

National Labor Relations Board Rules that Northwestern University Football Players Can Unionize

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A regional director of the National Labor Relations Board ("NLRB") recently ruled that Northwestern University's football players who are attending the university on scholarship are university employees and therefore eligible to unionize under the National Labor Relations Act ("NLRA").

The ruling is inconsistent with the position maintained by the National Collegiate Athletic Association ("NCAA"): that student-athletes are students first and athletes second and therefore, cannot be considered as employees of the university they play for. The NLRB examined a number of factors in determining whether the Northwestern scholarship players should be eligible for coverage under the NLRA and determined that they were athletes first and students second. The factors supporting the NLRB's position are:

- (1) Scholarship players perform services for the benefit of the employer for which they receive compensation;
- (2) Scholarship players are subject to the employer's control in the performance of their duties as football players; and
- (3) Scholarship players are employees under the common law definition.

Scholarship Players Perform Services for the Benefit of the Employer for Which They Receive Compensation

The Northwestern University scholarship players receive scholarship aid that covers tuition, room and board, and books in the amount of approximately \$76,000.00 for full-time students who attend classes year round. This amount is awarded to the scholarship players for agreeing to play football for Northwestern University. Although most of the aid is paid on the students' behalf rather than being disbursed directly to the students and federal income tax is not withheld, it is still a benefit conferred on the student as a result of him performing services for the benefit of the university. The NLRB found that the financial aid packages conferred substantial economic benefit on the students, despite not being paid directly to the students.

Scholarship Players are Subject to the Employer's Control in the Performance of Their Duties as Football Players

Peter Ohr, who issued the opinion on behalf of the NLRB, found that scholarship players are athletes first and students second. He based his decision on the hours that the scholarship players devote to athletics (50-60 hours a week during the pre-season and 40-50 hours per week during the regular season) as compared to the time devoted to academic studies (20 hours per week) and the extensive control that university coaches exert over the athletes. Mr. Ohr noted that scholarship players are recruited based on their football prowess rather

than their academic accomplishments. He also examined the requirement that scholarship players provide coaches with information regarding the cars they drive, outside employment, and social media accounts. The Northwestern scholarship players also are required to accept invitations from their coaches on social media and prohibited from giving any media interviews unless directed to do so by the athletic department.

Scholarship Players are Employees Under the Common Law Definition

The scholarship players do not receive academic credit for playing football. They are, however, compensated for playing football. Therefore, the NLRB concluded that they meet the common law definition of employee under the NLRA. Although scholarship players meet the broad definition of employee under the NLRA, the NLRB found that walk-on players do not, because they do not receive the compensation that scholarship players do and are granted much greater flexibility in scheduling. Walk-on players also are permitted to leave the team at any time. If a walk-on player were to later earn an athletic scholarship and continue to play before exhausting his eligibility, however, then the player would be considered a part of the bargaining unit while on scholarship.

Although the recent ruling does not apply to state-run schools, it ultimately may impact their athletic programs as well since many state labor unions look to rulings from the NLRB for guidance.

Northwestern University President Morton Shapiro sent a letter to all NCAA Division I presidents last week. In that letter, Mr. Shapiro stated that if the NLRB's board in Washington declines to review Northwestern's appeal or upholds the decision of the regional director, "scholarship athletes at any private institution could similarly be represented by a union for the purposes of collective bargaining with the institution."

The effect of the ruling, if not overturned, will be to allow the Northwestern University's scholarship football players to organize into the nation's first unionized athletic team. The organization that has been established to organize the players is the College Athletes Players Association ("CAPA"). If the decision is upheld, other private university scholarship players also may organize under the CAPA.

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