

Will Student-Athletes Become Employees?

As the fall college football season is in full swing for another year, there is once again a national focus on collegiate sports. With the National Collegiate Athletic Association (NCAA) NIL rules now firmly in place, student-athletes such as the football stars on our screens every weekend, are able to profit off of their statuses in college sports through endorsement deals for their Name, Image, and Likeness.¹ This relatively new rule opened the floodgates to many interesting possibilities for the future. Perhaps most importantly, it raised the question of whether student-athletes will eventually be deemed employees of the NCAA, their conference, or their universities.

The Fair Labor Standards Act is the most relevant law that must be interpreted to assess whether student-athletes are employees. This act lays out federal minimum wage and overtime pay.² In *Berger* (discussed in detail below), the Seventh Circuit explained that FLSA does not clearly answer the question of whether student-athletes qualify as employees.³ The court explains that FLSA does not define “work” in the act.⁴ They further describe that the student-athletes tried to rely on the section in the Field Operations Handbook describing work-study programs because these programs qualified as employment.⁵ They tried to compare their student-athlete positions to work-study programs in order to also qualify as employees.⁶ Student-athletes also used the handbook to argue that NCAA sports are sufficiently different than the club sport extracurriculars which the section explicitly excludes from counting as work under FLSA.⁷ Evidently, there is still ambiguity under FLSA even after the publication of the handbook.

¹ Michelle Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

² U.S. Department of Labor, *Wages and the Fair Labor Standards Act*, <https://www.dol.gov/agencies/whd/flsa>.

³ *Berger v. NCAA*, 843 F. 3rd. 285, 290 (7th Cir. 2016).

⁴ *Id.*

⁵ *Filed Book Operations Handout* § 10.10b24 (1993).; *Berger v NCAA*, 843 F. 3rd. 285, 292-293 (7th Cir. 2016).

⁶ *Berger v. NCAA*, 843 F. 3rd. 285, 292-293 (7th Cir. 2016).

⁷ *Id.* at 293.

Thus far, student-athletes are not considered employees, despite the new NIL rules. In *NCAA v. Alston*, the Supreme Court held in an antitrust suit that the NCAA limiting student-athletes' compensation was a violation under the Sherman Act.⁸ This decision is what led the way for the new NIL rules.⁹ After this ruling, states were allowed to officially adopt their proposed NIL rules for student-athletes and the NIL deals began July 1, 2021.¹⁰ Importantly, the NCAA claims that the national NIL rules are supreme over state laws.¹¹ The concurrence in *Alston* by Justice Kavanaugh essentially raised the question as to whether student-athletes should be employees.¹² In Justice Kavanaugh's concurrence, he explained that:

“[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.”¹³

Kavanaugh's concurrence suggests that he believes that student-athletes are employees and that eventually they should be treated as such.¹⁴ In addition to Justice Kavanaugh's opinion, the current National Labor Relations Board's General Counsel, Jennifer Abruzzo, issued a memorandum stating her view that student-athletes are employees.¹⁵

Despite the view of Justice Kavanaugh and NLRB's Abruzzo, no court has yet held that student-athletes are employees. In *Dawson v NCAA*, the United States Court of Appeals for the

⁸ *NCAA v. Alston*, 594 U.S. 1, 2 and 34 (2021).

⁹ Michael McCann, *Alston Lawyers Seek to Claw Back Scholastic Cash for NCAA Athletes*, SPORTICO (Apr. 5, 2023), <https://www.sportico.com/law/analysis/2023/college-athlete-antitrust-lawsuit-1234718683/>.

¹⁰ Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

¹¹ Erin Walsh, *NCAA Says Schools Must Adhere to NIL Rules Regardless of Conflict with State Laws*, BLEACHER REPORT (June 27, 2023), <https://bleacherreport.com/articles/10080849-ncaa-says-schools-must-adhere-to-nil-rules-regardless-of-conflict-with-state-laws>.

¹² *NCAA v. Alston*, 594 U.S. 1, 5 (2021), (Kavanaugh concurring).

¹³ *NCAA v. Alston*, 594 U.S. 1, 5 (2021), (Kavanaugh concurring).

¹⁴ *Id.* at 2169.

¹⁵ Fisher Phillips, *Labor Board Advances Claims that Student-Athletes are Employers: What Does Your Athletic Department Need to Know?* (May 22, 2023), <https://www.fisherphillips.com/en/news-insights/labor-board-advances-claims-student-athletes.html>.

Ninth Circuit found that student-athletes are not employees of the PAC-12 or the NCAA under the Fair Labor Standards Act.¹⁶ The court’s reasoning included that the NCAA and conference league could not “fire or hire” the athletes and there was no “expectation of compensation.”¹⁷ The football player’s argument for “minimum wage” compensation and “overtime pay” thus failed.¹⁸

Dawson was considered and ruled on before NIL rules were adopted in California or any other state¹⁹ because this case preceded *Alston*. A year after *Dawson* was decided, however, California was the first state to adopt an NIL rule with Governor Newsome’s adoption of the Fair Pay to Play Act, initially set to begin in 2023.²⁰ After the national ruling in *Alston*, California’s NIL laws began in 2021.²¹ It is possible that this case could have been decided a different way today given the new national NIL rules which allow for student-athletes to be given compensation for their participation in sports (though they are not paid by the school directly).²²

It is far easier to argue against the court’s ruling in *Dawson* today given the new NIL rules. The court’s claim that there was no compensation expected by the players²³ is simply no longer accurate. However, it might still be true that the employers are not the NCAA nor the league per se, but there is a strong argument for student-athletes that universities themselves are their employers.

¹⁶ *Dawson v NCAA/Pac-12 Conference*, 932 F 3d. 905, 906-907 (9th Cir. 2019).

¹⁷ *Id.* at 909.

¹⁸ *Id.* at 906.

¹⁹ Tim Tucker, *NIL Timeline: How We Got Here and What is Next*, THE ATLANTA JOURNAL CONSTITUTION (Mar. 18, 2022), [ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/](https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/); *Dawson v NCAA/Pac-12 Conference*, 932 F 3d. 905, (9th Cir. 2019).

Though *Dawson* was ruled on by the Ninth circuit in 2019, the initial ruling was in 2017 and the 2019 case was heard a month prior to the passage of the California law.

²⁰ Tim Tucker, *NIL Timeline: How We Got Here and What is Next*, THE ATLANTA JOURNAL CONSTITUTION (Mar. 18, 2022), [ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/](https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/).

²¹ *State of California NIL Laws: What College Athletes and Sponsors Need to Know*, ICON SOURCE

<https://iconsource.com/california-nil-laws/#:~:text=On%20August%2031%2C%202021%2C%20The.when%20California%20Governor%20Gavin%20Newsom.>

²² Michelle Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021),

<https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

²³ *Dawson v NCAA/Pac-12 Conference*, 932 F 3d. 905, 906 (9th Cir. 2019).

In addition, the court was already on somewhat shaky ground in *Dawson* when it held that the NCAA could not hire or fire them²⁴ because the NCAA could mandate that a player is fired for committing certain violations.²⁵ The argument is still stronger that the student-athletes are employees of their own individual universities here, however, because there is no dispute that coaches have the ability to drop players from their roster and they have control over their recruiting (hiring) process as well. Thus, by reframing the issue of employers as the schools themselves, student-athletes may have a stronger chance of winning their case.

The Seventh Circuit similarly held that student-athletes are not employees in *Berger*.²⁶ The student-athletes' argument that they are employees failed despite their comparison of their “jobs” to the work study program that qualifies under the FLSA handbook.²⁷ The court also noted that sports participation is voluntary which works against the student-athletes argument that they are employees.²⁸ The court also held that the internship test was not applicable in cases of student-athletes because it was not representative of the relationship of student-athletes to universities.²⁹ This court thus adopted a flexible, case-by-case specific test for examining whether student-athletes are employees.³⁰

Another recent case on the issue of student-athletes as employees is *Johnson v NCAA*. In 2021, the court in the U.S. District Court for the Eastern District of Pennsylvania held that the student-athletes are not legally *not* employees of their respective colleges, so the NCAA’s motion to dismiss was denied.³¹ The suit was brought by Division I athletes in various sports at

²⁴ *Dawson v NCAA/Pac-12 Conference*, 932 F.3d. 905, 909 (9th Cir. 2019).

²⁵ For example, if a student-athlete fails a drug test. NCAA, *Summary of NCAA Regulations - NCAA Division* (2011), http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf

²⁶ *Berger v. NCAA*, 843 F. 3rd. 285, 294 (7th Cir. 2016).

²⁷ *Id.* at 293.

²⁸ *Id.*

²⁹ *Id.* at 291.

³⁰ *Id.*

³¹ *Johnson v NCAA*, 556 F. Supp. 3d. 491, 512 (Pa. E. Dist. Ct., 2021).

various colleges and universities in states such as Pennsylvania and New York.³² The Third Circuit heard arguments for this case on appeal in February of 2023 but the court has not yet reached a decision.³³ Given the timing of this case (it was brought after the NIL deals were permitted), the student-athletes are in the best position they have ever been in to prevail.

The most recent case on the issue of student-athlete employment status that is gaining national attention is in California. National College Players Association filed a complaint with the NLRB against USC, the PAC-12 conference, and NCAA during the spring of 2023.³⁴ In May 2023 in Los Angeles, a National Labor Relations Board official filed this complaint against these entities for not letting its student-athletes unionize and thus not recognizing student-athletes as employees.³⁵ This case is unique in that the student-athletes are alleging violations of the National Labor Relations Act by the three “joint” employers.³⁶ The student-athletes initial complaint focuses on the control that USC has claimed over student-athletes, particularly in regard to media appearance and social media posts.³⁷ This case, like *Johnson*, could be critical to this debate if student-athletes prevail. There is a hearing set in front of the administrative judge on November 7, 2023.³⁸

If the student-athletes prevail in *Johnson* or any similar case, obtaining a ruling that they are employees, many interesting legal issues would arise. Student-athletes, if deemed employees,

³² *Id.* at 496.

³³ Richard Johnson, *Explaining Johnson v. NCAA and What's at Stake in Wednesday's Court Hearing*, SPORTS ILLUSTRATED (Feb. 15, 2023), <https://www.si.com/college/2023/02/15/johnson-v-ncaa-court-hearing-employment-status>.

³⁴ Grant Mulkey and Austin Tapuro, *Pay-for-Play: The Status of College Athletes*, STINSON (Apr. 18, 2023), <https://www.stinson.com/newsroom-publications-pay-for-play-the-status-of-college-athletes-as-employees>.

³⁵ Daniel Wiessner, *USC, NCAA Face US Agency's Claims that College Athletes are Employees*, REUTERS (May 19, 2023), <https://www.reuters.com/sports/athletics/usc-ncaa-face-us-agencys-claims-that-college-athletes-are-employees-2023-05-19/>.

³⁶ Complaint at 1 and 3, *University of Southern California/PAC-12 Conference/National Conference Athletic Association v. National College Players Association*, (2023) (no. 31- CA 290326), <https://aboutblaw.com/77x>.

³⁷ *Id.* at 4-5.

³⁸ AP, *Labor Relations Board Files Complaint Against USC Over Athlete Compensation* (May 18, 2023), <https://apnews.com/article/usc-labor-ncaa-81a789801ee168f71d31bb0217d11981>.

should be allowed to unionize,³⁹ and participate in collective bargaining. Depending on which entity courts rule that students are employees of (their universities, the NCAA, or their leagues) could determine the scope of their bargaining power. For example, if the courts rule that student-athletes are employees of the NCAA, athletes should be free to unionize in any way they choose. That should also be the case if universities themselves are held to be the employers. This means student-athletes would need to make decisions about whether they would have separate groups based on division of play (for example, DI athletes would have its own union), sport (all soccer players would be in their own union), or by conference (for example, the Big Ten would create its own union).⁴⁰

Beyond collective bargaining, Title Nine cases could also be brought if compensation is dramatically different for female athletes as compared to their male counterparts.⁴¹ Similarly, players may have more rights and power against their coaches in some ways if they are deemed employees. For example, as a union, they could more easily strike,⁴² and they could have claims for overtime pay if their coaches exceeded the NCAA rules for practice hours in a week.⁴³

It is possible that Congress will address this question through legislation rendering the court's job far less significant. Currently, legislation is being considered that would address the question of whether student-athletes are employees. In May of 2023, a bill was discussed which

³⁹ Domenica Tomasetti, *The Legal Impact Resulting from Labeling Student-Athletes as Employees*, VILLANOVA UNIVERSITY: THE JEFFREY S. MOORAD CENTER FOR THE STUDY OF SPORTS LAW (Nov. 24, 2021), https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2021/TheLegalImpactResultingfromLabeling.html.

⁴⁰ Based on discussions in Professor Pinto's Sports Law class in Winter 2023.

⁴¹ Claudia McCarthy, *Consider How Title IX Could Apply to Employment of Student-Athletes*, COLLEGE ATHLETICS AND THE LAW VOLUME 19 ISSUE 10, (Jan. 2023), at 1, <https://onlinelibrary.wiley.com/doi/epdf/10.1002/catl.31118>.

⁴² Domenica Tomasetti, *The Legal Impact Resulting from Labeling Student-Athletes as Employees*, VILLANOVA UNIVERSITY: THE JEFFREY S. MOORAD CENTER FOR THE STUDY OF SPORTS LAW (Nov. 24, 2021), https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2021/TheLegalImpactResultingfromLabeling.html.

⁴³ Christopher Wood, *Attorneys Explain Legal/ Legislative Landscape Surrounding Classifying Student-Athletes as Employees*, THOMAS REUTERS (Aug. 18, 2023), <https://tax.thomsonreuters.com/blog/attorney-explains-legal-legislative-landscape-surrounding-classifying-student-athletes-as-employees/>.

would clarify that student-athletes are not employees of their universities.⁴⁴ Senator Cruz calls for even stricter legislation that would make clear that student-athletes are not employees of their schools, conferences, or the NCAA.⁴⁵

If Congress does not pass legislation on this issue and there continue to be suits brought across the nation by student-athletes asking courts to address the question of whether student-athletes are employees, if even one district rules that student-athletes are employees, it could push the Supreme Court to hear the case and decide the issue. Thus far, the Seventh and Ninth circuits have held that student-athletes are not employees⁴⁶ and the *Johnson* case is still pending in the Third Circuit.⁴⁷ It is impossible to know how the Supreme Court would decide the issue, but from *Alston*, it seems likely that Justice Kavanaugh would rule in favor of the student-athletes.⁴⁸ The question remains, could the NIL rules persuade the Supreme Court that student-athletes are employees?

⁴⁴ Christopher Wood, *Attorneys Explain Legal/ Legislative Landscape Surrounding Classifying Student-Athletes as Employees*, THOMAS REUTERS (Aug. 18, 2023), <https://tax.thomsonreuters.com/blog/attorney-explains-legal-legislative-landscape-surrounding-classifying-student-athletes-as-employees/>.

⁴⁵ *Id.*

⁴⁶ *Dawson v NCAA/Pac-12 Conference*, 932 F.3d. 905, 906-907 (9th Cir. 2019); *Berger v. NCAA*, 843 F. 3rd. 285, 294 (7th Cir. 2016); Jared Lucan and Sarah Niemiroski, *Third Circuit Hears Case on Whether College Athletes May be Employees*, SHIPMAN AND GOODWIN LLP (Feb. 20, 2023), <https://www.shipmangoodwin.com/insights/third-circuit-hears-case-on-whether-college-athletes-may-be-employees.html>.

⁴⁷ Richard Johnson, *Explaining Johnson v NCAA and What's at Stake in Wednesday's Court Hearing*, SPORTS ILLUSTRATED (Feb. 15, 2023), <https://www.si.com/college/2023/02/15/johnson-v-ncaa-court-hearing-employment-status>.

⁴⁸ *NCAA v. Alston*, 594 U.S. 1, 5 (2021), (Kavanaugh concurring).

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