University’s football players, explicitly stating, “We emphasize that our decision today does not concern other individuals associated with FBS football, but is limited to Northwestern’s scholarship football players.”<sup>5</sup>

This distinction is important, because although Northwestern’s efforts were stymied, the movement toward college athlete unionization may have recently regained some traction.

### *B. The Opportunity in Columbia*

In a petition filed by the Graduate Workers of Columbia (“GWC”) seeking statutory employee status for graduate student assistants, amongst other groups, the Board addressed the issue of “whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act [(“NLRA”)].”<sup>6</sup>

In overturning its 2004 *Brown University*<sup>7</sup> decision—which held, “It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university,”<sup>8</sup>—the Board in *Columbia* relied heavily on the language of NLRA § 2(3) and the common law definition of employment.<sup>9</sup> Accordingly, the NLRB extended statutory employment protections to student employees, including the GWC and undergraduate students.<sup>10</sup> The Board stated,

The unequivocal policy of the Act, in turn, is to “encourag[e] the practice and procedure of collective bargaining” and to “protect[ ] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.” Given this policy, coupled with the very broad statutory definitions of both “employee” and “employer,” it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons not to do so.<sup>11</sup>

As such, the Board extended employment status to a group of students previously unprotected by such recognition. The inclusion of undergraduates as part of this group creates an opportunity

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<sup>5</sup> *Id.* at \*6.

<sup>6</sup> *Columbia*, 364 NLRB at \*1.

<sup>7</sup> *Brown University*, 342 NLRB 483 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> The common law master-servant relationship, relied on by the Board here, “exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.” *NYU*, 332 NLRB 1205, 1206 (2000).

<sup>10</sup> The Board held that “student assistants who have a common-law employment relationship with their university are statutory employees under the Act.” *Columbia*, 364 NLRB at \*2.

<sup>11</sup> *Id.* (citations omitted).

for the proponents of student-athlete employment recognition—an opportunity previously thought occluded by *Northwestern*.

### III. Observations: Columbia's Relationship to College Athlete Unionization

*Columbia's* reliance on the common law definition of employment and its expansive interpretation of § 2(3) leaves the door cracked for the right fact pattern to establish statutory employment status for college athletes, especially considering *Columbia* overturned *Brown's* rejection of employment based on that same common law definition. Further, the NLRB has shown that its own interpretation of § 2(3) can evolve with time, devolve, then evolve yet again, as demonstrated by *Columbia*, *Brown*, and their progeny. That, coupled with the fact that *Northwestern* explicitly dodged the issue of student-athlete employment as it applied its decision only to *Northwestern* football, left the NLRB an opportunity to revisit—and perhaps establish—that relationship in the future under a better set of facts than those already presented.

The *Columbia* Board found that “*Permitting* student assistants to choose whether they wish to engage in collective bargaining—not prohibiting it—would further the Act’s policies.”<sup>12</sup> It also rejected the *Brown* Board’s argument that affording graduate students the opportunity to unionize and thus collectively bargain would “unduly infringe upon traditional academic freedoms . . . [such as the] right to speak freely in the classroom . . . .”<sup>13</sup> The *Brown* Board also argued “traditional academic decisions” as a basis for denying collective bargaining power for graduate students, which included “course length and content, standards for advancement and graduation, [and] administration of exams.”<sup>14</sup>

The Board recognized its “discretion” to afford statutory employment status to student assistants under the NLRA.<sup>15</sup> However, in footnote 56, the *Columbia* Board did address the college athlete issue and how the Board viewed its discretion under the present facts as compared with *Northwestern*.<sup>16</sup> It recognized that it denied employment protections in *Northwestern* because college athletics is dominated by public universities, extending those protections would not advance the purposes of the NLRA.<sup>17</sup> “Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act.”<sup>18</sup>

The disconnect, however, lies with the public-versus-private distinction. In *Northwestern*, the Board deferred to state employment laws in the states with schools making up the Big Ten to deny granting itself jurisdiction over the petition in the context of student-athletes—effectively denying employment status to the *Northwestern* football players seeking

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<sup>12</sup> *Id.* at \*7.

<sup>13</sup> *Id.* (quoting *Brown*, 342 NLRB at 490) (citations omitted).

<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

unionization and collective bargaining capabilities. However, in the context of student *assistants*—both graduate and undergraduate—the Board in *Columbia* took no such issue in asserting jurisdiction so as to grant statutory employment to *these* students.

Additionally, *Columbia*'s reasoning is at odds with the *Northwestern* discussion regarding the special relationship between college athletes and their universities (the “symbiosis”). Its decision to grant employment to non-athlete students who also provide a service to the university (an arguable concept in the athlete context) appears to be an inadvertent acknowledgement of unique nature of the athlete-university relationship, which the case law implies to be more elevated than the relationship between the regular student and that same school. If the Board *did* consider that relationship too elevated for it to address, it creates conflict between the notions that a lesser relationship warrants employment and collective bargaining protection, yet the elevated relationship does not command *at least* as much.

Further, for those who agree with the NCAA that student-athletes are “students first and athletes second,”<sup>19</sup> then it is peculiar that these athletes are not entitled to participate in the collective bargaining process that the Board stated would “further the Act’s policies” under the NLRA.<sup>20</sup>

#### IV. Solutions

Conceding the state employment law rationale used by the Board for punting on the college athlete employment issue in *Northwestern*, as it currently stands, only private schools would thus be able to unionize. The Big Ten having *Northwestern* as its sole private institution is clearly not an ideal candidate to lead the charge on unionization.<sup>21</sup> Vanderbilt University of the Southeastern Conference (“SEC”) presents a similar problem as it is the SEC’s only private member, although its positioning in the anti-union South, its presence in the current most influential football conference, and its academic prowess make it an interesting candidate (Vanderbilt, like *Northwestern*, has the type of academically-strong players on its roster—a

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<sup>19</sup> Walter Byers, former NCAA president and constructionist of the modern “student-athlete” moniker, when asked whether college athletes should be afforded employee status, stated:

The colleges are scared to death at the prospect of having their athletes identified as employees and therefore subject to workman’s comp. I had our law firm do major research on this issue. Our law firm, they rely on the old amateur rule to say look: these are students first and athletes second. These are student-athletes and they are working at their professional training as a student and therefore not subject to workman’s comp.

SCHOOLED: THE PRICE OF COLLEGE SPORTS (Makuhari Media 2013); Benjamin J. Block, Walter Byers: Was He Responsible for the ‘Pay To Play’ Controversy That Exists in College Sports Today?, ISPORTS TIMES (Oct. 16, 2013, 12:09 AM), <http://www.isportstimes.com/articles/9152/20131016/walter-byers-responsible-pay-play-controversy-exists.htm>.

<sup>20</sup> See *Columbia*, 364 NLRB at \*7.

<sup>21</sup> “Only 17 of [FBS’s roughly 125 member schools]—including *Northwestern*—are private colleges or universities, and *Northwestern* is the only private school in the 14-member Big Ten.” *Northwestern*, 362 NLRB at \*2.

function of extremely strict admissions standards—to be ideal candidates to make cognizable pro-union arguments to the rest of the country).

The Pac-12 falls into a similar trap despite its membership including Stanford University and the University of Southern California—two of the most prestigious academic institutions in the country. The answer may be the Atlantic Coast Conference (“ACC”). Six of the ACC’s member schools are private—Duke University, Boston College, the University of Miami (FL), Notre Dame, Syracuse University, and Wake Forest University—and are some of the most prestigious in the country. Further, their membership playing in a Power-5 conference affords them the type of exposure necessary to effectuate a unionization movement.

If unionization were to be allowed, it could have adverse consequences for the supporters of the current Power-5 college athletics model for revenue sports. Consider a national players union of private schools. If all Power-5 private schools joined, it would include schools like Miami (FL), Stanford, Notre Dame, Southern California, Texas Christian (“TCU”), and Baylor, among others. This is a collection of established, prominent, and fairly storied programs, along with others like Baylor and TCU who are up-and-coming national powers. The intrigue lies in the possibility of these institutions breaking away and forming their own conference.

This concept may seem far-fetched, but as is common with regard to modern collegiate revenue sports, its context lies in recruiting. If the idea of unionization begins to carry weight with high school athletes, these schools could gain a stranglehold on recruiting. High school recruitment is becoming more and more sophisticated, which is the result of a rounder world with regard to communication and access to other players through social media, text messaging, and other technological advances—for both coaches *and* recruits.<sup>22</sup>

Consequently, there is nothing to stop a savvy top high school athlete from choosing a university based primarily on its collective bargaining ability and his understanding of the benefits thereof, and then steering fellow top players to that same program. This could lead to a surplus of talent, more wins, and thus more money for that private school conference. The rest of this story is easy to see. The public schools’ cry to allow its players to unionize to re-level the playing field could tip the scales. This is, of course, purely speculative, but it is an interesting possibility, and is hardly a novel theory.<sup>23</sup>

Proponents of a union-based structure for revenue sport athletes argue that the benefits far outweigh the drawbacks, including Baruch College Zicklin School of Business Professor Marc

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<sup>22</sup> Rhiannon Potkey, *As football recruiting evolves, high school coaches stay involved*, Knoxville News Sentinel, Jan. 28, 2017, <http://www.knoxnews.com/story/sports/college/university-of-tennessee/football/2017/01/28/football-recruiting-evolves-high-school-coaches-stay-involved/97157574/>.

<sup>23</sup> See generally Marc Edelman, *NLRB Decision To Unionize Columbia Student Workers May Help College Athletes’ Union Movement*, Forbes (Aug 26, 2016, 2:52 PM), <http://www.forbes.com/sites/marcedelman/2016/08/26/nlrp-decision-to-unionize-columbia-student-workers-may-help-college-athletes-union-movement/#6a9aa3ab5a1a>.

Edelman (referenced above), who argues that unions will help athletes “win new financial rights, and secure improved health-care benefits and pension plans.”<sup>24</sup> Edelman continues, “A union also might help them obtain important protections such as notice and a hearing before being punished, and perhaps even give them the freedom to voice their opinions on social media without their college’s interference.”<sup>25</sup>

Detractors, like Northwestern University School of Law Professor Zev J. Eigen, recognize that athletes have legitimate grievances, but legally, there is no employment relationship between the university and the athlete.<sup>26</sup> “The fundamental exchange for all students and all universities is tuition money for an education,” Eigen says.<sup>27</sup> “Some college athletes get comped the tuition in exchange for playing a sport, but that does not alter the fundamental nature of their relationship with the school.”<sup>28</sup>

There is also a concern that allowing players to unionize would force smaller, less revenue-producing programs out.<sup>29</sup> However, that is countered with an incentive argument—that is, “the players and other rational participants in those sports would not have the incentive to even attempt to unionize.”<sup>30</sup>

The arguments on both sides are compelling, and the solution becomes less and less clear as the college sport industry grows at an alarming rate while athlete input in to the regulation of their own careers remains relatively static.

## V. Unionization Consequences

There is calamity associated with the effort to unionize and finally receive employee status, however. At the point that a college athlete receives employee recognition and the ability to unionize, he or she will also be subject to basic restrictions of employment—taxes and firing.

Currently, the Internal Revenue Code excludes the value of the athlete’s scholarship as taxable income. But there is an argument that the employment status should change this, at which point the scholarship should be considered compensation, or income. The issue then becomes ability-to-pay, especially for cash-poor athletes, as they only receive the “value” of a scholarship, but no actual payout.

With regard to employment termination, scholarships are traditionally one-year renewable, with the recent move toward four-year agreements. As such, an athlete can

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<sup>24</sup> Marc Edelman, *YES: It’s Time to Give Students More Control Over Their Employment*, WSJ.com (Sept. 15, 2015, 10:01 PM), <http://www.wsj.com/articles/should-college-athletes-be-allowed-to-unionize-1442368889?mg=id-wsj>.

<sup>25</sup> *Id.*

<sup>26</sup> See Zev J. Eigen, *NO: College Athletes Work Hard, but They Are Not Employees*, WSJ.com (Sept. 15, 2015, 10:01 PM), <http://www.wsj.com/articles/should-college-athletes-be-allowed-to-unionize-1442368889?mg=id-wsj>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Edelman, *supra* note 9.

only be removed from scholarship at year's-end (under normal circumstances). But, as employees, would the scholarship instead be deemed an at-will employment contract, terminable at any point? How would this compound the ability to pay consideration with the tax bill they may now be receiving, if at all?

These are interesting questions with difficult—and maybe murky—answers. The push for employment and unionization recognition requires serious consideration by its proponents—whether it enough to have won over hearts and minds, or whether college athletes truly want to see the current system changed. The lofty benefits may be offset by even loftier consequences.

## **VI. Conclusion**

*Northwestern*, though a damaging decision for college athlete unionization efforts, is not fatal, and it may even prove not as crippling as once thought. The NLRB's declination to address the issue of whether college athletes are, in fact, university employees actually left alive some interesting possibilities.

Some argue that the employment relationship is apparent, and others argue that the law is settled on the issue. In early February, Richard Griffin, the NLRB's General Counsel, circulated a memo within the NLRB which stated that FBS-level private school football players are henceforth to be considered employees under the National Labor Relations Act because "they perform services for their college and the NCAA, subject to their control, in return for compensation." The memo was circulated to clarify the *Northwestern* panel's decision to punt on the question of whether the Northwestern scholarship football players were employees (pun intended).

This is a massive step forward in the push for employment recognition, and though it is only a memo and not a binding NLRB decision, it sets the groundwork for the next labor dispute heard before the NLRB. It will be interesting to see if the new General Counsel who replaces Griffin will rescind the memo or will allow it to survive for use in review of future disputes. Regardless, *Columbia* created a line of reasoning that could provide the basis for establishing unionization and collective bargaining rights in college athletics and illuminated the NLRB's willingness to evolve. That willingness could prove fruitful for unionization efforts in the future.