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ALERT

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NLRB's Top Prosecutor Proclaims College Athletes are Employees

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On September 29, 2021, Jennifer Abruzzo, General Counsel for the National Labor Relations Board (the "Board"), made headlines with the issuance of a memorandum clarifying the GC's position that certain college athletes are employees under the National Labor Relations Act ("Act"). Perhaps more notable was GC Abruzzo's warning that should "an employer misclassify Players at Academic Institutions as 'student-athletes' and lead them to believe they do not have statutory protections," the Agency will "pursue independent violations of Section 8(1)(1) of the Act." Under Section 8(a)(1), an employer commits an unfair labor practice by interfering with, restraining, or coercing employees in the exercise of their right to engage in protected concerted activity, commonly known as "Section 7 rights."

What You Need to Know:

- GC 21-08 reinstates GC 17-01, which concluded that college athletes are statutory employees under the Act.
- The NLRB's opinion in *Northwestern University* does not preclude a finding that scholarship football players and similarly situated athletes are statutory employees.
- In pursuing alleged violations of Section 7 rights, the Board will consider a joint employer theory of liability, thereby exposing athletic conferences that exercise control over athletes including public institutions.

At the outset of the memorandum, GC Abruzzo reinstated GC 17-01, issued in 2017 and subsequently rescinded by the Board under President Trump, which concluded that Northwestern University scholarship football players were statutory employees under the Act. In reinstating GC 17-01, GC Abruzzo also made clear that the Board's decision in *Northwestern University*, a decision predicated on the Board declining to exercise jurisdiction and leaving open the question of employee status, did not preclude a finding that the football players at issue in that case or other similarly situated athletes at institutions of higher education are employees under the Act.

In determining employee status, GC Abruzzo relied heavily on the language and policies of the Act, emphasizing that the term "employee" is broadly defined by Section 2(3) and stressing that nowhere within the enumerated exceptions to the term "employee" were football players or college athletes mentioned. GC Abruzzo found further support in common-law agency principles stating an "employee includes a person who perform[s] services for another and [is] subject to the other's control or right of control." The GC went on to apply this standard in connection with the facts of *Northwestern University* and more generally with respect to college athletes to illustrate the relationship as indicative of employee status. Specifically, GC Abruzzo highlighted the following facts:

- Athletes performed a service for the University and the NCAA and generated considerable profit and other benefits for the University;
- Athletes received significant compensation, including financial support for the cost of tuition, room and board, and stipends for other academic and personal expenses;
- The NCAA controlled players' terms and conditions of employment by establishing practice and competition hours, rules concerning scholarship eligibility and GPA requirements, and restrictions on gifts that players may accept; and
- The University controlled the "manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules."

GC Abruzzo then shifted her focus to the changing "societal landscape" of college sports. Citing the Supreme Court's recent unanimous decision in *NCAA v. Alston*, which rejected the NCAA's antitrust defense premised on asserted "amateurism" in college sports, GC Abruzzo pointed to both increased collective action by college athletes across college campuses and the NCAA's recent rule change allowing college athletes to profit from their name, image, and likeness. According to GC Abruzzo, these realities liken college athletes to professional athletes, who, in turn, should be afforded protections under the Act.

Given the clear shift in college sports and the GC's position, the memorandum instructs Regional Board Offices, universities, and college athletes to submit all cases involving the alleged misclassification of college athletes to the Board's Division of Advice, where GC Abruzzo will directly influence the shaping of Board policy.

In future cases where the Board pursues alleged violations of Section 7 rights of athletes at institutions of higher education, GC Abruzzo indicated that she would consider a joint employer theory of liability and pursue unfair labor practice charges against the NCAA and athletic conferences that exercise control over athletes, even where some member schools are public institutions.

In short, at face value the memorandum has serious implications for the operations of institutions of higher education. Until complaints are issued and cases are brought before the Board, however, the true scope of those implications and the memorandum's effect on federal labor policy remains unclear. What is clear, however, is GC Abruzzo's position that "employee" under Section 2(3) will be broadly construed to include college athletes, as well as student teachers and research assistants as employees within the definition. The attorneys at Saul Ewing Arnstein & Lehr will continue to monitor the situation and provide updates as this significant issue develops.

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