STUDENTS AS EMPLOYEES

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Students . . . or something more?

- Student Athletes
  - National Labor Relations Act
  - Fair Labor Standards Act
- Graduate Students
  - Teaching Assistants & the FLSA
  - Research Assistants & the FLSA
  - National Labor Relations Act
- Easing Unionization, Expansive View of Employee Rights, Pain for Employers
- Internships

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Student Athletes and the NLRA

How did we get here?

- *Northwestern Univ.*, 362 NLRB 1350 (2015).
  - Concerned Division I Football Bowl Subdivision football players who received grant-in-aid scholarships.
  - Regional Director found that these student athletes are employees within the meaning of the NLRA and therefore are entitled to a union representation election.
  - On appeal, the Board declined to assert jurisdiction without deciding the employee status issue.
    - Nature of sports leagues – control exercised by leagues over individual teams.
    - Composition and structure of FBS – overwhelming majority are public colleges and universities outside of NLRB jurisdiction.
    - Decision expressly did "not address what the Board's approach might be to a petition for ***all*** FBS scholarship football players (at least those at private colleges and universities)" (emphasis added).

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Student Athletes and the NLRA

- ***NLRB General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context*, GC Memo 17-01 (2017).**
  - Concerned multiple topics, including the "question left open in" *Northwestern University*: whether FBS players at private colleges and universities are employees under the NLRA, and therefore receive the protections of Section 7 of the Act.
  - Relied on the *Northwestern University* factual record, the *Columbia University* decision regarding graduate assistants, and "other public information" to conclude that such players are employees under the Act.

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Student Athletes and the NLRA

- ***Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, GC Memo 21-08 (2021).**
  - GC Abruzzo stated her prosecutorial position that "certain Players at Academic Institutions are employees under the Act."
  - Adopted and updated GC Memo 17-01 to conclude that scholarship football players at Division I private institutions and "other similarly situated players" are employees, based on common law agency principles:
    - Payment – i.e., the scholarship
    - Control
    - For a Service

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Student Athletes and the NLRA

- GC Abruzzo also cited three developments since the 2017 Memo:
  - Supreme Court's decision in *NCAA v. Alston,* recognizing that college sports is a profit-making enterprise and rejecting NCAA's antitrust defense based on the notion of amateurism in college athletics.
  - Changes to Name Image Likeness (NIL) rules: "The freedom to engage in far-reaching and lucrative business enterprises makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income."
  - Unprecedented levels of collective action and activism
    - Social justice issues
    - Pandemic health and safety
    - Demands for "fair treatment."

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Student Athletes and the NLRA

- Two other key points from the 2021 GC Memo
  - The GC will also consider "**misclassification violations**":
    - Simply referring to players as "mere 'student-athletes' and leading them to believe that they do not have statutory protections" violates Section 8(a)(1) of the Act.
  - The GC will consider a **joint employer** theory of liability among the institution and its conference and/or the NCAA, because players perform services for, and are subject to the control of, those entities.
    - Examples of control: eligibility standards and terms, unilateral contract terms in the "Student-Athlete Agreement," detailed recruitment rules, and extensive compliance requirements which can result in termination if violated.
    - GC will consider pursuing charges on a joint employer theory against a conference even if some members schools are state (i.e., public) institutions, where an athletic conference is an "independent, private entity, created by the member schools."

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Side Note on Joint Employment

- Generally, joint employers may be held liable for each other's unfair labor practices and other obligations under the NLRA (e.g., collective bargaining)
- The NLRA standard for joint employer relationship has been in flux since 2015
  - Dramatically expanded by *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015).
  - Affirmed by D.C. Circuit in 2018.
  - In 2020, the Republican-majority NLRB promulgated a regulation with a narrower standard in.
  - In 2022, the Democrat-majority NLRB issued a new joint-employer NPRM rescinding the 2020 rule and replacing it with the expanded pre-2020 standard.

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Side Note on Joint Employment

- Proposed rule: two entities are joint employers where either employer "share(s) or codetermine(s) those matter governing employees' essential terms and conditions of employment."
  - "Share and codetermine" is defined mean "possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly or both) one or more of the employees' essential terms and conditions of employment."
  - "Essential terms and conditions of employment" are defined to "generally include, but are not limited to, wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means or methods of work performance."
- Effective date extended to Feb. 26, 2024; coalition of business advocacy groups have filed suit challenged the new rule; rule would only apply prospectively.

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Student Athletes and the NLRA

- ***University of Southern California, Pac-12, NCAA and the National College Players Association***
  - February 2022: NCPA filed an Unfair Labor Practice charge on behalf of football and men's and women's basketball players against USC, the Pac-12 Conference and the NCAA (Case No. 31-CA-290326).
  - December 2022: NLRB Regional Director found merit to the ULP Charge.
  - May 2023: GC issued a complaint, commencing the ALJ trial process.
  - The only alleged violation is ***misclassification***: USC, the Pac-12 and the NCAA, as joint employers, misclassified college athletes as "non-employees" thereby depriving student athletes of their Section 7 rights and discouraging them from engaging in protected concerted activities.
  - ALJ trial is underway; final resolution likely years away, following appeals to the Board, the Court of Appeals, and possibly Supreme Court.

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Student Athletes and the NLRA

- ***Trustees of Dartmouth College***
  - February 5, 2024: NLRB Regional Director finds that Dartmouth's men's basketball players are employees under the Act.
  - Players perform a service that benefits Dartmouth.
    - Revenue, possibly profits (though profitability does not bear on employee status), alumni engagement and financial donations, publicity which enhances student interest and applications.
    - Noted the administrative infrastructure for handling athletics-generated revenue and publicity.
  - Dartmouth exercises control over players' "work"
    - Student-Athlete handbook is like an employee handbook; coaches and administrators have discretion to make decisions within parameters set by NCAA and Ivy League rules; scheduling and supervision of players.
  - Players receive compensation.
    - "Early read" for admission; equipment and apparel; tickets to games; lodging and meal; "Peak Performance" program for athletes.
    - "Fringe benefits" including academic support, career development, sports and counseling psychology; sports nutrition, leadership and mental performance training, strength and conditioning training, sports medicine, and integrative health and wellness.
  - Found that *Northwestern University* is not binding because Ivy League schools are all private, and noted that a single team unit can be appropriate even if a league-wide unit would also be appropriate.
  - Election scheduled for March 5, but might be delayed due to an appeal.

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Student Athletes and the NLRA

Where are we going?

- Expect more NLRB filings
- So many questions…
  - Joint employer status of schools, conferences, NCAA.
  - NLRB jurisdiction and public/private issue.
    - How will the states react?
  - Conference-wide units? Multi-sport units at a single school?
  - Will NCAA and conferences opt for collective bargaining to neutralize the antitrust threat?
  - If the NLRB position that student athletes are employees prevails, colleges will be required to engage in collective bargaining with unions representing college athletes re wages, hours, other conditions of employment.
  - What will collective bargaining look like?
- The answers are only starting to emerge, and already it appears that the NLRB standards could be highly fact-specific (i.e., employee status could vary by sport, by conference, NCAA division, NCAA vs NAIA, and even within these groupings).
- Best to start thinking about these issues now.

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"Student" Athletes & the FLSA

- Seventh Circuit & Ninth Circuit have held that student-athletes are not employees under the FLSA.
  - Participation in collegiate athletics is entirely voluntary; and
  - The long tradition of amateurism in college sports shows that student-athletes participate in their sports for reasons wholly unrelated to immediate compensation.

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"Student" Athletes & the FLSA

- Third Circuit, *Johnson et al. v. NCAA, et al.*, is weighing the issue of whether college athletes are employees.
  - Issue there is whether Division I student athletes are employees for purposes of the Fair Labor Standards Act.
    - Judges focused on level of control institutions exercise.
    - Judges asked NCAA counsel to provide supplemental letter brief regarding whether an athlete loses their scholarship if they quit or are removed from the team.
  - 20 Division 1 universities named, as well as NCAA, and a putative defendant class of 125 NCAA D1 colleges and universities.
  - Oral argument on January 18, 2023, on the appeal of the district court's denial of Defendants' motion to dismiss.
  - Case has been stayed pending Third Circuit issuance of a mandate.

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Graduate Teaching Assistants & the FLSA

FLSA Fact Sheet #17S

- Graduate teaching assistants whose primary duty is teaching are exempt. Because they qualify for the teacher exemption, they are not subject to the salary basis and salary level tests.
- An employment relationship generally will exist when a student receives compensation and his or her duties are **not** part of an overall education program.

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Graduate Research Assistants & the FLSA

FLSA Fact Sheet #17S

- Generally, an educational relationship exists when a graduate or undergraduate student performs research under a faculty member's supervision while obtaining a degree. Under these circumstances, the Department would not assert that an employment relationship exists with either the school or any grantor funding the student's research. This is true even though the student may receive a stipend for performing the research.
- An employment relationship generally will exist when a student receives compensation and his or her duties are **not** part of an overall education program.

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Graduate Assistants & the NLRA

- *Columbia University*, 364 NLRB 1080 (2016) remains the controlling Board precedent
  - Rejected the notion that graduate assistants are primarily students and have a primarily education, not economic, relationship with their university
  - Common-law definition of employment applies: employer has the right to control the work, and the work is performed for compensation
  - Employee status can exist even where the graduate assistants' work advances their own educational interests, if it advances the university's interests as an employer as well

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Graduate Assistants & the NLRA

- *Columbia University* – The Unit
  All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and **All Departmental Research Assistants employed by the Employer at all of its facilities**, including Morningside Heights, Health Sciences, Lamont-Doherty, and Nevis facilities, but excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

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Graduate Assistants Unionizing

- Since 2016, several dozen graduate assistant unions have been voluntarily recognized or NLRB-certified at private institutions
- Public institutions remain governed by state law which varies on whether graduate assistants can unionize
- For private institutions, employee status will be found where typical terms and conditions apply to graduate assistants
  - Unique circumstances for some groups have led to exclusions from proposed bargaining units

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Post-Pandemic Graduate Student Unionizing

2021	2022	2023
• Indiana University	• Clark University • MIT • Boston University	• Northwestern University • John Hopkins University • University of Chicago • Dartmouth College • Duke University • University of Minnesota • Cornell University • Emory University • USC • Stanford University • University of Maine • Northeastern University • Syracuse University • W. Wash. University

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NLRB Eases the Path to Unionization

- *Cemex Construction Materials Pacific, LLC*, 327 NLRB No. 130 (Aug. 25, 2023).
  - New legal framework for representation elections
    - A ULP during an election campaign could result in imposition of the union regardless of election outcome
  - Less time to campaign
  - Aggressive campaigning poses new risks
  - Compliance is more important than ever
  - Authorization cards could end up deciding union representation
  - ***Critical for employers to get ahead of union organizing impulses***
    - ***Once it's started, it might already be too late***

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Graduate Assistants Unionizing

- Why are graduate students unionizing?
  - Administration effecting changes without consulting graduate students.
  - Increasing graduate student requirements (e.g., working hours, etc.) without a sufficient increase in compensation.
  - Expanded worker interest in unionizing across the broader economy.
- What do graduate students want?
  - Stronger anti-discrimination and anti-harassment measures
  - Tuition relief
  - Expanded healthcare
  - Family leave
- What measures can institutions take to mitigate graduate students' desire to unionize?
  - Conduct "temperature checks" to understand how imminent graduate student organizing activity might be, and to identify the potential motivating factors.
  - Develop a legally-compliant process for minimizing or even avoiding friction when implementing changes for graduate students.
  - Reinforce awareness of efforts to improve graduate students' work environments.

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The NLRB's Expansive View of Employee Rights

- The current NLRB and its GC have reinstated an expansive view of the protection of employee rights and "concerted activity," rejecting the prior Republican-majority Board's approach in determining employer conduct that unlawfully inhibits employees' Section 7 rights. Cases address:
  1) Employee conduct that qualifies as protected concerted activity
  2) Setting-specific employee misconduct standards
  3) Workplace rules
  4) Scrutiny of common provisions in severance/separation agreements

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More Employer Pain from NLRA Violations

- The NLRB's traditional remedy for ULPs is "make whole relief"
  - Making the adversely affected employee whole for losses caused by the employer's violation, usually consisting of back pay (lost wages) for an employee who was unlawfully discharged or denied a job or a promotion
- In *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022), the NLRB redefined "make whole relief"
  - Now includes all "direct or foreseeable pecuniary harms" that result from an employer's ULP
  - Direct or foreseeable harms––also referred to as "consequential damages"––can include far more than just back pay:
    - Out-of-pocket medical expenses incurred by a former employee who lost health insurance
    - Credit card debt
    - Taxes and fees from 401(k) withdrawals

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Internships

The Primary Beneficiary Test

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

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Employment v. Internship

Employment	Internship
• A foreign language major reshelving books at the library. • A political science major performing cashier duties at the bookstore. • A math major filing correspondence for the chairperson of the Math Department.	• An archeology major receiving one course credit for archiving and analyzing artifacts housed by the World Studies Department. • A law student researching and summarizing case law for a paper they are co-authoring with their professor.

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Third Party Internships

Potential Pitfalls

- Paying stipends
- Screening candidates
- Offering course credit
- For-profit entities

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Any Questions?

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