11-1-2021

# The Next Step for Players at Academic Institutions: Employees Status and Collective Bargaining

Daniel Wachenfeld
*Cardozo Arts & Entertainment Law Journal*

# The Next Step for Players at Academic Institutions: Employees Status and Collective Bargaining

BY DANIEL WACHENFELD /ON NOVEMBER 1, 2021

"University of Tennessee Football Stadium" by Steve DiMatteo on Unsplash

Players at academic institutions have found themselves on a winning streak lately. The flurry of athlete-friendly developments in the world of college athletics dates back to September 30, 2019, when the California Legislature passed a bill prohibiting schools from punishing athletes who accept endorsement money while in college.[1] The National Collegiate Athletic Association (NCAA) labeled this legislation an existential threat to college athletics when it was introduced months earlier.[2] Not long after, Florida passed its own law allowing college athletes to profit off of their name, image, and likeness (NIL).[3] On June 21, 2021, the Supreme Court weighed in on the college athletics debate with their holding in *NCAA v. Alston*.[4] The Court unanimously found that the NCAA violated the Sherman Act by limiting athletes' education-related benefits, but left the rest of the NCAA's compensation limits in place.[5] Justice Kavanaugh wrote separately to emphasize that the NCAA's remaining compensation restrictions also raise serious questions under antitrust laws.[6] After the Supreme Court's decision in *Alston*, and in

the face of mounting pressure from state NIL laws, the NCAA suspended its own rules barring players at academic institutions from profiting off of their names, images, and likenesses.[7]

The players' latest victory has come in the form of a memorandum released on September 29, 2021 by Jennifer Abruzzo, the General Counsel of the National Labor Relations Board. In the memo, Abruzzo asserts that some players at academic institutions are employees under the National Labor Relations Act.[8] Abruzzo also declares the term "student-athlete" as a misclassification, and indicates that she will pursue an independent violation of Section 8(a)(1)[9] where an employer misclassifies players at academic institutions as "student-athletes."[10] The memo revisits *Northwestern University*,[11] which produced the findings: (1) the athletes perform a service for the universities and the NCAA; (2) the athletes are compensated for that service with scholarships covering tuition, room and board, and meal plans (3) the NCAA controls the players' terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, and minimum grade point average; and (4) the university controls the manner and means of the athletes' work on the field, and various facets of their daily lives.[12] These findings, Abruzzo asserts, clearly satisfy the definition of employee found in Section 2(3) of the National Labor Relations Act (NLRA).[13]

The memo also cites "significant developments in the law, NCAA regulations, and the societal landscape" as indications that the traditional notion of players at academic institutions as amateurs is shifting.[14] In the wake of *Alston*, commentators theorized that as the courts continue to chip away at the NCAA's limits on compensation, players at academic institutions will be brought more closely within employee status under the law.[15] Moreover, Abruzzo argues that the players' newfound "freedom to engage in far-reaching and lucrative business enterprises" makes them more akin to professional athletes than amateurs.[16] Finally, Abruzzo cites the players' recent activism with respect to racial justice as well as health and safety concerns in the face of the COVID-19 pandemic. .[17] Her memo asserts that such activism directly concerns the terms and conditions of employment, and is protected concerted activity.[18]

One of the most interesting aspects of Abruzzo's memo is the implication that players at academic institutions could soon be unionizing. Taking Abruzzo's finding that the players are becoming more like employees as true, they would have the right, under Section 7 of the NLRA "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[19] Collective bargaining and players' unions are hallmarks of professional sports, with each league having its own Players' Association. This is a fate the NCAA has been trying to avoid for a long time.[20] The NCAA contends that amateurism plays a direct role in consumer demand.[21] In particular, the NCAA feels that its compensation limits, and the players' non-employee status, are essential to differentiating their product from professional sports.[22] However, the California Northern

District Court found that the NCAA's compensation rules have no connection with consumer demand for college sports.[23] In fact, the players at academic institutions introduced evidence that, despite the increase in new types of compensation allowed for players, consumer demand for college sports has actually increased over the years.[24] The Court concluded that "whatever understanding consumers have of amateurism, they enjoy watching sports played by student-athletes who receive compensation and benefits such as these, because this compensation has been paid and increased while college athletics has become and remains exceedingly popular and revenue-producing."[25]

Overall, it seems that the NCAA is quickly losing its grasp on the athlete compensation limits that have been its bread and butter for decades. Courts, lawyers, and legislators are no longer buying the argument that limits on athlete compensation somehow preserve the integrity of college sports, or make up some quintessential component of the product. The NCAA's compensation limits have been eroding away, and Jennifer Abruzzo's memo may signal that the final blow is coming. If players at academic institutions really are employees, then they'll be able to form a players' union, under Section 7 of the NLRA, akin to those that exist for the MLB, NFL, NBA, and NHL and bargain collectively, wielding much more power and influence than they ever have before.

***Daniel Wachenfeld is a Second Year Law Student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law Journal. Daniel is interested in entertainment, sports, and intellectual property law.***

1. 2021 Cal. Legis. Serv. Ch. 159 (S.B. 26) (WEST).
2. Dan Murphy, Everything You Need to Know About the NCAA's NIL Debate, ESPN, (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/LUZ9-5UHU].
3. Fla. Stat. Ann. § 1006.74 (West).
4. National Collegiate Athletic Association v. Alston, 141 S. Ct. 2141 (2021).
5. Id.
6. Id. at 2166-67.
7. Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act, No. Memorandum GC 21-08, (Sept. 29, 2021) [hereinafter GC 21-08].
8. Id.
9. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. National Labor Relations Board, Interfering with Employee Rights (Section 7 & 8(a)(1)) https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1#:~:text=Who%20We%20Are-,Interfering%20with%20employee%20rights%20(Section%207%20%26%208(a)(,the%20

exercise%20of%20their%20rights [https://perma.cc/ELG3-39RJ] (last visited Oct. 22, 2021).

10. GC 21-08, supra note 7.
11. 362 N.L.R.B 1350, Decisions of the National Labor Relations Board (N.L.R.B).
12. GC 21-08, supra note 7.
13. Id.
14. Id.
15. Id., Alex Blutman, The Strike Zone – NCAA v. Alston, onlabor (June 22, 2021) https://onlabor.org/the-strike-zone-ncaa-v-alston/ [https://perma.cc/JW87-ZC7R].
16. GC 21-08, supra note 7.
17. Id., Alex Blutman, The Strike Zone – NCAA v. Alston, onlabor (June 22, 2021) https://onlabor.org/the-strike-zone-ncaa-v-alston/ [https://perma.cc/JW87-ZC7R].
18. GC 21-08, supra note 7.
19. 29 U.S.C.A. § 157 (West).
20. See NCAA v. Alston, 141 S. Ct. 2141 (2021) ("The NCAA's definition of amateurism has changed steadily over the years."); see also In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (9th Circ. 2019) ("[NCAA] argue[s] that the challenged compensation limits are procompetitive because 'amateurism is a key part of the demand for college sports' and 'consumers value amateurism.'"); see also, Patrick Hruby, The NCAA Says Paying Athletes Hurts Their Education. That's Laughable, The Washington Post (Sept. 20, 2018) https://www.washingtonpost.com/outlook/the-ncaa-says-paying-athletes-hurts-their-education-thats-laughable/2018/09/20/147f26c0-bb80-11e8-a8aa-860695e7f3fc_story.html [https://perma.cc/RFB9-LR45].
21. NCAA v. Alston, 141 S. Ct. 2141, 2152 (2021).
22. In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1083 (9th Circ., 2019).
23. Id. at 1070.
24. Id. at 1076.
25. Id. at 1074.