Published on *The National Law Review* https://natlawreview.com

NLRB General Counsel Asserts that College Football Players Are “Employees"

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Ruling could impact both private universities and preparatory schools

On January 31, 2017, the National Labor Relations Board’s (NLRB) General Counsel Richard F. Griffin, Jr. issued a memorandum to the board’s regional directors asserting an unprecedented legal conclusion that football players at all 17 private schools in Football Bowl Subdivision (FBS) are employees under the National Labor Relations Act (NLRA). This memorandum represents a major expansion of NLRB Regional Director Peter S. Ohr’s 2014 ruling that Northwestern football players are employees and may form a union and contradicts the board’s reversal of Ohr’s ruling.

Griffin’s memorandum concluded that “scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.” Under the NLRA, employees are entitled to “engage in concerted activities for the purpose of [their] mutual aid and protection.” Such concerted activities include the right to file an unfair labor practice charge under the act. For example, the memorandum provided the hypothetical that “a football player who has been kicked off the team and lost his scholarship because he discussed improving concussion protocols with his teammates in violation of an unlawful team rule would be entitled to the protections of the Act.” Further, the memorandum also offered the speculation that players could “advocate” to “reform NCAA rules so that [they] can share in the profit derived from their talents.”

Importantly, Griffin’s memorandum conflicts with the board’s ruling in Northwestern University, 362 NLRB No. 167 (Aug. 17, 2015), in which it declined to exercise its jurisdiction over a representation petition filed by a union seeking to represent Northwestern University’s scholarship football players. In Northwestern University, the board unanimously held, “We conclude, without deciding whether the scholarship players are employees under Section 2(3) [of the NLRA], that it would not effectuate the policies of the Act to assert jurisdiction in this case.” Accordingly, the board reversed Regional Director Ohr’s decision and dismissed the union’s petition for representation.

In his memorandum, Griffin attempted to provide the answer to the question the board left open about whether football players at private schools are indeed employees under the act. However, this conclusion is merely Griffin’s opinion and has no binding precedential effect on subsequent cases. Moreover, the unprecedented legal conclusions of this memorandum are considered unlikely to be enforced by the new majority of the NLRB. Griffin, an appointee of President Obama, concludes his

term in November and will be succeeded by a nominee of President Trump, who is confirmed by the Senate.

Although the theory averred by general counsel may ultimately fail, private universities and preparatory schools that offer scholarships to student athletes must now be prepared to defend against allegations that these athletes are employees and entitled to the full panoply of rights provided by the act. Student athletes at these institutions may now attempt to file unfair labor practice charges in response to any number of actions, such as revoking a scholarship or other discipline related to their employment with the institution. It is critical for these institutions to have a plan of action in place in the event they face such allegations.

National Law Review, Volumess VII, Number 38