Out with student-athletes, long live Players at Academic Institutions

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It's difficult to imagine a four month period more impactful for the NCAA, if not for intercollegiate athletics on the whole, than the one we're currently in. From the Supreme Court's decision in Alston in June 2021, to the NIL frenzy in July 2021, perhaps it's no surprise that September 2021 ended with what might be fairly described as the biggest impact of all.

On September 29, 2021, Jennifer Abruzzo, General Counsel for the National Labor Relations Board (NLRB), issued a memorandum outlining her position with respect to the employment status of collegiate athletes. In short, according to Abbruzo, "certain Players at Academic Institutions (sometimes referred to as student athletes), are employees under the National Labor Relations Act, and, as such, are afforded all statutory protections."

It is important to note a few things. First, the general counsel position is independent of the board itself, though it serves as the board's top prosecutor. Second, the position taken in the memorandum is an enforcement provision, not a decision of the NLRB. Last, this position will undoubtedly have to work its way through the adjudication process and the courts. Abruzzo's position, however, is clear in its telegraphing of where she intends to focus and where she would like to see the board go on collegiate athletes.

In getting to her ultimate conclusion that certain Players at Academic Institutions are employees under the NLRA, Abruzzo carefully navigated a number of previous NLRB decisions, not the least of which being Northwestern University. Recall that in the Northwestern decision, the NLRB declined to exercise jurisdiction over the Northwestern football players and dismissed their petition to form a union. Therefore, the board highlighted the unique nature of college athletes and that the vast majority of

NCAA institutions are public colleges and universities, over which the board lacks jurisdiction.

Abruzzo rightly explained that nothing in the Northwestern decision actually precluded her conclusion that collegiate athletes are employees under the NLRA. In fact, much of the evidence in that decision supported her rationale – players generate profits for colleges, players receive significant compensation through scholarships, the NCAA controls the players' terms and conditions of employment, and the college controls the daily lives of players.

As to the board's reach extending into the public sector, Abruzzo – in the very last footnote of her memorandum – stated her willingness to explore a joint theory of liability on the idea that players "perform services for, and [are] subject to the control of, the NCAA and their athletic conference, in addition to their college or university," even if some member schools are state institutions.

Beyond the Northwestern decision, Abruzzo noted that a number of significant developments in college sports also support the position that collegiate athletes are employees under the NLRA. First, Alston and its impact on how amateurism is defined ("the decision is likely a precursor to more changes to come in college athletics"). Second, the NCAA's decision to permit Players at Academic Institutions to profit from their name, image and likeness. Third, the growth of social activism displayed by Players at Academic Institutions and their collective efforts to "demand fair treatment" and "improve their working conditions."

Taken together, according to Abruzzo, "the scholarship football players at issue in Northwestern University, and similarly situated Players at Academic Institutions, are employees under the Act." And, for good measure, lest an institution misclassify a student as a student-athlete, Abruzzo states that she "will also consider pursuing a misclassification violation" because the term 'student-athlete' may lead Players "to believe they are not entitled to the Act's protection" and ultimately has a chilling effect on their legal rights.

While we will visit the particulars of the memorandum in more depth in subsequent posts, colleges and universities must be cognizant of what this position means in the short term for its athletic department and, more specifically, its players. For instance, if a player is an employee, is their scholarship considered income? If so, what are the tax implications? How do walk-ons, or non-scholarship athletes factor into the definition of players? Most sobering, what would a strike look like?

Last, while the memorandum has an unquestioned focus on athletics, there is no doubt that the rationale offered by Abruzzo could apply to other business units on campus. Now is the time to take stock of the potential impact and stay tuned for how this begins to unfold.

Here's to what 2022 may bring.

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