



The Future of Collective Bargaining at Colleges and Universities

Wednesday, December 1, 2021 | 1:00 p.m. ET

Sponsored by



Presenters



Jonathan C. Fritts
Partner
Morgan Lewis

Morgan Lewis



Harry I. Johnson, III
Partner
Morgan Lewis

Agenda

- Understand the legal developments that make student-athletes organizing into unions or engaging in collective action more likely than at any previous time.
- Understand some of the “employee relations” issues and how to handle them
- Understand the state of the law on union organizing and collective bargaining for graduate student assistants and faculty.



NCAA v. Alston: The Dam Breaks

1985: Division I football and basketball raised approximately \$922 million and \$41 million, respectively.

2016: NCAA Division I schools raised more than \$13.5 billion.

Currently approximately 180,000 Division I student-athletes

How will the NCAA modify its models (e.g., NIL) to avoid future litigation?

9-0 Decision Affirming Violation

Kavanaugh Concurrence

Kavanaugh: “The NCAA is not above the law.” Opened door to pending arguments that the NCAA is violating antitrust law in other respects.

Suggested collective bargaining as one possible solution.

NCAA v. Alston: Kavanaugh Concurrence

**“JUSTICE KAVANAUGH’S CONCURRING
OPINION WILL POTENTIALLY SHAPE
FUTURE DISCUSSIONS RELATED NOT
ONLY TO THE NCAA MARKET BEHAVIOR
BUT ALSO THE BROADER DEBATE
RELATED TO ANTITRUST AND LABOR
MARKETS.”**

NCAA v. Alston: Kavanaugh Concurrence

- The NCAA cannot price-fix labor by defining its product in a manner that incorporates the price-fixing.
- Openly questions whether the NCAA's limitations on noneducation-related benefits could survive scrutiny under antitrust laws.
- “[NCAA] traditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. . . . The NCAA is not above the law.”

NCAA v. Alston: Kavanaugh Concurrence

Explicitly suggests that collective bargaining could be a solution:

- “And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes? Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues.”

NCAA v. Alston: Kavanaugh Concurrence

Why is this concurrence significant?

- Strong attack on any Step 2 justification under the “rule of reason” standard
- No majority/plurality/individual rebuttal to the concurrence.

Mounting federal legislative/public pressures to permit college student/athlete organizing

College Athlete Right to Organize Act

Introduced by Senators Chris Murphy (D-Conn.) and Bernie Sanders (I-Vt.), the *College Athlete Right to Organize Act* asserts what has been clear for too long: college athletes are employees, entitled to the most fundamental of labor rights – the right to organize and collectively bargain for fair pay and equitable conditions.



Kim Kelly  @GrimKim · Aug 31, 2020

For @TeenVogue, I wrote about professional sports strikes, student worker exploitation, NCAA union-busting, and why college athletes really, really need a union



Ian Rapoport  @RapSheet · Aug 9, 2020

Imagine if college football had the kind of leadership that the NFL and the NFLPA showed over the last few months to put the league and its players in position to play a full season amid a pandemic. Just the incredible hours of work and teamwork. And the NCAA is the opposite.



Bernie Sanders  @BernieSanders

The NCAA will fight any attempt to share their billions with players. College athletes are workers. They deserve pay, a union, and to own their own name, image, and likeness.

College Sports • Perspective

For college athletes seeking to organize, Biden administration offers hope

NIL Waiver: The Details

Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities are responsible for determining whether those activities are consistent with state law.

College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.

Individuals can use a professional services provider for NIL activities.

Student-athletes should report NIL activities consistent with state law or school and conference requirements to their schools.

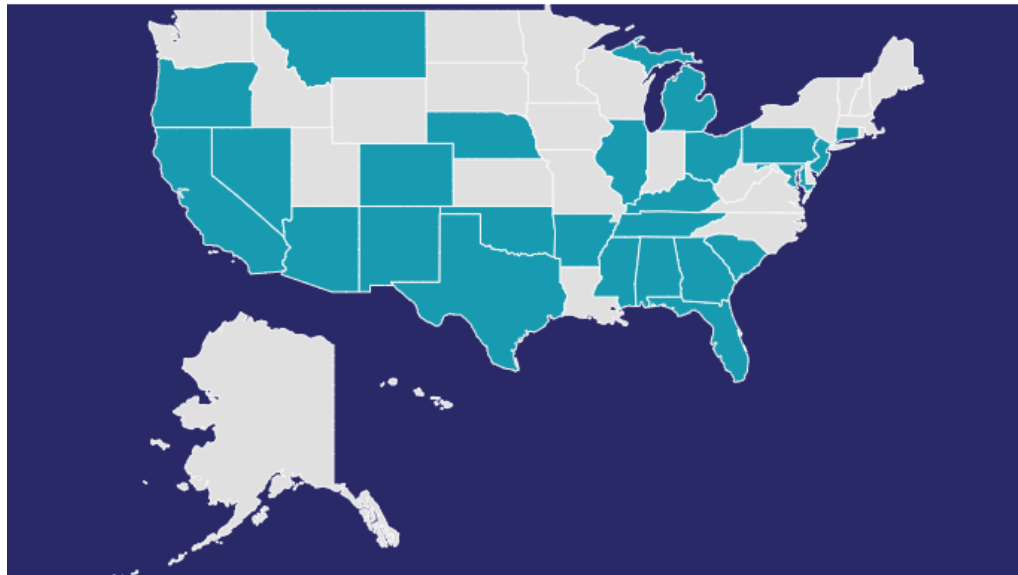
Athletes can enter into NIL agreements with boosters.

High school students can engage in these activities without impact to eligibility.

Individual States with NIL Laws

If states determine their own rules — does this provide an advantage?

The map below tracks states where governors have signed NIL bills into law.



Individual States with NIL Laws

Effective July 1 (or earlier)

- Oklahoma
- Nebraska
- Pennsylvania
- Alabama
- Florida
- Georgia
- Mississippi
- New Mexico
- Texas
- Kentucky
- Ohio
- Oregon
- Illinois
- Colorado

Effective post–July 1

- Arizona (July 23)
- Missouri (August 28)
- Connecticut (September 1)
- Arkansas (1/1/22)
- Tennessee (1/1/22)
- Nevada (1/1/22)
- South Carolina (7/1/22)
- Michigan (12/31/22)
- California (there's currently a proposal to move up the date to no later than 1/1/22)
- Montana (6/1/23)
- Maryland (7/1/23)
- New Jersey (2025)

Labor Law Basics

National Labor Relations Act (NLRA)

- Federal law governing labor relations for most private sector employers in United States
- Enforced and interpreted by National Labor Relations Board
- Provides **employees** with right to:
 - engage in “protected concerted activity,”
 - join or refrain from joining labor union,
 - have union collectively bargain their terms and conditions of employment

National Labor Relations Board (NLRB)

- Quasi-judicial body.
- Decides cases on basis of formal administrative proceedings.
- 5 members, appointed by President.
- NLRB members generally conform to labor policy espoused by President’s party.
- Highly politicized. Abrupt NLRB policy shifts.

NLRB currently

- Democratic Chairperson, and majority Democrat
- Member Prouty was General Counsel of Major League Baseball Players Association from 2013 – 2017



NLRB overrules Regional Director; refuses to assert jurisdiction over student athlete organizing case

Northwestern University, 362 NLRB 1350 (2015)

Northwestern University and College Athletes Players Association (CAPA), Petitioner. Case 13-RC-121359

August 17, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

Introduction

In this representation case, the Petitioner asks the Board to find that Northwestern University's football players who receive grant-in-aid scholarships are employees within the meaning of Section 2(3) of the National Labor Relations Act and direct an election in a unit of these grant-in-aid players. The Regional Director agreed with the Petitioner, found that the grant-in-aid scholarship players are employees within the meaning of Section 2(3), and directed an election.¹ Because this case

- “[W]e find that *it would not effectuate the policies of the Act to assert jurisdiction in this case*, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of Section 2(3).”
- “In particular, of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions. ***As a result, the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by ‘employers’ within the meaning of Section 2(2) of the Act.***”

NLRB concludes that graduate assistants are employees under the NLRA

***Columbia University,*
364 NLRB No. 90 (August 23, 2016)**

**The Trustees of Columbia University in the City of
New York and Graduate Workers of Columbia-
GWC, UAW. Case 02-RC-143012**

August 23, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, AND MCFERRAN

The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants.¹ The Board

- Overruled *Brown University* (graduate assistants were not employees and therefore did not have statutory rights to unionize)
- Applied common law principles in analyzing employee status
- Student assistants are employees under the NLRA

Northwestern – Revisited and Reversed?

Northwestern was an exercise of discretion.

Former RD Peter Ohr who originally decided the case is now Deputy General Counsel (GC).

GC position is in favor of NLRA jurisdiction.

Democrat-controlled Board with Dave Prouty, a former sports union GC

Columbia University demonstrates that the Board is already willing to find undergraduate students are statutory employees.

“Uniqueness of student-athlete” destroyed by Supreme Court: *Alston* now makes clear that the Court approves of some freedom for compensation negotiations and maybe collective bargaining.

Prior assumption of inconsistent or partial regulation is now gone: NCAA is also allowing NIL negotiation, and many individual states allowing at least NIL negotiation; *Alston* further allows negotiation of “educational benefits.”

Prior Obama GC interpretation of “employee” under Section 2(3) of the NLRA

In January 2017, the NLRB GC at the time (Democrat Richard Griffin – **Deputy GC Jennifer Abruzzo**) issued GC 17-01–General Counsel’s Report on the Statutory Rights of University Athletes:

- Only applied guidance to private colleges and universities
- GC recommendations/guidance persuasive only
- Specifically relates only to individual’s rights to seek protection against ULPs
- Memo withdrawn in December 2017

Accordingly, FBS scholarship football players clearly satisfy the broad Section 2(3) definition of employee and the common-law test. This conclusion is not precluded by the Board’s *Northwestern University* decision. There, the Board decided not to assert jurisdiction over a representation petition involving only Northwestern college football players because of the nature of the control exercised by the football leagues over individual teams and because of the composition of Division I FBS football, in which the majority of the teams are public universities not subject to the Board’s jurisdiction.¹²² However, those difficulties are not relevant to the question of whether the players are employees under the NLRA.¹²³ The preemptive exclusion of a whole category of employees from the NLRA’s protection based on the Board’s determination not to proceed in one representation

Biden GC Memo on Statutory Rights of Student-Athletes

MEMORANDUM GC 21-08

September 29, 2021

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Statutory Rights of Players at Academic Institutions (Student-Athletes)¹ Under
the National Labor Relations Act

On January 31, 2017, the Office of the General Counsel issued GC 17-01, which addressed various issues regarding the statutory rights of university faculty and/or students under the National Labor Relations Act ("the Act" or "NLRA"). That memo summarized pertinent representation case decisions and was intended to serve as a guide for employers, labor unions, and employees regarding how the Office of the General Counsel intended to apply those cases to the National Labor Relations Act. GC 17-01 was later rescinded by GC 18-02. This memo

Biden GC Memo on Statutory Rights of ~~Student Athletes~~

September 29, 2021

“Student-Athlete” is now a forbidden term

Resurrects GC Memo 17-01

Relies on “intentional misclassification” theory

“The freedom to engage in far-reaching and lucrative business enterprises makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport...”

Biden GC Memo on Statutory Rights of ~~Student Athletes~~

September 29, 2021

“In sum, it is my position that ... Players at Academic Institutions, are employees under the Act. I fully expect that this memo will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that I will be taking that legal position in future investigations and litigation under the Act. In addition, it notifies them that I will also consider pursuing a misclassification violation.”

“Because Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability.”

The Board's rationale in *Northwestern University* appears to be on the way out...

NLRB is now majority-D

- Dave Prouty, former MLBPA GC, nominated for seat

GC Memo developments

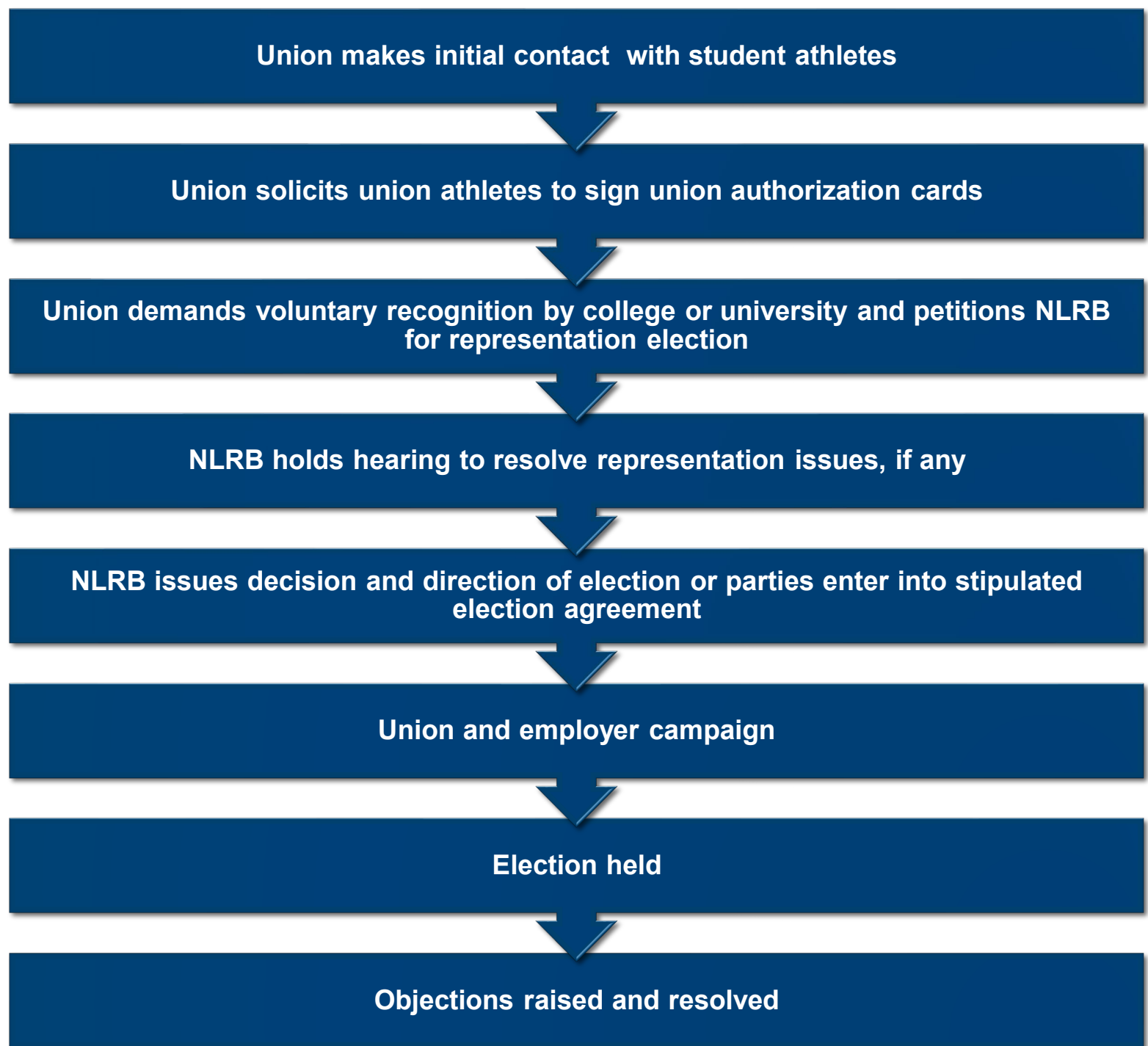
“Uniqueness of student-athlete” destroyed by Supreme Court—*Alston* now makes clear court approves of some freedom for compensation negotiations and maybe even (Kavanaugh) collective bargaining

Prior assumption of inconsistent/partial regulation is now gone—NCAA is also allowing NIL negotiation and many individual states allowing at least NIL negotiation

Does it make sense to wait until the NLRB rules to repeal or modify *Northwestern*?

Organizing Student Athletes: A “Primer”

Union organizing process/timeline



Unions organize using “authorization cards.”

Union authorization cards—

- Legally binding contracts
- Traditionally paper, but increasingly electronic
- Designate union as bargaining representative
- Means to formal union election or voluntary employer recognition



YES! I WANT TO CREATE A UNION WITH MY COLLEAGUES.

I want to work together to advance the academic mission of the University by ensuring that faculty have the support they need to carry out that mission. Therefore, I hereby authorize the United Steelworkers (USW) to represent me for purposes of collective bargaining.

Print Name: _____

Home Address: _____

City: _____ State: _____ Zip: _____

Cell Phone: _____

Personal Email: _____

Department: _____

Job Title: _____

Signature: _____ Date: _____

Would you like to receive monthly union updates via email? Yes

Would you like to receive text messages about the campaign? Yes

By submitting your mobile phone number and e-mail address you are agreeing to receive messages from the United Steelworkers (USW). You can opt out at any time. Standard data and message rates may apply. For full terms and conditions: <http://usw.to/2c>

Witness Signature: _____



NLRB election petition

- Upon gathering enough authorization cards, unions will:
 - (1) file election petition with NLRB or
 - (2) demand voluntary recognition by employer
- Law requires 30% “showing of interest”—i.e., authorization cards from at least 30% of potential bargaining unit—in order to file petition
- But most unions won’t file without at least 70% card support

FORM NLRB-502 (RC) (2-18)		UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD RC PETITION		DO NOT WRITE IN THIS SPACE	
Case No.			Date Filed		
INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov , submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.					
1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.					
2a. Name of Employer:			2b. Address(es) of Establishment(s) involved (Street and number, City, State, ZIP code):		
3a. Employer Representative - Name and Title:			3b. Address (if same as 2b - state same):		
3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address		
4a. Type of Establishment (Factory, mine, wholesaler, etc.)		4b. Principal Product or Service		5a. City and State where unit is located:	
5b. Description of Unit Involved: Included:				6a. Number of Employees in Unit:	
Excluded:				6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Check One: <input type="checkbox"/> 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state). <input type="checkbox"/> 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.					
8a. Name of Recognized or Certified Bargaining Agent (If none, so state)			8b. Address:		
8c. Tel. No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address		

Union organizing process/timeline

Once the union is certified, the employer and union must begin negotiating on the collective bargaining agreement in good faith

The collective bargaining agreement defines the terms and conditions of employment for all the members of the bargaining unit

First contracts can often take more than one year to reach and execute, if agreement is ever reached

During the initial contract year, the employer must maintain the status quo and must not take unilateral action

In traditional workplaces, negotiable items often include salary and salary increase increments; work hours and break times; types of insurance plans; calculation of vacation time and sick days; and other issues, such as mileage or uniform costs

Increasing activism nationwide a likely precursor to union organizing activity

University of Minnesota—September 2020—200 student athletes and coaches protest in response to university cuts of multiple sports

University of Texas—June 2020—athletes threatened to forgo participating in recruiting and donor-related events if campus and athletic leadership failed to implement demands aimed at supporting students of color

Pac-12—August 2020—football players threaten to sit out amid pandemic, inequality concerns

Trevor Lawrence (Clemson) and Justin Fields (Ohio State) repeatedly call for formal student athlete players association

USW subsidizing efforts of National College Players Association

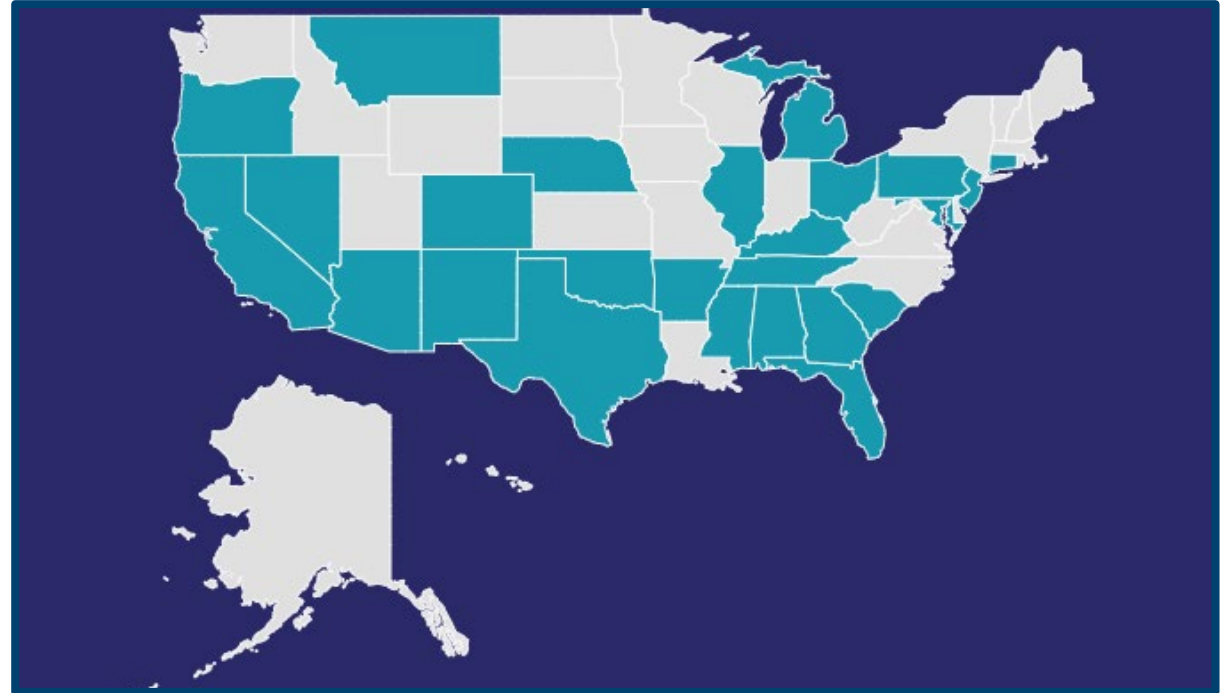
Impact on public universities?

Student athletes at public universities would likely be considered state employees not covered by NLRA

Nevertheless, numerous states have passed laws on college student athletes being compensated for use of their NIL, with other states planning or considering such legislation

Federal College Athlete Right To Organize Act under consideration by Congress could preempt state laws if passed

GC Memo 21-08 (new) will apply pressure to public universities by regulating the NCAA and conferences through joint employer theory



What could college student athlete bargaining units look like in the future?

Single college or single sport/team bargaining units

Single conference bargaining units (ACC, Big 12)

Single division bargaining units (D1, D2...)

Private universities only (Ivy)

NCAA-wide bargaining unit

***Significant employer implications for NCAA
and divisions/conferences/schools***

Aspects of collegiate athletic environment that might be subject to collective bargaining

Revenue shares
“Salary caps”
Name, image and likeness
Number of games and practices
Allocation of funds amongst players within revenue-generating sports
Allocation of funds between revenue-generating and nonrevenue-generating sports
Number of sports teams
Tutors and other education assistance programs
NFT rights
Title IX implications
Travel accommodations
Field/surface/stadium requirements
Family tickets

What unions might target college student athletes?

UAW

- Represents graduate and undergraduate students at Columbia University

AFT

- Deep knowledge of education sector and affiliated with Georgetown Alliance of Graduate Employees

SEIU

- Long history of engaging in national campaigns targeting universities and represents/has targeted adjunct faculty at colleges/universities across the country

USW

- Funded CAPA's organizing efforts at Northwestern University

Pro Sports Unions

- National Football League Players Association already partnered with National College Players Association to jointly explore marketing and licensing of all college student athletes through NFLPA's licensing affiliated entity

AFSCME

- Uniquely positioned to manage employer-employee relations in public sector because it represents state, county, and municipal employees throughout country

What messages to the athletes do colleges and universities need to think through about these issues?

How should universities respond?

Allow/oppose union efforts on individual university basis

Establish multiuniversity association/coalition to develop consolidated union response

Educate student athletes on what unionization could mean for them—

- Uniformity vs. individuality
- Cooperation vs. conflict

Train university administrators on how to manage/interact with student athletes during union recognition/election campaign

Student Athletes – What's To Be Done?

- ✓ Realign inhouse counsel and athletic department to an “employee relations” model
- ✓ Decide on a “player relations” strategy
- ✓ Implement that strategy
 - ✓ Remember: Any message will beat “no message.”

Participant Poll

Which categories of faculty/employees/students are currently represented by a union at your institution?

- Full-time faculty
- Adjunct faculty
- Graduate teaching/research assistants
- Other categories of student employees
- Maintenance employees
- Campus police/security
- None of the above

Are Full-Time Faculty Management?

**Pacific Lutheran University and Service Employees
International Union, Local 925, Petitioner. Case
19-RC-102521**

December 16, 2014

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, JOHNSON, AND SCHIFFER

In this case, we reexamine two significant bodies of our caselaw pertaining to the collective-bargaining rights under the National Labor Relations Act of faculty members at private colleges and universities. First, we reexamine the standard we apply for determining, in accordance with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when we should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities. Second, we reexamine our standard for determining, in accordance with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act.

- To be considered managerial employees excluded from the NLRA, full-time faculty must ***actually exercise control or make effective recommendations*** in certain primary and secondary areas of university policy.
- Effective recommendations “must almost always be followed by the administration” and must “routinely become operative without independent review by the administration.”

Primary Areas of Decision-Making

- **Academic Programs.** This area includes the university's curricular, research, major, minor, and certificate offerings, as well as the requirements to complete those offerings.
- **Enrollment Management.** This area of decision-making “dictates the size, scope, and make-up of the university's student body.”
- **Finances.** This area includes “[w]hat the school charges for its services[,] . . . which plays a significant role in determining which university a student will attend.”

Secondary Areas of Decision-Making

- **Academic Policy.** This category broadly encompasses teaching and research methods, grading policies, academic integrity policies, research policies, and course content policies. *Pacific Lutheran Univ.*, 361 NLRB at 1420.
- **Personnel Policies and Decisions.** This secondary area of decision-making “affects the make-up of the university” and includes decisions regarding hiring, firing, promotion, tenure, leave, and dismissal. *Pacific Lutheran Univ.*, 361 NLRB at 1420.

The State of Collective Bargaining for Graduate Student Assistants



GSA Bargaining Issues

- COVID health and safety issues
- Compensation and benefits
- Leaves of absence
- Procedures for addressing issues of discrimination and harassment
- Union security
- Defining management/academic prerogatives

Have a Question?



Submit questions to our presenters
using the Chat.



Thank You

Please complete your event evaluation

Sponsored by

