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NLRB, Labor Laws and the Impact on NCAA Athletes

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Can—and should—college athletes be classified as employees? The answer to that question may be in flux. In a recent episode of the In-House Roundhouse Podcast, Womble Bond Dickinson attorney and host Mark Henriques welcomed Womble Bond Dickinson attorney Mike Ingersoll and University of North Carolina School of Law Professor Barbara Osborne to discuss the latest developments. Both guests were scholarship student-athletes themselves during their college days, adding to their perspective on the many issues pertaining to college athletes as employees. This article is derived from that conversation and is the latest installment in Womble Bond Dickinson's Opportunity Economy series.

Just when you think you have all the answers about college athletes as employees, the National Labor Relations Board changes the questions.

NLRB General Counsel Jennifer Abruzzo's September 2021 memorandum states that her office will consider some college athletes to be employees moving forward. But a number of significant questions—including whether Abruzzo's memo has the full support of the NLRB—remain unanswered.

The NLRB Memo: What it Says

Ingersoll explained that Abruzzo's memo dovetailing off of the NLRB's 2015 *Northwestern University* decision—which really was a non-decision. In that case, the NLRB failed to render a decision as to whether or not Northwestern University's scholarship football players were university employees under the National Labor Relations Act. That non-decision created a gray area of the law that Abruzzo's memo seeks to fill.

"Essentially, she has decided her office will prosecute disputes brought by students under the NLR Act as if they are employees," Ingersoll said. "She said any mischaracterization of players as 'student-athletes' – which is a nomenclature that has been used for decades – will itself be consider a violation of the NLRA as far as her office is concerned."

The NLRB hasn't adopted this as its official position, though, and the memo appears to be limited only to private colleges and universities, because the NLRA only applies to private schools.

“The memo itself raises more questions than it answers,” Osborne said. “I think it invites student-athletes to file claims that they deserve to be paid as employees, and that opens a whole new can of worms.”

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So should the term “student-athlete” be scrubbed from the college sports lexicon?

Ingersoll believes colleges and universities should avoid using it, at least in the short term, if they believe they are at risk of having to defend employment claims in front of the NLRB.

“I always thought of myself as a student-athlete and was proud of that,” Osborne said. “I don’t necessarily know that using that term misidentifies, but you need to classify those people as employees.”

Unanswered Questions in the NLRB Memo

However, as Osborne notes, this raises the first of many serious unanswered questions. The NLRB memo would require at least some college athletes to be classified as employees. However, this is at odds with NCAA rules, which prohibit athletes from being institutional employees.

“So we have a conundrum,” she said.

Another question: Which athletes are covered by the memo? Ingersoll said that is unclear.

“The memo distinguishes ‘Certain Players’ as a capitalized term – but it doesn’t actually define the term,” he said. The NLRB only has jurisdiction over private colleges and universities, not state-supported schools. The *Northwestern University* case applied only and explicitly to scholarship football players at Northwestern. It provided no opinion on other players in any other sport or at any other university, Ingersoll noted.

So to which students and sports does the memo apply? Only scholarship players or all varsity athletes? Both men’s and women’s athletics? Only so-called “revenue sports” or any officially sanctioned sport? To date, college officials and athletes don’t have any answers to these questions.

“Wait and see how it gets enforced,” Ingersoll said. “My assumption would be that it is intended to apply as broadly as the GC’s office can make it apply.”

Osborne said, “The ‘Certain Players’ term is very unclear. The only sport she mentions is football, but it’s hard to say if it’s just about football. But if the memo only applies to scholarship football players, you are leaving everybody else vulnerable.”

She explained that the NLRA is all about the ability to unionize and engage in activities related to exploring unionization, with the employer being prohibited from interfering.

“What she’s saying is that if these athletes want to unionize, we’re going to support that and (the colleges) can’t interfere. Again, though, that opens up so many more questions than there are answers,” Osborne said. For example, which athletes may organize? Can only private school athletes organize? And what exactly are “revenue sports?” This may vary from school to school. For example, the University of Georgia’s Gymnastics program is a profitable operation, while many schools actually lose money on football.

Another key question is that if athletes can organize, may they then collectively bargain with the NCAA about its rules and requirements. Ingersoll said all of this is unprecedented territory for college sports.

“From a legal standpoint, there’s been no union activities among college sports that I’m aware of,” he said. “As an athlete, it’s made clear to you early on that when you participate on a team, you are part of a dictatorship, not a democracy. There is no forcing the coaching staff or administration to do something they don’t want to do.”

Osborne said, “I absolutely agree that it’s not something athletes think about doing – they’ve got too much personally at stake…. The flip side is that we do see student-athletes, through the free speech aspect, uniting for causes. I see that as a more hospitable way to open up a dialogue as to what could be done to make things better, but I don’t see that in union terms.”

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As an example, Ingersoll noted the 2020 college football season, in which a number of teams influenced their conferences to hold the season amid COVID-19 concerns.

What’s Next for Athletes as Employees?

The NLRB memo isn’t the only significant development related to the employment status of college athletes.

An Eastern District of Pennsylvania case brought by college athletes alleges employment status under FLSA demanding wages. The claim survived a motion to dismiss and is now up on appeal. This is quite different from the Seventh Circuit precedent in *Berger*, which the Appeals Court dismissed because it decided college athletes weren’t employees and, thus, aren’t subject to the FLSA.

“We’ll see what ends up happening at the appellate level in light of these decisions,” Ingersoll said. “At the time of the *Berger* decision (in 2016), the landscape was significantly different than it is now.”

Also, the NLRB hasn't adopted the Abruzzo memo as its official position and is limited in scope. But Ingersoll said the memo may "bleed into" state and federal litigation—litigation he expects to increase in volume.

One factor driving increased litigation surrounding college athletes-as-employees is Supreme Court Justice Brett Kavanaugh's concurrence in this year's *NCAA v. Alston* decision. The case opened the door for college athletes to use their name, image and likeness for commercial purposes

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Osborne pointed out that there may be many unintended consequences if student-athletes are reclassified as university employees. For example, scholarships would be considered taxable income, and athletes may even be owed wages. Employment status also may impact Pell Grants or need-based financial aid eligibility. For student-athletes who are dependents on families, how would family taxes be impacted? "There are all sorts of tax implications," Osborne said.

Such a change in status also could require colleges and universities to provide Worker's Compensation coverage for student-athletes who are hurt on the job.

And then there is the NLRB memo itself. Is it effective without board adoption? And what would happen if the board does (or does not) adopt it?

"The memo essentially means that Abruzzo and her office will investigate and prosecute claims with the assumption that the athlete is a university employee," Ingersoll said. However, he said the full board ultimately will have to make a decision on the memo and stake out a position.

"If the board were to reject Abruzzo's position, that essentially kills it—Abruzzo is bound by the board. The board is going to have to stake out an official position. If the board adopts it, that will be the NLRB's position and as long as the athlete meets the criteria, then the case will have to proceed under the assumption the athlete is an employee under the NLRA."

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But the NLRB's position certainly could change later under a different administration. "The real teeth are in state and federal litigation decisions. That's when you will see a bit of a sea change," he said.

“The thing that stops that wave of litigation would be if we have federal legislation—which we’ve had a lot of lobbying for,” Osborne said. Proposals on the table run the gamut from supporting everything the NCAA has done in the past to the proposed College Athlete Bill of Rights, which would provide compensation and revenue sharing for student-athletes. Osborne wonders if the uncertainty created by the memo might force some form of Congressional action.

In addition, she notes that 37 court cases decided that state student-athletes are not employees and do not have rights associated with employment. “We have to reconcile those precedents,” she said.

So the path forward remains uncertain, with many questions still left to be decided.

Ingersoll said, “Justice Kavanaugh did provide a road map for these challenges to move forward. But right now, the NLRB memo is limited in its scope and impact. There should be no rush to judgment until we have some binding case law.”

Also, click here to read *“Alston Aftermath: NLRB General Counsel Memo Confirms Employment Status for Certain College Football Players Under the National Labor Relations Act and Declares an End to the ‘Student-Athlete’” by Mike Ingersoll.*

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