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NLRB Goes Long: Regional Director Finds NU Football Scholarship Athletes Employees

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Earlier today the Regional Director ("RD") for Region 13 of the NLRB found that Northwestern University's scholarship football players are employees under the NLRA and thus have the right to unionize. As a result, the RD directed that an election be held to determine whether they wished to be represented by the College Athletes Players Association ("CAPA"). This is a groundbreaking decision that no doubt will be litigated for some time to come.

In coming to the conclusion that the scholarship athletes were employees under the Act, the RD focused on whether the players were "employees" under the common law definition of an employee, i.e., whether the athletes perform services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. Here, the RD found that the players performed valuable services for the University in that the University's football program generated revenues of approximately $235 million from 2003-2012, along with the value provided to the University's reputation from having a winning football team.

The RD also considered the up to $76,000 a year players receive in tuition, fees, room and board and books for up to five years to be "compensation." While the RD recognized players do not receive a paycheck in a traditional sense, and are not taxed on the benefits they receive, "they nevertheless receive a substantial economic benefit for playing football." Equally important, the RD found that the "tender" players accepting scholarships must sign constituted an employment contract, for it provided them with information as to the duration and terms and conditions under which they would receive compensation. Lastly, the RD took into account the fact the players are not permitted to engage in any other employment, and thus are dependent upon the scholarships for bare necessities, and that the scholarships were clearly in exchange for the athletic services being performed. The scholarships are tied to the players' athletic performance, since the scholarships can be revoked if players voluntarily withdraw from the team or violate team rules.

The RD also determined that the scholarship players were subject to the University's "control" in the performance of their duties as football players. The RD's conclusion was based on the following considerations. During training camp six weeks before the start of the academic year coaches prepare and provide daily itineraries setting forth, hour by hour, what players are to do from as early as 5:45 am until 10:30 pm. Players spend 50 to 60 hours per week engaged in football related activities during training camp. During the regular season, players can spend 40 to 50 hours per week on football related activities. It is not unusual at away games for players to spend 25 hours over a two-day period traveling to, practicing for and participating in away games. According to the RD, coaches control every detail for those trips and what the players do during this time. Even during the off season players are expected to devote 12 to 25 hours per week on football related activities. In addition, the RD stated that the coaches control the players' private lives as well, given the numerous rules players must follow under the threat of discipline and/or the loss of their scholarships. Rules range from prohibitions on alcohol and tobacco use, to where players live, what they post on the internet, etc. The control exercised over the players

was found to be so pervasive that the RD found it "clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent."

The RD found that the players on scholarship, at least those who had yet to exhaust their eligibility, were employees under the Act. The RD found, however, that the walk-on players were not employees under the Act since they received no compensation in the form of scholarship monies tied to playing football, signed no "tender," and appeared to have greater flexibility when it came to missing practices and workouts to the extent it conflicts with their coursework.

The University argued that the players were not employees based on *Brown University*, 342 NLRB 483 (2004), in which the Board found certain graduate assistants were not employees. The RD distinguished Brown University, finding that (1) scholarship football players are not primarily students, due to the amount of time they spend on football-related activities per week (40-50 hours per week versus about 20 hours per week attending classes); (2) scholarship players' athletic duties do not constitute a core element of their educational degree requirements, as they receive no academic credit for playing football, nor must they play football to obtain their undergraduate degree; (3) academic faculty do not supervise scholarship players' athletic duties - football coaches who are not part of the academic faculty supervise players' athletic duties; and (4) scholarship players' compensation is not financial aid, as it is given in exchange for the athletic service that the player is providing the University.

The RD also found that the players are not temporary employees and thus excluded from coverage under the NLRA because, although their "employment" is for a finite duration, it is for a "substantial" duration, i.e., four to five years.

Having found that the scholarship football players were employees and given that the walk-ons were not employees, the RD found that the proposed bargaining unit was appropriate. The RD further found that the union was a labor organization under the Act. In light of the findings, the RD ordered than an election be scheduled for determine whether the scholarship players wished to be represented by CAPA.

The University has the right to request review of the decision from the NLRB.

This decision will have a huge impact on both private and public sector educational institutions. If upheld, it is possible many private university scholarship athletes, at least in revenue generating sports, will be subject to organizing. Public university athletes may similarly attempt to organize in states where public employees in the educational sector are permitted to organize. Moreover, this decision may cause the Board to revisit its decision in *Brown University*. We will continue to report on this case as new developments occur.

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