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COMMENTARY

Student Athletes Consider Forming Labor Unions as They Look to Get Paid for Their Efforts

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Employment Law

By Jeffrey Campolongo and Scott M. Badami | October 20, 2023 at 10:47 AM

One of the most frequent questions that crosses the plane of sports and employment law, is whether college athletes should be paid? Student athletes contend that they should be treated as “employees,” while educational institutions prefer to classify students as merely that, students. The landscape dramatically changed in June 2021, when the National Collegiate Athletic Association (NCAA) implemented an interim policy on name, image and likeness, or NIL, allowing student-athletes to make money from their personal brand.

The NCAA’s interim policy has three main parts:

- Athletes can engage in NIL activities if they follow their state’s laws where their school is located. Schools must ensure these activities comply with state law.
- Athletes in states without NIL laws can still participate in NIL activities without breaking NCAA rules.

- Athletes are allowed to seek professional service providers for their NIL activities.

The Next College Student Athlete (NCSA) is the largest college athletic recruiting platform connecting high school athletes with college coaches. The NCSA website sets forth examples of the types of things for which student-athletes could now be paid. The list includes things such as: autographs and memorabilia, camps and clinics, personal appearances, merchandise, affiliate/ambassador roles, NFTs, blogging, podcasting, public speaking, music, art, etc.

Does the ability to receive remuneration for being a college athlete mean that the students are deemed employees of the university? Do employment laws apply? Are labor laws enforced? Does OSHA enter the equation? What about HIPAA concerns relating to medical conditions and injuries?

These questions, and more, will likely play out over the coming years. In the meantime, 15 players on the Dartmouth College men's basketball team filed a petition with the National Labor Relations Board (NLRB) to form a labor union in September. While it is premature to conclude if their efforts will be successful, there are a handful of legal issues that will be developed and then decided before we learn if this type of college basketball union attempt will succeed. The petition seeks to officially declare that the players are employees of Dartmouth and give them the right to collectively bargain by joining Local 560 of the Service Employees International Union.

First, some history: back in 2014, football players at Northwestern University similarly attempted to form a union. Those efforts failed in 2015 when the NLRB unanimously concluded it was the wrong forum to decide the unionization effort, concluding that it did not have jurisdiction over public schools and if the NLRB ultimately addressed the merits, it would run counter to the National Labor Relations Act's goal that the board create "stable and predictable labor environments" in various industries.

So, if Northwestern's effort failed, why did the Dartmouth players try again? First, none of the Dartmouth basketball players receives an athletic scholarship for school, unlike most of the Northwestern football players. In a preliminary opinion from 2015, the NLRB's regional director asserted that the Northwestern players were "employees" as the players received "compensation" in the form of their football scholarships. Unlike the Big 10 (Northwestern's athletic conference), there are no athletic scholarships in the Ivy League (Dartmouth's athletic conference). Other potential factors at play this time include the fact that the Ivy League has all private schools, while the vast majority of schools in the Big 10 are public. Also, unions for student workers already exist on Dartmouth's campus (including students who work for the school's dining services).

The first hearing on the players' union petition took place earlier this month before the NLRB in Boston. The opening witness for the players detailed the types of actions a union takes on behalf of represented employees and how unions can help its members be treated equally and fairly. The union objects from time to time as Dartmouth allegedly was not consistent in determining what type of discipline should be appropriate for various conduct. Drawing an

analogy to the basketball players, the union official stated if a player on the team is subject to a disciplinary proceeding, the union would assist in ensuring that the player is treated equally as do other players. The union also seeks to take advantage of changes in leadership/direction of the NLRB as the agency has now issued a memorandum noting it considers college football players and some other athletes in revenue-generating sports to be school employees, which opens the door (the union hopes) for athletes at private colleges and universities to negotiate concerns about player health, working conditions and compensation.

While contending that the college respects unions, Dartmouth's witness urged the NLRB regional director to dismiss the petition as the players are not employees—as they do not receive athletic scholarships. Moreover, the college contended, the players play on a team that loses money for the school. Dartmouth further asserted its policies are clear that all players are students first (and are required to go to class with attendance requirements) before they can compete in athletics. The college further argued that while Dartmouth absolutely provides its athletes with some benefits not available to the general student body (such as equipment, apparel, tickets, shoes and a nutritionist), those types of benefits are not counted as “compensation” under labor law. Finally, in addition to losing money (to the magnitude of hundreds of thousands of dollars per year over the past five years)—in an effort to show the basketball team is not a part of a for-profit business model, the college offered that none of its basketball players has a NIL (name, image, likeness) deal. In sum, the Dartmouth presentation was an effort to show its players were amateurs as contrasted with a major college money -making program.

In reply, counsel for the union emphasized that Dartmouth indeed uses its teams and athletes to raise significant sums of money (including a recent \$50 million campaign to improve the arena used by the players) that benefit the college's finances, marketing and reputation.

Procedurally, the hearings will attempt to determine if the players are indeed employees. After the NLRB's regional director in Boston makes a determination, it is likely the losing side will appeal that preliminary conclusion to the full NLRB in Washington, D.C. And the side that loses before the full NLRB has the option to challenge that determination in federal courts. In short, this case will not be finally decided for a number of years, unless a settlement can be reached. But it reflects the growing business of college sports and an effort for players to receive a much more significant slice of the ever-growing financial pie.

The Dartmouth attempt to organize a labor union is not likely to be the last word from the NLRB concerning college athletes. In May, the NLRB's Los Angeles office issued a complaint against the University of Southern California (and others) asserting that the school misclassified college football and basketball athletes as “student athletes” rather than “employees.” And back in July, another complaint was filed against Northwestern University, this time alleging Northwestern violated federal law by similarly misclassifying its players as “student athletes.” With the explosion of NIL activities for which students can now get paid, expect to see more employment-related issues playing out than ever before in the NCAA.

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