

Eligibility of University Football Players for Union Representation Expected to be Hotly Contested

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Whether Northwestern University's grant-in-aid scholarship football players are eligible as employees for union representation under the National Labor Relations Act will be decided by the National Labor Relations Board. [In granting the University's "Request for Review"](#) of the Regional Director's March 26, 2014, decision holding that they were eligible for such representation, the Board noted that it will accept amicus (friend-of-the-court) briefs, setting the stage for an intense, high-stakes battle.

Northwestern University is a private institution of higher education in Illinois. The Regional Director for Region 13 of the NLRB, Peter Sung Ohr, had decided that scholarship football players at Northwestern are "employees" (and not temporary employees) under the Act and eligible for union representation. Further, he found appropriate a bargaining unit composed of "all football players receiving a grant-in-aid football scholarship and not having exhausted their playing eligibility" and directed an election be held. In granting the University's "Request for Review," the NLRB wrote that "it raises substantial issues meriting review."

The Regional Director used the common law definition of employee in reaching his eligibility decision, holding that a person is an employee if he or she performs a service for another, under a contract of hire, for compensation, and is subject to the other's right of control. The Regional Director found the following:

- The scholarship football players perform a service (playing football) for compensation (a scholarship);
- The scholarship players' commitments to play football in exchange for the scholarship constitutes a contract for hire; and

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- The scholarship players are under the control of the University for the entire year, including in-season and out-of-season workouts, and the University places restrictions on their entire personal life and imposes detailed regulations that the players must follow at the risk of losing their scholarship.

The Regional Director also decided the NLRB's 2004 *Brown University* decision (342 NLRB 483), in which the NLRB found graduate assistants not to be employees of the university, to be inapplicable because playing football is not part of the players' academic degree program. However, he wrote that the scholarship football players would be found to be employees even if the *Brown University* test was applied. He noted:

- The scholarship players are not primarily students due to the 50-60 hours a week during the season that they devote to football;
- The scholarship players' football "duties" do not constitute a part of their academic degree requirements;
- The academic faculty does not supervise the players' football duties; rather, coaches who are not part of the faculty do so; and
- The grant-in-aid football scholarship is not need-based, like the financial aid other students receive, but is given solely in exchange for playing football.

Further, the Regional Director decided the scholarship football players are not "temporary employees" (generally ineligible to participate in collective bargaining) because they work more than 40 hours a week during the season, work year-round, and are expected to work for 4-5 years and play football as their prime consideration.

Finally, the Regional Director found the "walk-on" players were not included in the bargaining unit because they are not employees within the meaning of the NLRA. ("Walk-on" players do not receive grant-in-aid scholarships, but may receive need-based financial aid to attend the University. This aid is not contingent on them remaining on the football team and can be renewed every year if the player qualifies for it.)

The election took place as scheduled on April 25, 2014, and the ballots were impounded pending the Board's decision on the Request for Review. We anticipate the filing of numerous amicus briefs by private colleges and universities, conferences and unions. Indeed, invitations by the Board for such briefs in other high-profile cases have attracted substantial participation. The NLRB even may take the unusual action of allowing the parties and others to argue their positions orally before the full, five-member Board. The ballots will be counted if the Board affirms the Regional Director's decision.

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