

STUDENT-ATHLETES AS EMPLOYEES: A CLASSIFICATION WITH FAR-REACHING IMPLICATIONS ON COLLEGIATE SPORTS

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INTRODUCTION

Amateurism is a revered tradition in college sports.¹ However, this notion may soon be a thing of the past. In a groundbreaking decision on February 5, 2024 in *Trustee of Dartmouth College, Laura Sacks*, the Regional Director of Region 1 of the National Labor Relations Board (NLRB), issued a written decision finding Dartmouth's men's basketball players to be employees under the National Labor Relations Act (NLRA).² The NLRB's decision marks a step towards allowing student-athletes to unionize.³ With this formal recognition as employees under the NLRB and the opportunity to unionize, student-athletes can exercise their right to collectively bargain with their college or university for the first time in American collegiate athletics history.⁴

The matter of allowing student-athletes to receive compensation while still enrolled at a college or university has been presented as a question for judicial interpretation in a variety of matters. This issue has most frequently been raised in the frame of antitrust cases, like *NCAA v. Alston*, where student-athletes challenged the National Collegiate Athletic Association (NCAA) rules limiting education-related benefits.⁵ The Supreme Court's unanimous decision in favor of student-athletes in *Alston* signaled how the Court may rule if presented with the question of student-athletes being deemed employees.⁶ With the attention that cases like *Alston* have garnered for student-athletes, their amateur status is being called into question. In addition to the Dartmouth matter, the looming issue of

¹ *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

² Cristina Stylianou and Gregg E. Clifton, *Update: NLRB Regional Director Determines That Dartmouth's Men's Basketball Players Are Employees*, Lewis Brisbois (Feb. 7, 2024) [https://lewisbrisbois.com/\[https://perma.cc/TE5V-R4YT\]](https://lewisbrisbois.com/[https://perma.cc/TE5V-R4YT]).

³ *See id.*

⁴ *See id.*

⁵ *NCAA v. Alston*, No. 20-512, slip op. (June 21, 2021).

⁶ Christopher Wood, *Attorney Explains Legal/Legislative Landscape Surrounding Classifying Student-Athletes As Employees*, Thomas Reuters, Tax & Accounting, (Aug. 19, 2023) [https://tax.thomsonreuters.com/\[https://perma.cc/L6TV-42TW\]](https://tax.thomsonreuters.com/[https://perma.cc/L6TV-42TW]).

a formal decision of whether student-athletes may and should be classified as employees has also been raised in *Johnson v. NCAA* under the Fair Labor Standards Act (FLSA) and in another NLRB case regarding student-athletes involving the NCAA, the Pac-12 Conference, and the University of Southern California (USC).

This paper will analyze the impact that the classification of student-athletes as employees will have on collegiate athletics as we know it. Part I reviews the legal landscape of cases that seek to answer the question of whether student-athletes have earned the right to be deemed employees. Since *Johnson* is only concerned with potential employee designation and compensation pursuant to the FLSA, and not the designation of student-athletes as employees pursuant to the NLRA like the cases against USC and Dartmouth, the section will be divided into two parts: the FLSA and the NLRB. Part II contends that student-athletes can, and should, be considered employees. Part III raises proposed solutions to potential issues and concerns that schools, or even student-athletes themselves, may have about officially being considered employees. Finally, this paper concludes that a collegiate athletic wide re-classification of student-athletes as employees is an inevitable step that the NCAA should prepare for.

I. JOHNSON, USC, AND DARTMOUTH: THE CASES SETTING THE STAGE

A. THE FLSA: JOHNSON V. NCAA

The plausible option of deeming student athletes as employees is currently being considered in *Johnson v. NCAA*. In November 2019, *Johnson* was originally filed in the United States Eastern District Court of Pennsylvania against the NCAA and numerous other colleges.⁷ Currently in *Johnson*, the plaintiffs, former Villanova football player Trey Johnson who joined with other Division I student-athletes, brought suit against the NCAA in the Eastern District of Pennsylvania.⁸ The plaintiffs allege that by virtue of their participation in collegiate athletics, student-athletes must be considered employees under the FLSA.⁹ By securing an employee classification, the student-athletes would be entitled to receive back

⁷ Josh Goldberg and Carter Gaines, *What You Need to Know About Johnson v. NCAA*, Greenspoon Marder LLP (May 1, 2023) <https://www.gmlaw.com/> [https://perma.cc/9CJ9-KRXW].

⁸ Kohrman Jackson & Krantz LLP, *One Year of Collegiate Athletics Following NCAA v. Alston* (July 6, 2022) <https://www.jdsupra.com/> [https://perma.cc/V97Q-MUYG].

⁹ *Id.*

pay compensation, including overtime eligibility, for the time they spend participating in college athletics.¹⁰ The plaintiffs also claim that since the NCAA and its member institutions profited at their expense, they are entitled to damages for unjust enrichment.¹¹

The NCAA filed a motion to dismiss the lawsuit claiming that the plaintiffs failed to state a claim by not alleging facts that would establish that they are employees.¹² Such an establishment of employee status is a requirement to bring a claim under the FLSA.¹³ In August 2021, Judge John R. Padova of the Eastern District of Pennsylvania denied the NCAA's motion to dismiss.¹⁴ The decision of Judge John R. Padova to deny the NCAA's motion to dismiss bodes well for student-athletes.¹⁵

Johnson currently sits in the United States Court of Appeals for the Third Circuit pursuant to an interlocutory appeal filed by the NCAA challenging Judge Padova's decision. On February 15, 2023, a three-judge panel heard oral arguments from both parties.¹⁶ The plaintiffs remained steadfast in their argument that they should be paid for the time they spend practicing and participating in competitions.¹⁷ In support of their argument, the plaintiffs used the analogy that their work as a student-athlete is no different than that of a student library worker since they both work while in school.¹⁸ The plaintiffs also stated their desire for the court to run a multifactor test to determine if they can be employees.¹⁹ In the NCAA's oral argument, the association relied heavily on *Vanskike v. Paters* as legal precedent.²⁰ The ruling of *Vanskike*, a case which discussed whether prisoners are employees of a prison, cited a purported slavery loophole in the 13th Amendment.²¹ The loophole states that slavery is not legal unless it is being used as punishment for a crime.²² The NCAA cited the loophole discussed in the ruling

¹⁰ *Id.*

¹¹ Goldberg, *supra* note 7.

¹² *Id.*

¹³ *Id.*

¹⁴ Kohrman, *supra* note 8.

¹⁵ *Id.*; Goldberg, *supra* note 7.

¹⁶ Richard Johnson, *Explaining Johnson v. NCAA and What's at Stake in Wednesday's Court Hearing*, Sports Illustrated (Feb. 15, 2023) <https://www.si.com/college/2023/02/15/johnson-v-ncaa-court-hearing-employment-status>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Johnson, *supra* note 16.

of *Vanskike* as an example of a carve-out that would allow them to avoid running the plaintiff's requested employment test.²³ A decision from the United States Court of Appeals for the Third Circuit is still pending.

B. THE NLRB

1. UNIVERSITY OF SOUTHERN CALIFORNIA

In December 2022, the NLRB directed the Regional Director of the Los Angeles Regional office of the NLRB to proceed with issuing a formal complaint against three respondents.²⁴ The respondents: USC, the Pac-12 Conference, and the NCAA.²⁵ The complaint alleged that student-athletes who generate revenue should be legally classified as employees under the NLRA.²⁶

On May 18, 2023, the Los Angeles Regional Office of the NLRB filed a single complaint against USC, the Pac-12 Conference, and the NCAA.²⁷ The complaint alleged that football and men's and women's basketball players at USC are statutory employees of all three respondents, as joint employers, pursuant to the NLRA.²⁸ After the complaint was issued, NCAA Vice President Tim Buckley stated that it "appears to be driven by a political agenda and is the wrong way to help student-athletes succeed."²⁹

2. DARTMOUTH

In September 2023, the Dartmouth's men's basketball filed a petition to unionize with Region 1 of the NLRB.³⁰ The petition sought to allow the team, except for managers and supervisors, to

²³ *Id.*

²⁴ Gregg E. Clifton, *NLRB Reclassification Efforts of Student-Athletes Moves Forward*, Lewis Brisbois (Dec. 16, 2022) <https://lewisbrisbois.com/> [https://perma.cc/Z4HR-UNVX].

²⁵ *Id.*

²⁶ *Id.*

²⁷ Trecia Moore and Tyler M. Paetkau, *Back to School: What You Need to Know as the NLRB Pursues Unfair Labor Practice Charges on Behalf of College Athletes*, Husch Blackwell <https://www.huschblackwell.com/> [https://perma.cc/T2G4-H4H5].

²⁸ *Id.*

²⁹ Gregg E. Clifton and Christina Stylianou, *NLRB Takes Next Step to Reclassify Student Athletes As Employees Under Federal Law*, Lewis Brisbois (May 20, 2023) <https://lewisbrisbois.com/> [https://perma.cc/LGB8-23XD].

³⁰ Christina Stylianou and Gregg E. Clifton, *Update: Student-Athletes' Newest Effort to Unionize – Dartmouth Men's Basketball's Petition to the NLRB*, Lewis Brisbois (Sep. 14, 2023) <https://lewisbrisbois.com/> [https://perma.cc/U46A-C5EF].

join and gain membership status in Local 560 of the Service Employees International Union (SEIU) in Hanover, New Hampshire location.³¹

On February 5, 2024, Region 1 Director Laura Sacks ruled that the Dartmouth College men's basketball players are employees within the meaning of the NLRA.³² This decision confirmed the players legal right to file a petition seeking to unionize and granted the men's basketball players the right to a union election.³³ Regional Director Sacks emphasized that her decision was not based off of the profitability or revenue generation of the Dartmouth men's basketball team since profitability of a business is not a determining factor used in granting employment status.³⁴ Rather, her conclusion was based on the control that the university held over the on-campus and off-campus schedules, services, and autonomy of the student-athletes.³⁵ Among the benefits that the men's basketball players receive that are tantamount to compensation, Regional Director Sacks listed numerous examples such as tickets to games, lodging, and meals.³⁶

II. ANALYSIS: THE POTENTIAL IMPLICATIONS OF STUDENT-ATHLETES AS EMPLOYEES

A. OVERALL IMPACT³⁷

If student-athletes are officially classified as employees, numerous laws will be considered. As amended, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, sex, color, national origin, and religion. In considering whether a student-athlete is protected by Title VII, the courts will have to consider if the athlete is being compensated, receiving benefits, and if adverse action was taken against the student-athlete for any academic reason. It is important to note that how Title VII will apply is dependent on each case's own particular facts and circumstances.

³¹ *Id.*

³² Bethany S. Wagner, Neil V. McKittrick, and Zachary V. Zagger, *NLRB Regional Director Rules Dartmouth Basketball Players Are Employees, Setting Up Potential Landmark Board Case*, Ogletree Deakins (Feb. 7, 2024) <https://ogletree.com/> [https://perma.cc/XXV4-GXA4].

³³ *Id.*

³⁴ Stylianou and Clifton, *supra* note 2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Sass Law Firm, *Are College Athletes Employees of an Educational Institution and Do They Have Rights?* <https://www.employmentlawtampa.com/> [https://perma.cc/AB3E-E5JC].

In addition to Title VII, anti-discrimination laws in each state will have to be closely evaluated.

Even if it is found that Title VII or the applicable state's anti-discrimination law does not apply to a student-athlete's individual case, they could still receive protections under Title IX of the Education Amendments of 1972. Title IX, an anti-discrimination law prohibiting gender discrimination at federally funded colleges and universities, includes equity in athletics. If a student-athlete's case is properly brought under Title IX, then the Office of Civil Rights will investigate it.

Furthermore, two additional Acts could apply. First, the Americans with Disabilities Act of 1990 to protect a student-athlete who may require reasonable accommodations if they have a disability. In addition, the Rehabilitation Act of 1973, specifically Section 504, may apply to further prohibit disability discrimination to provide workplace accommodations to a student-athlete with a disability.

B. IMPACT OF JOHNSON³⁸

If the NCAA prevails in the hearing at the United States Court of Appeals for the Third Circuit, the case will likely be dismissed. However, if the United States Court of Appeals for the Third Circuit in *Johnson* determines that athletes need to be classified as employees, it could have a transformative effect on collegiate athletics.

Specifically, if the plaintiffs prevail in the hearing, the employment test will be run to determine if student-athletes are employees under FLSA guidelines. While the specific amount that student-athletes should be paid will not be decided, it still raises the question of how NCAA member institutions will afford this possible change to the status quo. In addition, the Third Circuit asked both the NCAA and the plaintiffs to be prepared to answer how student-athlete classification as employees will impact Title VII, Title IX, and possible issues with tax implications on both parties.

If the case were to be accepted by the United States Supreme Court, it could cause an upheaval in collegiate athletics. With Justice Brett Kavanaugh already signaling the interest of the Court to hear cases about student-athlete compensation in his concurring opinion in *Alston*, the NCAA should continue to hope that the Third Circuit will follow the prior decisions of other circuits.

³⁸ Johnson, *supra* note 16.

C. IMPACT OF NLRB RULINGS IN USC AND DARTMOUTH

1. USC

A judge ruling in favor of the NLRB would empower USC athletes. By siding with the NLRB and thus deeming that student-athletes are actually employees of both USC and the NCAA, student-athletes would receive all of the benefits of a full-time employee.³⁹ Such benefits include minimum wage, social security, overtime, worker's compensation, workplace protections against racial discrimination and sexual harassment, and other health and safety protections.⁴⁰

Furthermore, student-athletes would have the ability to unionize and collectively bargain with the university for salary amongst other protections.⁴¹ These newfound capabilities for student-athletes would be similar to the players' unions in major sports leagues, such as the National Basketball Players' Association (NBPA).⁴² This similarity between student-athletes and professional sports athletes may set a precedent that other schools will have to follow suit.⁴³

If USC athletes prevail, a complete restructuring of NCAA rules could be necessary.⁴⁴ While USC, the Pac-12 and the NCAA argue that USC athletes being considered employees would cause conflicts with Title IX, immigration laws, IRS policy, and state workers compensation laws, this type of shakeup for the NCAA could prove beneficial for the Association.⁴⁵ Referring to USC athletes as employees could help the NCAA as it would create clear, direct communication lines between the student-athletes and the Association.⁴⁶

2. DARTMOUTH

The decision by Regional Director Sacks allows for Dartmouth men's basketball players to vote in due course in an election

³⁹ J. Brady McCollough, *Q&A: What USC's hearing before NLRB could mean for the future of college athletics*, Los Angeles Times (Nov. 6, 2023) <https://www.latimes.com/> [https://perma.cc/8GA8-JAUJ].

⁴⁰ *Id.*

⁴¹ Luca Evans, *How the NLRB's case against USC and the NCAA could fix college-athlete compensation*, The Orange County Register (Feb. 2, 2024) <https://www.ocregister.com/> [https://perma.cc/ZT7R-RGUC].

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ J. Brady McCollough, *supra* note 39.

⁴⁶ Luca Evans, *supra* note 41.

conducted by the NLRB.⁴⁷ This vote will allow them to voice their opinion on whether they wish to be represented for collective bargaining purposes by Local 560.⁴⁸ However, Dartmouth College is likely to appeal the ruling by Regional Director Sacks to the full NLRB.⁴⁹ By requesting a formal review of the decision by Regional Director Sacks, the election process would be stayed.⁵⁰ This appeal will also allow for the NLRB to revisit the issue of whether or not student-athletes at private universities can be classified as employees under the NLRA.⁵¹

If the NLRB affirms the ruling by Regional Director Sacks in *Trustees of Dartmouth College*, it could spark organizing efforts across college sports.⁵² As a result, the current collegiate athletic landscape would be upended by challenging the student-athlete designation across the United States.⁵³

III. PROPOSED SOLUTIONS: HOW STUDENT-ATHLETE EMPLOYMENT CLASSIFICATION UNIONIZATION CAN BE BENEFICIAL FOR ALL

A ruling in favor of the plaintiffs in *Johnson, Dartmouth*, and *USC* would put pressure on the NCAA and its member institutions to adopt an employment model for their athletes.⁵⁴ Specifically in *Johnson*, a ruling for the plaintiffs would mark the first time in decades years that the NCAA's rules against pay-for-play would not be accepted.⁵⁵ This push back would eventually lead to a formal decision by the NCAA on amateurism vs. employment: which one are NCAA student-athletes?⁵⁶

With *USC*, it is the first case to consider whether the Pac-12 and the NCAA are joint employers. If joint employer status is found, then student-athletes in the NCAA will be open to union representation no matter if they attend a private or public institution.⁵⁷ Doing so, would allow for hundreds of thousands of

⁴⁷ Stylianou and Clifton, *supra* note 30.

⁴⁸ *Id.*

⁴⁹ Wagner, McKittrick, and Zagger, *supra* note 32.

⁵⁰ Stylianou and Clifton, *supra* note 30.

⁵¹ Wagner, McKittrick, and Zagger, *supra* note 32.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Phil Ciciora, *Would court ruling mean college athletes are employees?*, Illinois News Bureau (Nov. 28, 2023) <https://news.illinois.edu/> [https://perma.cc/YWD7-MSG5].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Moore and Paetkau, *supra* note 27.

student-athletes to join a union.⁵⁸ It would also make the NCAA and Pac-12 to be held liable for their respective actions and each other's violations under the NLRA.⁵⁹

Despite the belief that the decision in *Dartmouth* to deem student-athletes as full-time employees would result in the immediate unionization of student-athletes, it would not. Rather, this decision would allow for colleges and universities to directly negotiate with each student athlete on individual compensation models reasonable for both the institution and the athlete, consequently providing a deterrence from future litigation.⁶⁰ While the decision of whether student-athletes may unionize is still up for consideration, the NCAA and athletic directors at NCAA member institutions should prepare for union avoidance planning.⁶¹ While preparing for such, the aforementioned parties should consider implementing additional training for staff members to prepare for the possible new era of student-athletes as employees.⁶²

IV. CONCLUSION

As Justice Brett Kavanaugh stated in *Alston*, “Nowhere 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.”⁶³ Due to Court decisions like those supported by Justice Kavanaugh's opinion, amateurism is rapidly becoming a term of the past when referring to student-athletes. This re-classification of student-athletes to employee status will improve the college sports landscape by finally providing athletes the rights and protections afforded to other employees in the United States. As a result, the NCAA will be forced to deliver clear guidelines that the Association and all member institutions must adhere to going forward.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Robert Dickinson, *Digging Deeper into the Latest House v. NCAA Ruling and its Implications for College Sports* (Nov. 8, 2023) <https://swimswam.com/> [https://perma.cc/F9UZ-93BS].

⁶¹ Maynard Nexsen, *Collegiate Athletes Deemed “Employees” Under the NLRA: Dartmouth Basketball Players Cleared for Unionization Vote* (Feb. 7, 2024) <https://www.maynardnexsen.com/> [https://perma.cc/6YVT-MJQK].

⁶² *Id.*

⁶³ *NCAA v. Alston*, No. 20-512 and 20-520, slip op., Kavanaugh Concurrence at 5 (June 21, 2021).