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The Largest Wave in the NCAA's Ocean of Change: The "College Athletes are Employees" Issue Reevaluated

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THE LARGEST WAVE IN THE NCAA’S OCEAN OF CHANGE: THE “COLLEGE ATHLETES ARE EMPLOYEES” ISSUE REEVALUATED

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INTRODUCTION

In 2020, National Collegiate Athletic Association (NCAA) Division I institutions saw their intercollegiate athletics revenues reach \$15.7 billion.¹ This revenue would have placed the NCAA 203rd on Fortune 500’s list of the largest companies in America.² At the heart of the NCAA’s business lies the more than 170,000 college athletes who compete on 6,000 athletic teams at more than 350 Division I institutions.³ These college athletes participate in sporting competitions; in return they receive support that includes scholarships, stipends, academic programs, and academic revenue distributions.⁴ Most recently, in *National Collegiate Athletic Association v. Alston*, the Supreme Court held illegal the NCAA rules limiting education-related benefits (like those mentioned above) made available to Division I football and basketball college athletes.⁵ Some believe that the Supreme Court has not gone far enough.

Advertised as a “generational quarterback,” the Jacksonville Jaguars selected Trevor Lawrence as the number one pick in the 2021 National Football League Draft.⁶ Lawrence reached this football peak after recording “one of the most celebrated careers by a quarterback in college football history.”⁷ During his time in the NCAA, he led the Clemson Tigers to a National Championship, was a Heisman trophy finalist, and served “as the face and voice of the sport” for two seasons.⁸ Lawrence put blood, sweat, and tears into his football work

1. *Finances of Intercollegiate Athletics Database*, NCAA, <https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx> (last visited May 2, 2023) (follow hyperlink; then choose “Intercollegiate Athletics Revenue Items”; then choose 2020 from drop down menu).

2. *Fortune 500 List of Companies 2020*, FORTUNE, <https://fortune.com/fortune500/2020/search/> (last visited May 2, 2023).

3. *Our Division I Story*, NCAA, <https://www.ncaa.org/sports/2021/2/16/our-division-i-story.aspx> (last visited May 2, 2023).

4. *Id.*

5. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

6. Kevin Patra, *Trevor Lawrence Selected No. 1 Overall by Jaguars in 2021 NFL Draft*, NFL (Apr. 29, 2021, 8:26 PM), <https://www.nfl.com/news/trevor-lawrence-jaguars-selected-no-1-overall-2021-nfl-draft>.

7. *#16 Trevor Lawrence*, CLEMSON FOOTBALL, <https://clemonsontigers.com/sports/football/roster/trevor-lawrence/> (last visited May 2, 2023).

8. *Id.*

and only received education-related benefits.⁹ However, if Lawrence had been paid like a traditional employee he could have made substantially more. Recently, a study from the National Bureau of Economic Research estimated that a starting quarterback (like Lawrence) could have plausibly received \$2.4 million in compensation if college athletes could engage in collective bargaining with their academic institutions.¹⁰ While this would be the highest compensation, the study also found that the lowest-paid players (back up running backs and long snappers) could have possibly received \$140,000.¹¹ However, this possibility is currently just a legal hypothetical. Under the National Labor Relations Act (NLRA), college athletes are not legally considered “employees” and cannot engage in collective bargaining.¹² Yet, the legal landscape surrounding this conclusion has drastically changed over the past five-to-seven years—putting the conclusion back at issue.

This paper will seek to answer whether recent judiciary and National Labor Relations Board (NLRB) precedent and guidance establish a new argument for college athletes to be considered “employees” under the NLRA. Part I reviews the NLRB precedential landscape and regulatory persuasive guidance to establish the NLRB’s current position. Part II addresses the relevant old arguments pertinent to the question of whether college athletes can be considered “employees” under the NLRA or any tangential law. Part III contends that there is a straightforward argument that shows that college athletes *can* be considered “employees” under the NLRA; but the changing college sports landscape and potential impacts may raise questions as to whether college athletes *should* be considered “employees.” Finally, this paper concludes that while college athletes can be considered “employees” under the NLRA, public policy favors the status quo until the stakeholders can agree on broad and agreed upon rule changes.

I. NATIONAL LABOR RELATIONS BOARD “EMPLOYEE” LEGAL LANDSCAPE

The issue at hand can be boiled down to a most basic conflict between two opposing labor parties—institutions that sponsor NCAA Division I athletic

9. Nancy Armour, *Opinion: Everybody Except Trevor Lawrence Making Money Off His Clemson Career*, USA TODAY (Jan. 9, 2019, 11:27 AM), <https://www.usatoday.com/story/sports/columnist/nancy-armour/2019/01/08/everybody-except-trevor-lawrence-making-money-off-his-clemson-career/2515081002/>.

10. Craig Garthwaite et al., *Who Profits From Amateurism? Rent-Sharing in Modern College Sports 7* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), <https://www.nber.org/papers/w27734>.

11. *Id.* at 37.

12. More specifically, in 2015 the NLRB declined jurisdiction in their *Nw. Univ.*, 362 N.L.R.B. 1350, 1352 (2015), decision and declined to answer whether Northwestern University football players were classified as employees under the NLRA. However, prior to reaching the NLRB, the Regional Director had agreed that the college athletes were employees. *Id.* at 1350.

teams and the college athletes who compete on those teams. Labor relationships similar to this one may be recognized within a distinct category that Congress has codified through the NLRA.¹³ The NLRA differentiates labor from capital, defines both “employer” and “employee,” and confers certain federal rights to these categories.¹⁴ Providing minimal insight, the NLRA defines an “employee” as “any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include any individual . . . having the status of an independent contractor, or any individual employed as a supervisor”¹⁵ This ambiguous statutory language forces the NLRB and the judiciary to rely on common law principles to define “employee.” Further complicating the situation is the fact that these entities have historically used a sub-rule when deciding whether private university students¹⁶ are “employees” (important here as college athletes are university students).¹⁷ Thus the rule, deciding which university students constitute “employees,” is a two-part test—a common law test and a university student statutory standard.

A. The Legal Standard for the Common Law Test

As the entity tasked with administering the NLRA, the NLRB’s primary functions are “(1) ‘to determine and implement’ employee elections ‘as to whether [employees] wish to be represented by a union;’ and (2) ‘to prevent and remedy unlawful practices.’”¹⁸ The NLRB does this by conferring federal rights upon “employees.”¹⁹ Thus, the NLRB first had to create a common law standard to distinguish “employees” from “independent contractors.”²⁰ To do so, the

13. National Labor Relations Act, 29 U.S.C. § 151 (2023); see *Brown Univ.*, 342 N.L.R.B. 483, 487-88 (2004) (stating that the “fundamental conflict between the interests of the employers and employees” establishes the basis for the NLRA).

14. National Labor Relations Act, 29 U.S.C. §§ 152(2)-(3), 157 (2023).

15. *Id.* at § 152(3).

16. The NLRA only governs private entities, thus excluding public universities. However, the Act has served as the basis of U.S. labor policy for nearly ninety years.

17. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 92 (2006) (citing *Brown Univ.*, 342 N.L.R.B. at 491).

18. Benjamin Feiner, Note, *Setting the Edge: How the NCAA Can Defend Amateurism by Allowing Third-Party Compensation*, 44 COLUM. J.L. & ARTS 93, 104 (2020) (citing FREDERICK T. GOLDER & DAVID R. GOLDER, LABOR & EMPLOYMENT LAW: COMPLIANCE & LITIGATION § 2.1 (3d ed. 2019)).

19. Specifically, the NLRA grants *only* employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act, 29 U.S.C. § 157 (2023).

20. *Id.* at § 152(3).

NLRB adopted a “right of control” test for defining who are “employees.”²¹ The test is based on the common law doctrine of respondent superior.²² Under this reasoning, an independent contractor is a person who performs a task “by his own methods, not subject to the control of the alleged employer,” while an employee is “a person who is subject to the control of the employer” as to the purpose, methods and means of one’s work.²³ Since this iteration of the standard, Congress and the NLRB have endorsed the reasoning as the proper measure of statutory coverage.²⁴ More recently, the NLRB has sporadically considered the “economic realities” of the potential employer and employee relationship.²⁵

While the right-of-control test remains the primary standard for differentiating employees from non-employees,²⁶ the NLRB has occasionally considered the “economic realities” involved. Specifically, the NLRB has considered “the degree to which putative employees are economically dependent upon an employer.”²⁷ This additional consideration has resulted in a “blended approach” where both the NLRB and courts measure the degree of controller an employer has over an alleged employee with the alleged employee’s economic dependence on the employer.²⁸ This common law approach usually serves as the standard for who constitutes an “employee.” However, the NLRB has developed an additional statutory test that university students must meet to be considered “employees” under the NLRA.²⁹

B. The Statutory Standard for Defining “Employee”

On a surface level, when university students receive academic scholarships to perform teaching, research, or athletic services, it looks as if university

21. McCormick & McCormick, *supra* note 17, at 90 (citing Field Packing Co., 48 N.L.R.B. 850, 852-53 (1943); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 38 (2d ed. 2004)).

22. McCormick & McCormick, *supra* note 17, at 91 n.80.

23. *Id.*

24. *See id.* at 91 (Congress expressly excluded independent contractors and backed the right of control test in their 1947 Taft-Hartley Amendments to the Act); *see also* A. Paladini, Inc., 168 N.L.R.B. 952, 952 (1967) (“The Board has frequently held that, when persons are alleged to be independent contractors, the determination requires the application of the ‘right of control’ test.”).

25. McCormick & McCormick, *supra* note 17, at 91-92 (citing A. Paladini, Inc., 168 N.L.R.B. at 952; GORMAN & FINKIN, *supra* note 21, at 30).

26. Repeatedly, the NLRB underscores their standard. *See e.g.*, Brown Univ., 342 N.L.R.B. 483, 490 n.27 (2004) (“Under the common law, an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”).

27. McCormick & McCormick, *supra* note 17, at 92.

28. *Id.*

29. *Id.* at 92 (citing Brown Univ., 342 N.L.R.B. at 491).

students satisfy the common law test for being “employees.” However, the NLRB has not always seen it that way. Instead, when analyzing this question, the NLRB has developed an additional statutory test that university students historically have to meet to be considered “employees.”³⁰ This statutory standard has changed over the NLRA’s history due to the NLRB’s contradictory case precedent. This common law historical insight provides important knowledge regarding the situation at hand involving college athletes. The *Northwestern University* case sticks out as highly relevant because it was the first case where the NLRB addressed a set of facts “involving college football players, or college athletes of any kind.”³¹ Because the *Northwestern University* case directly addresses college athletes, the case serves as an important historical benchmark for this issue.³² Thus, this section will look at the statutory standard’s landscape pre and post the *Northwestern University* decision.

1. The Statutory Standard’s Landscape Up to Northwestern University

The controversy over whether university students are “employees,” under the NLRA, caught fire over twenty years ago with the NLRB’s *New York University* decision.³³ Reversing twenty-five years of NLRB precedent, the NLRB decided that graduate assistants were “employees.”³⁴ The NLRB rejected the argument that because “graduate assistants may be ‘predominately students,’ they cannot be statutory employees.”³⁵ Instead, the NLRB favored an argument based in the “traditional master-servant relationship” standard, in line with the traditional common law “right of control” rule.³⁶ However, the NLRB did an about face only four years later.

In *Brown University*, the NLRB considered whether teaching assistants, research assistants, and proctors were “employees” under the NLRA.³⁷ The NLRB ultimately agreed with Brown University’s argument³⁸ and found that the “relationship between a research university and its graduate students”

30. *Id.*

31. Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015).

32. *Id.* at 1350.

33. N.Y. Univ., 332 N.L.R.B. 1205, 1205 (2000).

34. *Id.* at 1205.

35. *Id.*

36. *Id.* at 1205-06 (citing N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85, 91 (1995)).

37. Brown Univ., 342 N.L.R.B. 483, 483 (2004).

38. The University argued that the NLRB was not “adequately consider[ing] that the relationship between a research university and its graduate students is not fundamentally an economic one but an educational one. *Id.* at 486.

dictates that graduate student assistants are not employees.³⁹ By doing so, the NLRB supported a “primarily students” principle in which they highlighted some key factors:

(1) the research assistants were graduate students enrolled in the Stanford physics department as Ph.D. candidates; (2) they were required to perform research to obtain their degree; (3) they received academic credit for their research work; and (4) while they received a stipend [], the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support.⁴⁰

By focusing on this “primarily students” principle, the NLRB completely avoided the common law “right of control” test.⁴¹ More direct to the college athlete issue, the NLRB declined to answer whether college athletes are “employees” in their *Northwestern University* decision.⁴² Thus, *Northwestern University*’s case history provides valuable insight.

a. Northwestern University 2014

In 2014, College Athletes Players Association (CAPA) petitioned the NLRB in hopes of the NLRB recognizing that Northwestern University football players are employees under Section 2(3) of the NLRA because they receive grant-in-aid scholarships.⁴³ Regional Director Peter Sung Ohr initially ruled that “players receiving scholarships from the Employer are ‘employees’” and were able to conduct an election to unionize and bargain collectively.⁴⁴ When coming to that decision, Director Ohr found that the statutory definition of “employee” articulated in *Brown University*⁴⁵ was “inapplicable in the instant case because the players’ football-related duties are unrelated to their academic studies.”⁴⁶

39. *Id.* at 486-88.

40. *Id.* at 487.

41. Richard T. Karcher, *Big-Time College Athletes’ Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 38 (2018).

42. Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015).

43. Nw. Univ. Emp. & Coll. Athletes Players Ass’n, 198 L.R.R.M. (BNA) ¶ 1837, at *1 (Mar. 26, 2014).

44. *Id.* at 2.

45. Brown Univ., 342 N.L.R.B. 483, 486-87 (2004).

46. Nw. Univ. Emp. & Coll. Athletes Players Ass’n, 198 L.R.R.M. (BNA) at *18.

Ohr further stated that this outcome would still hold if *Brown University's* statutory definition were applicable.⁴⁷

Within this dicta, Director Ohr references his belief that (1) “scholarship players are [not] ‘primarily students;’” (2) football players’ athletic duties create a relationship that is not “primarily an academic one;” (3) “academic faculty members do not oversee the athletic duties that the players’ perform;” and that (4) the form of compensation involved is based in a scholarship for academic services *quid pro quo* and not “financial aid.”⁴⁸ Based on this analysis, Ohr found that “players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer’s control and are therefore employees within the meaning of the Act.”⁴⁹ Even though the Northwestern Football team did vote to unionize, those results were never made public as the Regional Director’s decision was immediately appealed.⁵⁰

b. Northwestern University 2015

On appeal in 2015, the NLRB noted that “it would not effectuate the policies of the [NLRA] to assert jurisdiction” even if the grant-in-aid scholarship players were to be considered “employees” within the meaning of Section 2(3) of the NLRA.⁵¹ By refusing to answer whether these players are considered “employees,” the NLRB utilized their ability to decline asserting jurisdiction.⁵² When coming to this conclusion, the NLRB referenced the fact that the NCAA Division I Football Bowl Subdivision (FBS) exercises large amounts of control over individual teams and that the majority of FBS competitors, 108 of the 125 members, are public colleges and universities.⁵³ This reasoning led the NLRB to decide that “it would not promote stability in labor relations to assert jurisdiction in this case.”⁵⁴ While declining to assert jurisdiction, the NLRB did acknowledge that because scholarship players are both students and athletes, receiving scholarships to participate in an extracurricular activity, they are “materially set[] apart from the Board’s student precedent.”⁵⁵ This statement,

47. *Id.*

48. *Id.* at 18-20.

49. *Id.* at 14.

50. *Nw. Univ.*, 362 N.L.R.B. 1350, 1350 (2015).

51. *Id.* The NLRB chose not to answer this question.

52. *NLRB v. Denv. Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951).

53. *Nw. Univ.*, 362 N.L.R.B. at 1351-52.

54. *Id.* at 1352.

55. *Id.* at 1353.

while dicta, raises the question as to whether these college athletes are subject to the *Brown University*'s statutory definition of "employee."⁵⁶

As a result of this ruling, college athletes have yet to be considered "employees" under the NLRA.⁵⁷ However, this effort broadened the discord about how to value student labor and may lead to other college athletics groups organizing and pushing for employee rights and protections under labor and employment laws.⁵⁸ Although the NLRB failed to provide an answer, the *Northwestern University* case serves as an important benchmark in time as the case directly acknowledged the issue for the first time. Since this case, there have been notable developments.

2. The Statutory Standard's Landscape: Northwestern University to Now

While the NLRB has not heard another case directly relating to college NCAA Division I athletes, there have been new developments regarding the statutory standards for university students⁵⁹ as well as relevant NLRB General Counsel guidance.⁶⁰

a. Columbia University

The pertinent legal landscape was further shaken in 2016 when the NLRB reversed their *Brown University* decision in *Columbia University*.⁶¹ Here, the NLRB found that student assistants were "employees" based on the belief that "the Act's text supports the conclusion that student assistants who are common-law employees are covered by the Act, unless compelling statutory and policy considerations require an exception."⁶² In coming to this conclusion, the NLRB cited *Brown University* dissenters stating that the majority in that case "erred 'in seeing the academic world as somehow removed from the economic realm that

56. *Brown Univ.*, 342 N.L.R.B. 483, 487 (2004).

57. Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 296 (2016).

58. Kati L. Griffith & Leslie C. Gates, *Milking Outdated Laws: Alt-Labor as a Litigation Catalyst*, 95 CHL.-KENT L. REV. 245, 268 (2020).

59. *Columbia Univ.*, 364 N.L.R.B. 1080 (2016).

60. See generally Memorandum GC 17-01 from Richard F. Griffin, Jr., General Counsel on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context (Jan. 31, 2017) [hereinafter Memorandum GC 17-01]; see generally Memorandum GC 21-08 from Jennifer A. Abruzzo, Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act (Sept. 29, 2021) [hereinafter Memorandum GC 21-08].

61. *Columbia Univ.*, 364 N.L.R.B. at 1080.

62. *Id.* at 1085.

labor law addresses.”⁶³ The court even went as far as stating that the *Brown University* decision was based on “policy concerns . . . not derived from the Act at all.”⁶⁴ By backtracking on the *Brown University* case, the NLRB essentially unified the common law test and statutory standard definitions of an “employee.”⁶⁵ The NLRB articulated this view when they stated that when “student assistants have an employment relationship with their university under the common law test . . . the student assistant is a Section 2(3) employee for all statutory purposes.”⁶⁶ While this case liberalizes the NLRA definition of an “employee,” the NLRB reiterated that just because students *are* considered “employees” does not mean that the NLRB will exercise jurisdiction.⁶⁷ In doing so, the NLRB cited their *Northwestern University* decision as not contradicting with their current analysis.⁶⁸

While the NLRB, in *Columbia University*, did not decide the question of whether college athletes are “employees,”⁶⁹ the NLRB’s Office of the General Counsel has recently made arguments that certain Division I FBS college athletes should be considered “employees.”⁷⁰

b. General Counsel Memorandums

In 2017, because the *Northwestern University* case “did not directly address the right of workers . . . to seek protection against unfair labor practices,” the Office of the General Counsel provided a Report [GC Memo 17-01] to explain how they “will apply [*Northwestern University*] in the unfair labor practice arena.”⁷¹ Within this Report, the NLRB referenced the *Northwestern University* record, other public information, and the *Columbia University* decision to “conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.”⁷² Further, GC Memo 17-01 again snubbed any previous statutory standard in favor of the “common-law agency rules governing the

63. *Id.* at 1082 (citing *Brown Univ.*, 342 N.L.R.B. 483, 494 (2004) (dissent of Member Liebman and Member Walsh)).

64. *Id.*

65. *Columbia Univ.*, 364 N.L.R.B. 1080, 1085 (2016).

66. *Id.* at 1083.

67. *Id.* at 1086 n.56.

68. *Id.*

69. *See generally id.*

70. Memorandum GC 17-01, *supra* note 60, at 23.

71. *Id.* at 1.

72. *Id.* at 16 (again they make the distinction between public and private universities).

conventional master-servant relationship.”⁷³ The General Counsel reiterated their opinion in 2021 when the Office reinstated and reaffirmed GC Memo 17-01.⁷⁴

In 2021, the Office of the General Counsel issued a new Report [GC Memo 21-08] that reinstated GC Memo 17-01 and also “provide[d] updated guidance regarding [the General Counsel’s] prosecutorial position that certain Players at Academic Institutions are employees under the Act.”⁷⁵ With GC Memo 21-08, the General Counsel basis their non-precedential opinion on GC Memo 17-01 reasoning, “developments in the case law and [NCAA] rules related to Players at Academic Institutions, [] contemporaneous societal shifts,”⁷⁶ and other forms of purely persuasive evidence.⁷⁷ Also important to note, the General Counsel again pointed out that college athletes at state universities “would not be protected by the Act, which expressly excludes state and local governments from the Board’s jurisdiction.”⁷⁸ While these General Counsel Memorandums hold no precedential value, the fact that the General Counsel has prosecutorial power provides enough reasoning to acknowledge their position on the issue. Though, the fact that the President appoints the NLRB General Counsel to a four-year term leaves this body’s guidance susceptible to position flip-flopping whenever there is a change in administration.

As seen, the surrounding legal landscape is murky at best. NLRB precedent has switched multiple times over the last twenty years and the NLRB’s regulatory persuasive guidance has failed to establish any clarity. This has led to the continuation of the status quo. However, legal scholars and courts have danced around potential solutions, regarding the college athletes as “statutory employees” issue, through tangential laws and creative theories.

II. PRIOR RELEVANT LEGAL ANALYSIS REGARDING COLLEGE ATHLETES

Some argue that college athletes deserve to be compensated for the work they provide to colleges and universities. Yes, the NLRB dictates whether college athletes are “employees” under the NLRA. However, gaining employment rights through the NLRA is not the only avenue for college athletes

73. *Id.* at 18.

74. Memorandum GC 21-08, *supra* note 60, at 1.

75. *Id.*

76. *Id.* at 2.

77. *Id.* at 5, 7 (referencing dicta from *Nat’l Collegiate Athletic Ass’n v. Alston*, social justice activism following the murder of George Floyd, and concerns in the face of the COVID-19 pandemic.).

78. *Id.* at 8 n.33. However, the General Counsel does throw their weight behind the “joint employer” theory of liability, *infra*, Section II(B), as an avenue to pursue charges against athletic conferences or the NCAA even though those entities have member schools that are state institutions. *Id.* at 9 n.34.

to reach this goal. Instead, legal scholars have speculated ways for college athletes to achieve this end through differing means. While certain theories hold more water than others, the courts have broadly held with the status quo.⁷⁹

A. In Pari Materia with Workers' Compensation and The Fair Labor Standards Act

College athletes have attempted to secure additional employment-based benefits through avenues outside of the NLRA. Two of these avenues include workers' compensation laws⁸⁰ and the Fair Labor Standards Act (FLSA).⁸¹ When it comes to workers' compensation law claims, the most notable case in the field is *Waldrep v. Texas Employers Insurance Association*.⁸² While enrolled at Texas Christian University (TCU), Alvis Waldrep became paralyzed below the neck after sustaining a spinal cord injury in a football game against the University of Alabama.⁸³ Waldrep filed a workers' compensation claim that the Texas appellate court ultimately upheld the denial of.⁸⁴ The appellate court based their decision on the belief that Waldrep was not an employee under the relevant law.⁸⁵ In upholding the jury's finding that Waldrep was not an employee of TCU at the time of his injury, the appellate court affirmed that no contract of hire was formed between Waldrep and TCU, and that if there was, it did not give TCU the right to direct the means or details of Waldrep's work.⁸⁶ Otherwise, rather straightforward, the appellate court created ambiguity when they stated that their decision was based on the circumstances that existed in 1974 and that the outcome could be different if heard today.⁸⁷ There has been even more discourse surrounding how college athletes are categorized under the FLSA.

Under the FLSA, employees are provided a range of employment rights and protections that include minimum wage requirements and overtime compensation.⁸⁸ College athletes first attempted to gain these rights in *Berger v. National Collegiate Athletic Association*.⁸⁹ There, two former track-and-field

79. Epstein & Anderson, *supra* note 57, at 297.

80. *See, e.g.*, *Waldrep v. Tex. Emps. Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000).

81. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2023).

82. *Waldrep*, 21 S.W.3d. at 692.

83. *Id.* at 696.

84. *Id.* at 704-07.

85. *Id.*

86. *See Waldrep v. Tex. Emps. Ins. Ass'n*, 21 S.W.3d 692, 697-98, 701-02 (Tex. App. 2000).

87. *Id.* at 707.

88. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(a), 207(a)(1) (2023).

89. *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

athletes from the University of Pennsylvania sought class-action status to sue their University, the NCAA, and all NCAA Division I member schools for violating “the FLSA by not paying their athletes a minimum wage.”⁹⁰ Their suit ultimately failed when the Seventh Circuit Court of Appeals found that “student-athletic ‘play’ is not ‘work,’ at least as the term is used in the FLSA.”⁹¹ However, Judge Hamilton’s concurring opinion has given slim hope for future FLSA claims from Division I men’s basketball and FBS football college athletes against the NCAA and its members schools.⁹²

Lamar Dawson took up that hope when he brought suit against the NCAA and the Pac-12 Conference, but not his own school, the University of Southern California (USC), alleging violations of the FLSA.⁹³ Given Dawson’s unwillingness to sue USC, the Ninth Circuit found that the economic reality of Dawson’s relationship with the NCAA and Pac-12 “does not reflect an employment relationship.”⁹⁴ However, the court stated that deciding whether Dawson, as a college athlete, was an employee is a question “left, if at all, for another day.”⁹⁵ Further, the court limited their holding as not “express[ing] an opinion about student-athletes’ employment status in any other context.”⁹⁶ Thus, the Ninth Circuit again provided hope for potential future college athlete FLSA claims.

Given this hope, legal scholars have theorized that a positive outcome in an FLSA case is possible, and that the NLRB may revisit their *Northwestern University* decision in response.⁹⁷ If not, courts finding that college athletes are “employees” under the FLSA may lead to renewed unionization and collective bargaining efforts.⁹⁸ In certain FLSA⁹⁹ and NLRB¹⁰⁰ claims, college athletes have used the joint employer argument to further their employment rights goals.

90. *Id.* at 289.

91. *Id.* at 293.

92. *Id.* at 294 (Hamilton, J., concurring) (“I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men’s basketball and FBS football.”).

93. Dawson v. NCAA, 932 F.3d 905, 907 (9th Cir. 2019).

94. *Id.* at 909.

95. *Id.* at 907.

96. *Id.* at 913-14.

97. Sam C. Ehrlich, *The FLSA and the NCAA’s Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77, 109 (2019).

98. *Id.* at 109-10.

99. See, e.g., Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019); Johnson v. NCAA, 561 F. Supp. 3d 490, 495 (E.D. Pa. 2021).

100. See, e.g., N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1380-81 (5th Cir. 1980).

*B. Joint Employer Argument Establishing NCAA and Conference
Accountability*

Recently, legal scholars theorized a way that *both* private and public Division I college athletes could argue that they should be considered “employees.” The basis of this argument was that the NCAA and a college athlete’s respective universities are “joint-employers” in the eyes of the NLRB or the FLSA.¹⁰¹ As an example, Lamar Dawson used this argument in his FLSA claim against the NCAA and the Pac-12.¹⁰² To test whether two entities are joint employers for the same individual, some courts will use “four factors, referred to as the Enterprise test.”¹⁰³ Those four factors include the “authority to hire and fire . . . employees,” the “authority to promulgate work rules and assignments and to set . . . conditions,” “involvement in day-to-day employee supervision,” and “control over employee records . . .”¹⁰⁴ Other courts consider “the control which one employer exercises, or potentially exercises, over the labor relations policy of the other.”¹⁰⁵

When it comes to the NLRA and the NLRB’s opinions, the definition of a joint employer has recently expanded¹⁰⁶ and then narrowed.¹⁰⁷ Due to the transition from President Obama to President Trump, and the subsequent changes to the NLRB members, the joint employer argument may have become implausible due to a new stricter standard.¹⁰⁸ However, even under this new standard, legal scholars have argued that “the NCAA is likely a joint employer under the narrower ‘strict control’ test.”¹⁰⁹ Further, now with the change from President Trump to President Biden, the NLRB has shown a potential interest in changing the joint employer standard again.¹¹⁰ While it is unclear what that standard will be, it is predicted that the NLRB will liberalize the rule by not

101. Jay D. Lonick, Note, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 155 (2015); Andrew McInnis, Comment, *Play Under Review: How the NLRB Failed to Protect Some of the Most Vulnerable Employees—College Athletes*, 2018 MICH. ST. L. REV. 189, 193-94 (2018).

102. Dawson v. NCAA, 932 F.3d at 908.

103. Johnson v. NCAA, 561 F.3d at 500.

104. *Id.* (citing *In re Enterprise Rent-A-Car*, 683 F.3d 462, 469-70 (3rd Cir. 2012)).

105. *Id.* at 505.

106. Lonick, *supra* note 101, at 165-66.

107. McInnis, *supra* note 101, at 248050.

108. *Id.*

109. Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 210 (2020).

110. Mark Theodore et. al, *NLRB Plans to Revise Joint Employer Standard Once Again*, LAB. RELS. UPDATE (Dec. 15, 2021), <https://www.laborrelationsupdate.com/uncategorized/nlrb-plans-to-revise-joint-employer-standard-once-again/>.

requiring “joint employer[s] to actually exercise control over employment conditions, as long as the company possesses such authority.”¹¹¹ It may take a change in NLRB leadership or high-level judicial review to implement joint employer based solutions. However, some scholars argue that the *Brown University* and *Northwestern University* decisions already solve the purpose issue.

C. Brown University and Northwestern University Already Provide the Solution

Due in part to the uncertain and ambiguous legal history regarding college athletes as “employees,” some scholars have argued that no change in current precedent is needed to succeed in litigation. Instead, those scholars argue that college athletes can be considered statutory employees under the *Brown University*¹¹² standard and that NLRB’s refusal to assert jurisdiction in *Northwestern University* leaves the Regional Director’s pro-“employee” reasoning intact.¹¹³

When it comes to *Brown University*, scholars had theorized well before the *Northwestern University* decision that college athletes would meet the NLRB’s university student statutory standard from *Brown University*.¹¹⁴ The basis of this argument is that “[t]he relationship between employee-athletes and their universities . . . is nearly exclusively economic, or commercial” which makes these individuals “employees” under the NLRA.¹¹⁵ The very argument was addressed in *Northwestern University* (2014) when the Regional Director noted that if considered, Northwestern’s players would be deemed “employees” based on the *Brown University* statutory standard.¹¹⁶ However, the Director did find that “this statutory test is inapplicable . . . because the players’ football-related duties are unrelated to their academic studies unlike the graduate assistants whose . . . duties were inextricably related to their graduate degree requirements

111. *Id.*

112. McCormick & McCormick, *supra* note 17, at 154. The court in *Northwestern University* alluded to this when they stated that “[u]nlike those graduate assistants, the scholarship players are undergraduates, and . . . the football activities they engage in are unrelated to their course of study or educational programs.” *Nw. Univ.*, 362 N.L.R.B. 1350, 1353 n.10 (2015).

113. Robert L. Corrada, *The Northwestern University Football Case: A Dissent*, 11 HARV. J. SPORTS & ENT. L. 15, 37 (2020); *see also* Karcher, *supra* note 41, at 45.

114. McCormick & McCormick, *supra* note 17, at 119-54.

115. *Id.* at 130.

116. *Nw. Univ. Emp. & Coll. Athletes Players Ass’n*, 198 L.R.R.M. (BNA) ¶ 1837, at *22 (Mar. 26, 2014).

...”¹¹⁷ Again, this raises the question as to whether college athletes would even be held to the *Brown University*’s statutory definition of “employee.”

Other scholars have latched onto Director Ohr’s pro-“employee” reasoning, coupled with the fact that the NLRB refused to assert jurisdiction in *Northwestern University* (2015), to argue that college athletes can already be considered statutory employees.¹¹⁸ Even more telling, these scholars have recognized that *Columbia University* overrules and replaces *Brown University*’s student statutory standard.¹¹⁹ Thus, *Brown University*’s statutory standard has been replaced with a liberalized definition of “employee” in line with the common law definition.¹²⁰ While this standard has become less restrictive, antitrust law may be a quicker catalyst for college athletes to reach their employment rights goals.

D. NCAA’s compensation restrictions Potentially Illegal Under Antitrust Laws

There have been interesting developments in antitrust law that may soon impact employment rights for college athletes. Historically, the Supreme Court had afforded the NCAA broad freedoms under antitrust law due to the belief that “[i]n order to preserve the character and quality of [college sports], athletes must not be paid, must be required to attend class, and the like.”¹²¹ When the Court came to that decision, in *National Collegiate Athletic Association v. Board Of Regents*, they even stated that “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”¹²² However, the Supreme Court in *National Collegiate Athletic Association v. Alston* has recently degraded this amateurism defense to mere dicta and instead focused on a careful analysis of market realities when answering whether an antitrust violation exists.¹²³ In doing so, the Court held illegal the NCAA rules limiting education-related benefits made available to Division I football and basketball college athletes.¹²⁴ While that holding is important in its own right, Justice Kavanaugh’s concurring opinion provides rather sharp persuasive critiques that deserve recognition.¹²⁵

117. *Id.* at *18.

118. Corrada, *supra* note 113, at 37; Karcher, *supra* note 41, at 45.

119. Corrada, *supra* note 113, at 27 n.62; Karcher, *supra* note 41, at 46.

120. *Columbia Univ.*, 364 N.L.R.B. 1080, 1083 (2016).

121. *NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984).

122. *Id.* at 120.

123. *NCAA v. Alston*, 141 S. Ct. 2141, 2158 (2021).

124. *Id.* at 2166.

125. *Id.* (Kavanaugh, J., concurring).

Justice Kavanaugh places the rest of the NCAA's competition rules, "those [that] . . . generally restrict student athletes from receiving compensation or benefits," in the crosshairs when he states that they "also raise serious questions under the antitrust laws."¹²⁶ Important to our college athletes as "employees" issue is Justice Kavanaugh's proposed exceptions to the NCAA's arguably illegal business model.¹²⁷ Specifically, Kavanaugh recognizes that, "absent legislation or a *negotiated agreement* between the NCAA and the student athletes," the NCAA's compensation rules may lack legal legitimacy.¹²⁸ While potential antitrust legislation may lead to positive or a negative outcomes for college athletes,¹²⁹ Justice Kavanaugh's recognition of negotiations through collective-bargaining as a possible legal solution may place pressure on the NLRB or the NCAA to establish employment rights for college athletes. Thus, future antitrust court decisions may lead the NLRB to recognize college athletes as "employees" under the NLRA or the NCAA may achieve a similar end through willingly negotiated means.

While the NLRB dictates whether college athletes are "employees" under the NLRA, gaining employment rights through the NLRA is not the only avenue for college athletes to reach their employment rights goals. For our issue, the easy assumption is that until the NLRB effectuates their opinion from GC Memo 20-08, college athletes will not be recognized as "employees" under the NLRA. As for the other avenues to effectuate employment rights, courts have historically been consistent in finding that "student-athletes are not recognized as employees under any legal standard."¹³⁰ Even with this legal stance, persuasive arguments regarding whether college athletes are "employees" under the differing standards will persist.

III. THE "COLLEGE ATHLETES ARE EMPLOYEES" ISSUE REEVALUATED

The NLRB's precedential legal landscape post *Northwestern University* establishes an argument for private institution Division I college athletes, both in revenue and non-revenue sports, to be considered "employees" under the NLRA. However, public policy may favor the status quo until broad and agreed upon rule changes can be enacted.

126. *Id.* at 2166-67.

127. *Id.* at 2167.

128. *Id.* (emphasis added).

129. *See infra* Section III(B).

130. Epstein & Anderson, *supra* note 57, at 297.

A. College Athletes are “Employees” Under the NLRA

In actuality, the legal argument for college athletes to be considered “employees” under the NLRA has become rather straightforward. As established, the NLRB created a university student sub-rule when it comes to deciding whether these individual students are “employees” under the NLRA.¹³¹ Due to the NLRB’s holding in *Northwestern University*, and the NLRB’s subsequent *Columbia University* decision, private institution college athletes have no issue meeting this sub-rule. This is due to the fact that *Columbia University* essentially unified the common law test and the statutory standard.¹³² This can be seen when the NLRB stated that when “student assistants have an employment relationship with their university under the common law test . . . the student assistant is a Section 2(3) employee for all statutory purposes.”¹³³ This means that college athletes only need to meet the NLRB’s “right of control” test while potentially having the “economic realities” of the relationship considered.¹³⁴ This standard is so liberalized that it is not an issue for college athletes to meet. Further, even if *Columbia University* were to not exist, and the *Brown University* statutory standard stood in the way, college athletes would also meet that more stringent statutory burden.¹³⁵ Thus, unification of the standard broadens who is considered an employee under Section 2(3) of the NLRA and encompasses all college athletes. However, as the NLRB¹³⁶ and the Office of the General Counsel¹³⁷ have mentioned, the NLRA explicitly exempts federal, state, and local government entities, such as public schools¹³⁸ (which make up the majority of NCAA Division 1 institutions). So, public university college athletes would still be barred from utilizing the NLRA to establish employment rights for themselves. In addition, as the NLRB mentioned in *Columbia University*, just because college athletes *are* considered “employees” does not mean that the NLRB will exercise jurisdiction.¹³⁹ This has been the proverbial nail in the coffin that plays the larger role in preventing the NLRB from recognizing college athletes as “employees” under the NLRA.

131. McCormick & McCormick, *supra* note 17, at 92-93.

132. *Columbia Univ.*, 364 N.L.R.B. 1080, 1085 (2016).

133. *Id.* at 1083.

134. *See supra* Section I(A).

135. *Nw. Univ. Emp. & Coll. Athletes Players Ass’n*, 198 L.R.R.M. (BNA) ¶ 1837, at *15 (Mar. 26, 2014).

136. *Nw. Univ.*, 362 N.L.R.B. 1350, 1352 (2015).

137. Memorandum GC 17-01, *supra* note 60, at 20.

138. National Labor Relations Act, 29 U.S.C. § 152(2) (2023).

139. *Columbia Univ.*, 364 N.L.R.B. 1080, 1086 n.56 (2016).

While college athletes may be considered “employees,” the NCAA’s private and public institution structure has essentially stonewalled the NLRB from acting. The NLRB stated as much when they referenced the fact that 108 of the NCAA’s 125 members are public colleges and universities’ thus in their view, “it would not promote stability in labor relations to assert jurisdiction.”¹⁴⁰ Even if this lack of asserting jurisdiction argument is valid,¹⁴¹ the NLRB’s decision to do so deserves similar criticism as the *Brown University* dissenters placed on that decision’s majority.¹⁴² Specifically, that the “majority’s policy concerns are not derived from the Act at all, but instead reflect an abstract view about what is best for American higher education—a subject far removed from the Board’s expertise.”¹⁴³ Explicitly, the NLRB has placed “promot[ing] stability in labor relations,” between the NCAA and their member institutions, ahead of the NLRB’s primary functions—(1) “to determine and implement’ employee elections ‘as to whether they wish to be represented by a union’; and (2) ‘to prevent and remedy unlawful practices.’”¹⁴⁴ In withholding jurisdiction in *Northwestern University*, and in turn not providing NLRA protections to college athletes, the NLRB is effectively promoting and stabilizing unlawful employment practices by private institutions for the sole reason that public institutions are allowed to conduct themselves in that manor.

Yet, even with this harsh critique, there may be reasons beyond the “lack of asserting jurisdiction” argument that justify inaction by the NLRB, at least in the short term.

B. College Athletics’ Changing Legal Landscape and the Potential Impacts

Given the NCAA’s changing landscape, centered on name, image, and likeness (NIL),¹⁴⁵ COVID-19, and social justice, and the inhospitable NLRB legal landscape,¹⁴⁶ major policy questions arise as to whether collegiate athletes *should* be considered “employees.” Thus, while private institution Division I college athletes, both in revenue and non-revenue sports, can be considered

140. *Nw. Univ.*, 362 N.L.R.B. at 1351-52.

141. See Corrada, *supra* note 113, at 32 (“In any case, the decisions cited in *Northwestern University* do not support the Board’s contention that it has independent jurisdictional discretion in individual cases beyond analyzing the employer’s impact on commerce.”).

142. *Brown Univ.*, 342 N.L.R.B. 483, 494 (2004) (dissent of Member Liebman and Member Walsh).

143. *Id.* at 497.

144. Benjamin Feiner, Comment, *Setting the Edge: How the NCAA Can Defend Amateurism by Allowing Third-Party Compensation*, 44 COLUM. J.L. & ARTS 93, 104 (2020).

145. See Ian K. Schumaker & Leeann M. Lower-Hoppe, *The Right Way to Pay Intercollegiate Student-Athletes: A Legal Risk Analysis*, 23 UNIV. DENV. SPORTS & ENT. L.J. 45 (2020).

146. Memorandum GC 21-08, *supra* note 60, at 5.

“employees,” public policy may dictate the maintenance of the status quo until enough pressure is placed on the NCAA to change rules at the Divisional level.

First, the NLRB’s appointment structure, as well as congressional and legal uncertainty, create a legal landscape that may produce piecemeal implementation not conducive to college athlete utilization of the NLRA. One or two states could create chaos by amending state labor law to permit collective bargaining rights to grant-in-aid athletes at public universities.¹⁴⁷ In the opposite, lawmakers from Michigan and Ohio already introduced bills that would make college athlete unionization illegal.¹⁴⁸ More uniformly, Congress could amend the NLRA and prevent unionization at both public and private institutions. The NLRB could directly decide a case in favor of a college athlete’s labor rights under the NLRA. Or the NLRB could even tighten the student statutory standard back to the *Brown University* standard to obscure the situation further. All of these possibilities play directly into the historically uncertain legal landscape and would create problems for college athletes, their academic institutions, and the NCAA.

Second, any of the prior relevant legal arguments leading to college athletes gaining employment rights through other avenues outside of the NLRA could happen. As previously stated, a positive outcome in an FLSA case could lead to the NLRB revisiting their *Northwestern University* decision.¹⁴⁹ If not, courts finding that college athletes are “employees” under the FLSA may lead to renewed unionization and collective bargaining efforts.¹⁵⁰ In addition, a new effort to renew the joint employer argument¹⁵¹ could always lead to the NCAA, their conferences, or public institutions becoming susceptible to FLSA and NLRA claims. Or the Supreme Court could decide to take another college athlete case and find that limits on non-academic benefits to college athletes run afoul of antitrust law.¹⁵² In doing so, it could become beneficial for the NCAA to engage college athletes in collective bargaining as protection from alleged antitrust law violations.¹⁵³

147. Michael H. LeRoy, *Harassment, Abuse, and Mistreatment in College Sports: Protecting Players Through Employment Laws*, 42 BERKELEY J. EMP. & LAB. L. 117, 149 (2021).

148. Karcher, *supra* note 41, at 47; George J. Bivens, Comment, *NCAA Student Athlete Unionization: NLRB Punts on Northwestern University Football Team*, 121 PENN ST. L. REV. 949, 973 (2017).

149. Ehrlich, *supra* note 97, at 109-10.

150. *Id.*

151. Theodore et. al, *supra* note 110.

152. See *NCAA v. Alston*, 141 S. Ct. 2141, 2166-67 (2021) (Kavanaugh, J, dissenting).

153. Karcher, *supra* note 41, at 34–36; Ehrlich, *supra* note 97, at 110-11; Schumaker & Lower-Hoppe, *supra* note 145, at 63-67; Nicholas C. Daly, Comment, *Amateur Hour Is Over: Time for College Athletes to Clock In Under the FLSA*, 37 GA. ST. UNIV. L. REV. 471, 531-32 (2021).

Third, if pandora's box were to be opened, and the NLRB decided to consider college athletes as "employees," there may be undesirable consequences. The major consequence is the common argument that unionization would burden schools so much that institutions would be left with insufficient revenues to adequately fund their non-revenue generating sports.¹⁵⁴ This could strip athletic and academic opportunities to large amounts of college athletes. In addition, there may be some NLRA, FLSA, or even antitrust law ramifications that hurt college athletes. If college athletes gain "employee" status under the NLRA, there could be even greater amounts of scholarship revocations due to injuries or performance issues and would cut against the NCAA's academic focus. In regard to the FLSA, colleges and universities could likely show that fringe benefits, like housing, meals, medical coverage, and certain other in-kind compensation, could be considered "pay" under FLSA's federal wage and hour laws.¹⁵⁵ This could lead institutions to cut back on these fringe benefits, potentially making the everyday life harder for the majority of college athletes. As to antitrust law, collective bargaining rights go both ways which could lead to undesirable outcomes for college athletes like lock outs or increased regulations.

The NCAA's changing legal landscape and the potential positive and negative ramifications to action create a tinderbox that may hurt all involved stakeholders. The gist of the situation is that uncertainty defines the future—unless collective action is taken. Thus, it is this uncertainty that should escalate the desire, if not need, for college athletes, academic institutions, and the NCAA to work together on a solution. There must be change, and the implementation of regulations in favor of college athlete labor rights at the Divisional level may be the most equitable and universally accepted option.

CONCLUSION

Unequivocally, post *Northwestern University* precedent establishes an argument for private institution Division I college athletes, both in revenue and non-revenue sports, to be considered "employees" under the NLRA. The driving factor in this conclusion is the NLRB, by their *Columbia University* decision, unifying the common law test and the university student statutory standard definition of "employee."¹⁵⁶ This unification of the standard broadens who is considered an employee under Section 2(3) of the NLRA and now includes college athletes. Yet, as the NLRB mentioned in *Columbia University*,

154. See, e.g., Bivens, *supra* note 148, at 977; Schumaker & Lower-Hoppe, *supra* note 145, at 56-58.

155. Sam C. Ehrlich, "But They're Already Paid": Payments In-Kind, College Athletes, and the FLSA, 123 W. VA. L. REV. 1, 58 (2020).

156. Columbia Univ., 364 N.L.R.B. 1080, 1085 (2016).

just because they are considered “employees” does not mean that the NLRB will exercise jurisdiction.¹⁵⁷ This “lack of asserting jurisdiction” argument tarnishes any persuasive argument from the NLRB’s Office of the General Counsel or legal scholars. It also dampens the possibility of the NLRB meaningfully ruling in favor of college athlete labor claims.

Additionally, just because Division I college athletes at private institutions *can* be considered “employees” does not mean that they *should* be. The potential for piecemeal implementation, rapidly changing NLRB precedent, and preemptory congressional action creates a very inhospitable legal landscape for college athlete utilization of the NLRA. Further, pressures from workers’ compensation and FLSA claims, a reestablished joint employer argument, or illegality under antitrust laws may incentivize the NLRB or the NCAA to act on the issue at hand. However, there could also be unexpected or unintended negative consequences for collegiate athletes. Thus, this legal uncertainty and potential outside pressure should escalate the desire, if not need, for college athletes, academic institutions, and the NCAA to work together and implement regulations in favor of college athlete labor rights at the Divisional levels. Without this, college athletes may have to wait years if not decades for change, academic institutions may have to stay in perpetual fear of an unofficial strike, and the NCAA could have another NIL fiasco on their hands. Now is the time for the NCAA to utilize their freedom to enact pro-employment rights changes, before the judiciary, the NLRB, or legislatures take away that power or act first.

As of today, Division I college athletes, both in revenue and non-revenue sports, can be considered “employees” under the NLRA. However, the stakeholders involved must come to a joint resolution as the public policy consequences of inaction outweigh the benefits of an NLRB positional change. The NCAA must recognize the “college athletes are employees” tidal wave cresting on their ocean of change. If the NCAA chooses inaction, their entire institutional structure may be swept away.

157. *Id.* at 1086 n.56.