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The Clash of Antitrust Law and the NCAA: The Third Circuit Suggests a Test to Determine if Athletes Qualify as Employees on the Heels of the House Settlement

Client Bulletins

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On July 11, the Third Circuit laid out a test to settle the debate as to whether athletes are truly amateurs or actual employees entitled to benefits under the Fair Labor Standards Act ("FLSA").

The three-judge panel vacated a Pennsylvania District Court's decision to dismiss a suit filed by a group of student-athletes led by Ralph "Trey" Johnson, a former defensive back on the Villanova University football team claiming that the NCAA controlled their collegiate experience so much so that it functioned as their employer.

The athletes argue that the NCAA clearly exhibits employer-related controls over their day-to-day lives and decisions. Specifically, they allege that the school exercised control over their experience as students and that they were, therefore, entitled to payment as employees under FLSA. Examples of such control include mandated practices, travel schedules, guidance over acceptable social activities, social media presence and academic course choices based on athletic commitments.

In standing with the students, the Third Circuit leaned into the Seventh Circuit's opinion in *Berger v. NCAA*, holding that "for the purposes of the FLSA, we will not use the 'frayed tradition' of amateurism with such dubious history to define the economic realities of athletes' relationships to their schools."

Despite the *Berger* court's reasoning that the voluntary nature of college sports leads to an amateurism consideration, Judge David F. Hamilton cautioned that the NCAA should consider "an economic realities framework that distinguishes college athletes who play their sports for predominantly recreation or noncommercial reasons from those whose play crosses the legal line into work protected by the FLSA."

The Seventh Circuit panel concluded that athletes could not be barred from filing claims under FLSA if the economic realities analysis lends itself to an agency relationship. Under the economic realities test, athletes can be considered employees if they perform services for another party; those services are for that party's benefit, are performed under that party's control and in return for compensation that is expressed or implied or for in-kind benefits. However, the analysis hinges on the difference between "play" and "work."

If a court determines that athletes are "playing" their sport, the FLSA may not apply. Third Circuit Judge David Porter added that the economic realities test can apply under FLSA if the NCAA can be classified as an employer. An "employer" is an entity that can hire or fire a worker, supervises the worker's schedule and conditions of employment, determines how and how much the worker should be paid, and keeps employment records. Student-athletes insist that the NCAA easily fits this bill.

Student-athletes further argue that the extent of control exercised through their NCAA sports commitment mirrors the employer-employee relationship. As such, the NCAA has been inundated with litigation challenging the association's refusal to pay student-athletes amidst the rise in NIL funding and sponsor-induced cries for greater employee-related benefits and compensation.

The Third Circuit's decision to overturn comes on the heels of the May 2024 blockbuster *House* settlement proposal, which calls for a $2.77 billion payment over the next ten years to 184,000 former student-athletes claiming lost wages for name, image, and likeness proceeds retained by the NCAA. [1] If the massive settlement did not cause enough angst in NCAA boardrooms across the country, this decision will surely ignite further debate about the efficacy of the NCAA and its ability to withstand the mountain of litigation it faces surrounding athlete compensation.

The Third Circuit majority added, "[w]ith professional athletes as the clearest indicators, playing sports can certainly constitute compensable work…[a]ny test to determine college athlete employee status under the FLSA must therefore be able to identify athletes whose play is also work." [2]

Many smaller NCAA schools are left in a conundrum as settlements are issued that likely overreach the financial ability of the college or university. The select share of larger colleges and universities rest their fiscal hope on the historically high-ticket sales of well-known basketball and football teams. Smaller programs representing over 98% of the NCAA member schools are struggling to stay afloat amidst reductions in enrollment and less financial support from the NCAA and federal funding. Smaller NCAA conferences, such as the MEAC or Patriot League, are left to decide between disbanding the conference or entering their own litigation to sever ties from the cloud that looms over the NCAA.

It appears the courts will continue to shape the future of the NCAA and its role as a potential employer to millions of college student-athletes. This complex issue will surely play out on a court, or in a courtroom, near you.

If your institution is facing financial implications from the House settlement or would like to discuss the FLSA and the economic realities analysis on your campus, please contact a member of Benesch's White-Collar, Government Investigations & Regulatory Compliance Practice Group for consultation. We look forward to meeting the needs of colleges and universities seeking to navigate the world of antitrust, compliance, and student-athlete relationships as the collegiate sports world continues to evolve.

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[1] *Association, et al*., 843 F.3d 285 (7th Cir. 2016).

[2] *See In re: College Athlete NIL Litigation*, 4:20-cv-03919 (N.D. Cal.).

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