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ALERT

Court Rules That Student-Athletes Are Not Employees Under the FLSA

The U.S. District Court Decision Is Another Win for the NCAA and Its Member Colleges

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HIGHLIGHTS:

- The U.S. District Court for the Southern District of Indiana, in concluding that student-athletes at the University of Pennsylvania (Penn) are not employees under the Fair Labor Standards Act (FLSA), has dealt another blow to legal arguments that student-athletes should be paid as employees, dismissing a complaint against the National Collegiate Athletic Association (NCAA) and 123 member schools.
- The putative class action was brought by three individuals who are or were members of the women's track and field team at Penn.
- The decision is particularly helpful to the NCAA and colleges because the court expressly recognized the principle of amateurism in college sports.

In another blow to legal arguments that student-athletes should be paid as employees, the U.S. District Court for the Southern District of Indiana recently concluded that student-athletes at the University of Pennsylvania (Penn) are not employees under the Fair Labor Standards Act (FLSA).

Background and Decision Highlights

The court in *Gillian Berger, et al, v. National Collegiate Athletic Association*, et al, 1:14-cv-01710-WTL-MJD (S.D. Ind.) dismissed a complaint by Penn student-athletes against the National Collegiate Athletic Association (NCAA) and 123 NCAA member schools. The court dismissed without prejudice the claims against the NCAA and all of the other defendants for lack of subject matter jurisdiction, concluding that the plaintiffs could not plausibly suggest that they have standing to sue any entity other than Penn as their purported employer. The court also held that, as a matter of law, the plaintiffs' participation in an NCAA athletic team at Penn does not make them employees of Penn for FLSA purposes. The court, therefore, dismissed with prejudice the claims against Penn.

The putative class action was brought by three individuals who are or were members of the women's track and field team at Penn. They did not receive, and were not eligible for, athletic scholarships because Penn and Ivy League schools do not offer athletic scholarships. The student-athletes argued that they were employees under the FLSA and therefore were entitled to at least the federal minimum wage for all hours spent performing as a student-athlete.

The student-athletes argued that the 2010 U.S. Department of Labor's "Fact Sheet #71: Internship

Programs Under the Fair Labor Standards Act" (Intern Fact Sheet) – setting forth a test and criteria to determine whether interns are employees – should be applied to determine whether student-athletes are employees. The court analyzed the Intern Fact Sheet, the U.S. Supreme Court opinion in *Walling v. Portland Terminal Co*., 330 U.S. 148 (1947), and more recent opinions from appellate courts. The court concluded that: 1) the Intern Fact Sheet is not intended to apply to student-athletes, 2) the courts have determined that the Intern Fact Sheet, though perhaps persuasive in some instances, did not apply to all interns in all situations, and 3) there is no test that applies equally to interns and student-athletes.

The court reasoned that the test for determining who is an employee requires a more flexible approach than the approach announced by the Intern Fact Sheet. The correct approach, the court concluded, considers the totality of the circumstances. And the proper inquiry in making such a determination for student-athletes must consider the true nature of the relationship between student-athletes and the university.

Examining the nature of that relationship, the court noted important facts of:

- the country's "revered tradition of amateurism in college sports," as recognized by the U.S. Supreme Court in *NCAA v. Board of Regents of Univ. of Oklahoma* (1984) – a tradition that the court noted was an "essential part" of the economic reality between student-athletes and Penn
- the generations of students who have vied to be a part of the athletics tradition with no thought of any compensation
- the Department of Labor has never taken any action to apply the FLSA to student-athletes, though there are thousands of such unpaid athletes on college campuses each year
- the Department of Labor has expressly taken the position that a student's participation in interscholastic athletics, even though he or she may receive minimal payment for participation in such activities, does not create an employment relationship

What the Ruling Means

In the midst of student-athlete litigation, the *Berger* decision is an important win for the NCAA and colleges, which have consistently argued that student-athletes should not be compensated. The decision is particularly helpful to the NCAA and colleges because the court expressly recognized the principle of amateurism in college sports, which has been a key litigation argument in defending student-athlete claims for compensation and other employee rights.

This is the latest in a series of legal wins for the NCAA and colleges on the issues of student-athlete compensation and attempts to classify student-athletes as employees.

In August 2015, the National Labor Relations Board (NLRB or the Board) dismissed a petition by Northwestern University scholarships football players seeking to unionize. The student-athletes argued that their receipt of scholarships in exchange for participating in football made them employees under the National Labor Relations Act. While that NLRB decision did not address whether scholarship football players were, in fact, employees under the NLRA, the Board declined to exercise jurisdiction in the case because of the composition and structure of the Football Bowl Subdivision college football league (comprised mostly of public colleges and universities over which the Board cannot assert jurisdiction), and the Board concluded that it would not promote stability in labor relations to assert jurisdiction in that case. (See Holland & Knight's alert, "NLRB Decision on Student-Athlete Unionization a Win for Colleges, But Title IX Still in Play," Aug. 26, 2015).

In September 2015, the U.S. District Court of Appeals for the Ninth Circuit in *O'Bannon* struck down a district court's order requiring that Division I men's football and basketball programs establish a

system to pay student-athletes deferred compensation of up to $5,000 per year. Efforts to change aspects of the student-athlete experience continue at a number of levels, including with the NCAA, conferences, universities and in the legislature. (See Holland & Knight's alert, "Boston Ordinances Proposed to Address Student-Athlete Safety and Scholarships," Oct. 15, 2014.*)*

Vernon Strickland and David Santeusanio are members of Holland & Knight's Education Team, as well as its Collegiate Athletics Team, which advises clients on these and other matters related to collegiate athletic programs. We have deep experience litigating collegiate-athletics matters, advising institutions on the obligations and impact of Title IX, as well as on NCAA and other reporting issues, drafting contracts for individuals in athletic departments, separating from coaches when the situation demands and athletic conference realignment matters.

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