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COLLEGE ATHLETES IN REVENUE-GENERATING SPORTS AS EMPLOYEES: A LOOK INTO THE ALT-LABOR FUTURE

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The writing is on the wall. In the next few years, it seems clear now that at least the elite student athletes in Division I power conferences in college football and basketball, revenue-generating sports programs, will be deemed employees for the purpose of determining college and university legal obligations toward them. The inevitability of this sea change in the way these athletes are viewed will be the culminating result of various lawsuits as well as state legislation under a myriad of labor, employment, and antitrust laws. The two most visible of these lawsuits so far, *O'Bannon v. NCAA*¹ and *Northwestern University*,² quietly avoided the direct question whether student athletes involved in the litigation were employees when in each case a finding that they were students and not employees would have resolved their claims and ended the litigation.³ It seems painfully evident in these two cases, as will be demonstrated in this article, that the court in *O'Bannon* and the National Labor Relations Board (NLRB) in *Northwestern* felt strongly that the student athletes involved must in fact be employees or sufficiently employee-like to stay away from a directly confronting the issue. Despite these developments, however, courts still accept the argument that even elite student athletes are amateurs and students, and not therefore employees. Although plaintiff-athletes have

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1. *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049 (9th Cir. 2015).

2. *Northwestern Univ.*, 362 N.L.R.B. 1350 (2015).

3. In *O'Bannon* the court expressly stated that elite student athletes were in a labor market and that the nature of the relationship between the athletes and their colleges was a transactional relationship anticipating economic gain on both sides. *O'Bannon II*, 802 F.3d at 1065. In *Northwestern University* the NLRB assumed *arguendo* that the students were employees and then declined to assert jurisdiction for prudential reasons. 362 N.L.R.B. at 1350.

so far mostly lost in federal litigation, it seems clear that cases will continue to be brought and that eventually these college athletes will prevail because the amateur ideal of the college athlete at the very least in sports that generate substantial revenue for schools is crumbling and unsustainable at the same time that various legal tests of employee status as well as simple economic reality reveal these athletes are truly employees.⁴ More recent evidence of erosion in amateur status is found in state legislation requiring that these athletes be allowed direct payment for use of name, image, and likeness (NIL) by commercial entities.⁵ After California passed a law in September, and Florida threatened to pass the same law in late October, the NCAA yielded to pressure and announced that it will allow student athletes to receive NIL payments.⁶

The current landscape of labor, employment, and antitrust litigation involving mostly elite college athletes in revenue-generating sports represents a piecemeal approach to vindicating these students' rights as employees. As the NCAA's primary defense that these particular athletes are in fact amateurs falls apart, nobody has really focused on the perhaps more interesting and fundamental question about what it will mean for these students to be viewed as employees. How will their lives be changed? Will they be able to retain an identity as a student? How will expectations

4. See Richard T. Karcher, *Big Time College Athletes' Status as Employees*, 33 A.B.A. J. LAB. & EMP. L. 31, 53 (2018) ("The Regional Director's findings in *Northwestern University* and the NLRB's decision on review (declining jurisdiction without explicitly reversing the Regional Director) suggest that *Berger* may have been decided differently if the plaintiffs were scholarship athletes in revenue sports. In other words, *Northwestern University* strongly supports the position that scholarship athletes in revenue sports are employees under the FLSA, even if non-scholarship athletes in non-revenue sports are not university employees under the FLSA 'economic reality' test.").

5. Steve Berkowitz, *California Assembly Passes Bill that Brings State to Verge of Rules Showdown with NCAA*, USA TODAY (Sept. 10, 2019), <https://www.usatoday.com/story/sports/2019/09/09/california-assembly-bill-allows-college-athletes-use-likeness/2269869001/> [<https://perma.cc/G6YG-CNGF>]; Jeremy Bauer Wolf, *One Step Closer to Pay for College Athletes*, INSIDE HIGHER ED., (Sept. 11, 2019.), <https://www.insidehighered.com/news/2019/09/11/california-passes-bill-allowing-athletes-be-paid-name-image-and-likeness> [<https://perma.cc/GX5A-UX3T>]. The California law goes into effect in 2023.

6. See Bobby Caina Calvan, *Florida following California's example*, DENVER POST (Oct. 25, 2019), <https://www.pressreader.com/usa/the-denver-post/20191025/281947429636251> [<https://perma.cc/R9YU-TKPG>]. The Florida proposed legislation is modelled after California's. *Id.* The biggest football states are likely to follow since none of them wants to cede a recruiting advantage. Indeed, as this article was going to print, substantial NIL Bills had been introduced in Arizona, Colorado, Georgia, Illinois, Iowa, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, North Carolina, South Carolina, Virginia, and Wisconsin. The NCAA was quick to change course after the possibility of Florida legislation was announced. See Ralph D. Russo, *NCAA Allows profit for athletes, but lots of questions remain*, DENVER POST (Oct. 30, 2019), <https://www.pressreader.com/usa/the-denver-post/20191030/281943134678345> [<https://perma.cc/UP6D-72RR>]. The NCAA Board of Governors will allow student athletes to receive pay for use of their NIL. *Id.* However, the NCAA Board "is emphasizing that change must be consistent with the values of college sports and higher education and not turn student-athletes into employees of institutions. *Id.*

change in the college field of play and in the locker room as a result of their new status as employees who happen also to be students? What about students in non-power conferences who might still be viewed as students and amateur athletes? How will employee athletes be paid by colleges and universities, and what will that mean with respect to the level of control colleges and universities have over them? Will collective bargaining take place in college, and, if it does, what will it look like? Will it be undertaken on a national basis, a conference basis, or in individual schools? What will student athlete employees and colleges and universities bargain over? In attempting to answer these questions, this article will explore the brave new alt-labor world of college football and basketball “employees” in revenue-generating sports.

This article will begin by looking at some current and recent litigation brought by college athletes against their respective universities as well as recent state legislation that may affect their status as employees. Part I will focus on what the courts, agencies, scholars, and state legislators have said or implied about whether these athletes are or should be employees under the law. This Part will demonstrate why the designation of athletes in revenue-generating sports is fragile and cannot endure for much longer. Part II switches and focuses on college “work study” programs, showing in fact that there is nothing unusual or strange about having students work as “employees” in college, and then showing how work study can serve as an effective template for structuring the relationship between a college or university and its football or basketball players. This Part shows that colleges have very little to fear by treating these elite student athletes as employees, and that such a transition can actually be a relatively easy one. This Part explains how colleges and universities can treat these student-athletes as employees for work study programs by a minor change in Department of Labor Regulations. Part III will take a look at how collective bargaining in college might happen, what are likely to be the subjects of bargaining, and why, in fact, union organizing and collective bargaining rights for athletes in revenue-generating sports will be critical in the new alt-labor world of college athlete employment.

Importantly, this article maintains only that student athletes in revenue generating sports should be (and will be) classified as employees. Generally, this means men’s college football and basketball players who are grant-in-aid scholarship recipients on teams in Division I Power 5 Conferences.⁷ It is precisely because these sports generate substantial

7. The analysis in this article mainly focuses on football players in the FBS Division I Power 5 Conferences, but the conclusions would apply to any college sport that independently makes substantial

revenue for schools that schools invariably treat these students more as employees than as students. One need only review the comprehensive factfinding regarding the Northwestern University football team to see that this is the case.⁸ With respect to sports funded completely by schools, there is no such incentive for schools to treat these athletes as anything but students. With respect to non-revenue generating college sports, the amateur ideal of the college athlete can and should be preserved and maintained.

I. IT'S COMING: ELITE COLLEGE ATHLETES AS "EMPLOYEES"

A. O'Bannon *Chips Away at the NCAA and Amateur Status of Elite College Athletes*

The door was opened by the federal district court decision in *O'Bannon v. NCAA*.⁹ Ed O'Bannon was an accomplished NCAA Division I forward for the UCLA Bruins from 1991 to 1995. One evening, years after his basketball career had ended, while visiting a friend's house, O'Bannon saw his image on a video game being played by his friend's son.¹⁰ The video game character was a perfect replica of O'Bannon. Wearing O'Bannon's former UCLA jersey and number, the virtual athlete was a tall, slim, bald-headed and left-handed African American forward. O'Bannon initially felt "pretty fired up . . . [and] thought it was pretty cool."¹¹ Regarding lack of consent and compensation for the use of his likeness, O'Bannon forgot about the matter, "chalk[ing] it up as part of the system."¹² However, O'Bannon later came into contact with his longtime

money for the college or university. At that point, as I argue in this article, the sport is invariably treated by the college or university as a commercial enterprise, and the athletes involved are effectively treated as employees. For these players especially, the NCAA defense that they are not employees will soon fall. That essentially means that college basketball athletes in the power 5 conferences should also be viewed as employees. The Football Bowl Subdivision (FBS) Power 5 Conferences include the ACC, the Big 10, the Big 12, the PAC 12, and the SEC. These comprise approximately 65 football teams including Notre Dame, an independent, counted as an ACC school for Power 5 Conference designation purposes. See *Full List of Division I Football Teams*, NEXT C. STUDENT ATHLETE, <https://www.ncsasports.org/football/division-1-colleges> (last visited Dec. 20, 2019) [<https://perma.cc/QH8B-GFYA>].

8. See Northwestern Univ., 2014-15 NLRB Dec. (CCH) P15781, 2014 NLRB LEXIS 221, at *2-*9 (Mar. 26, 2014); Roberto L. Corrada, *The Northwestern University Football Case: A Dissent*, 11 HARV. J. SPORTS & ENT. L. 201, 203-07 (2020).

9. See *O'Bannon v. NCAA (O'Bannon I)*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

10. See Villanova Univ., *Examining O'Bannon v. NCAA*, YOUTUBE (Apr. 29, 2016), <https://www.youtube.com/watch?v=WgeyH5kSoF0> [<https://perma.cc/5WK2-SKZV>].

11. *Id.*

12. Villanova Univ., *supra* note 10.

friend Sonny Vacaro, who asked him to be the named plaintiff in a lawsuit against the NCAA on behalf of former student-athletes. Vacaro worked as a Nike consultant in the late 1970s and was responsible for the marketing scheme paying coaches to put their players in Nike sneakers. Vacaro was involved in signing Michael Jordan to Nike and Kobe Bryant to Adidas.¹³ However, despite being a key player in the commercialization of college and professional basketball, Vacaro, a longtime opponent of the NCAA, left his position with Reebok in 2007 to challenge the association's amateurism rules.¹⁴

O'Bannon and others filed an antitrust lawsuit against the NCAA alleging that its limits on player ability to receive payments for use of their name, likeness, and image was a "restraint of trade" in violation of the law.¹⁵ The NCAA maintained that college athletes, as amateurs, are not employees in a labor market, and thus their limits are lawful. O'Bannon prevailed in the trial court.¹⁶ The trial court found that NCAA rules limiting player payments by commercial entities for the use of their name, image or likeness unreasonably restrained trade in violation of antitrust law.¹⁷ In so holding, the court made various findings related to the commercial nature of the transactions taking place between these particular student athletes and their colleges and the NCAA.¹⁸ According to the court,

[w]hile it is true that many FBS football and Division I basketball players do not pay for tuition, room, or board in a traditional sense, they nevertheless provide their schools with something of significant value: their athletic services and the rights to use their names, images, and likenesses while they are enrolled. . . . The Seventh Circuit recently observed that these "transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act." The court reasoned that "the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions."¹⁹

Moreover, according to the court, elite college athletes are in a labor market for their services, one that prizes their ability to play football or

13. Joe Nocera & Ben Strauss, *A Reformed 'Sneaker Pimp' Takes On the N.C.A.A.*, N.Y. TIMES (Feb. 12, 2016), <https://www.nytimes.com/2016/02/14/sports/ncaabasketball/a-reformed-sneaker-pimp-takes-on-the-ncaa.html> [<https://perma.cc/5QB8-LX64>].

14. *Id.*

15. *O'Bannon I*, 7 F. Supp. 3d at 955.

16. *Id.*

17. *Id.* at 963.

18. *Id.* at 988-93.

19. *Id.* at 988-89 (quoting *Agnew v. NCAA*, 683 F.3d 328, 340-41 (7th Cir. 2012)).

basketball for the school and a separate labor market for the use of their name, image, and likeness for use in TV broadcasts and rebroadcasts and for video games.²⁰ The court stated, “the sellers in this market are the recruits; the buyers are FBS football and Division I basketball schools; the product is the combination of the recruits’ athletic services and licensing rights”²¹ Thus, according to the court, the plaintiffs presented sufficient evidence to show an anticompetitive effect in a “labor market.”²²

The trial court then formulated two remedies to address the antitrust violation by the NCAA. First, the trial court ordered that the NCAA could not cap the amount of grant-in-aid given to FBS football and Division I basketball recruits at less than the full cost of attendance.²³ Allowing “cost of attendance” scholarships significantly changes the amount that athletes can be paid.²⁴ Second, the trial court ordered that the NCAA could not prevent schools from depositing a limited share of revenues (up to \$5,000 per player per year) generated from the use of their name, image, or likeness into a trust fund that would payout upon the student’s graduation.²⁵

The trial court’s decision was then upheld by the U.S. Court of Appeals for the Ninth Circuit, although one of the two remedies was struck down by the appellate court.²⁶ According to the Ninth Circuit,

the rules here—which regulate what compensation NCAA schools may give student-athletes, and how much—do relate to the NCAA’s business activities: the *labor* of student-athletes is an integral and essential component of the NCAA’s “product,” and a rule setting the price of that labor goes to the heart of the NCAA’s business. Thus, the rules at issue

20. *Id.* at 991-92. *See also* Rock v. NCAA, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at *11 (S.D. Ind. Aug. 16, 2013) (finding that plaintiff had identified a cognizable market in which “buyers of labor (the schools) are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)”); *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (“Plaintiffs have alleged a sufficient ‘input’ market in which NCAA member schools compete for skilled amateur football players.”).

21. *O’Bannon I*, 7 F. Supp. 3d at 991.

22. *Id.* at 993 (emphasis added).

23. *Id.* at 1007-08.

24. *See* Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 20, 2015), <https://www.nytimes.com/2015/10/01/obannon-ncaa-case-court-of-appeals-ruling> [<https://perma.cc/QW6L-5BJZ>] (“The cost of attendance, typically several thousand dollars more than a traditional college scholarship, accounts for the financial demands of additional activities like traveling home and back and paying cellphone bills.”).

25. *O’Bannon I*, 7 F. Supp. 3d at 1008.

26. *O’Bannon II*, 802 F.3d at 1049. Chief Justice Thomas dissented in part, crediting expert testimony in the trial court maintaining that the NIL fund payments to players of \$5,000 was so small that it would not have an anticompetitive effect on the sport. *Id.* at 1083. Thus, Thomas argued the fund should have been upheld. *Id.* at 1079.

here are more like rules affecting the NCAA's dealings with its coaches or with corporate business partners²⁷

Also, in finding that the NCAA's limits on compensation violate the antitrust laws, the court necessarily held that the rules imposed by the NCAA are not "eligibility" rules, as the NCAA maintained, but restraints on commercial transactions governed by antitrust laws and requiring a Rule of Reason analysis:

In other words, the substance of the compensation rules matters far more than how they are styled. And in substance, the rules clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools: a school may not give a recruit compensation beyond a grant-in-aid, and the recruit may not accept compensation beyond that limit, lest the recruit be disqualified and the transaction vitiated. The NCAA's argument that its compensation rules are "eligibility" restrictions, rather than substantive restrictions on the price terms of recruiting agreements, is but a sleight of hand. There is real money at issue here.²⁸

The court's finding is that these students are in a labor market and that their labor is part of a commercial transaction or exchange. The very strong implication of this finding is that these students are employees. The Ninth Circuit fell short of making such a finding, although it struck one of the district court's remedies because it felt that remedy in particular crossed a line between viewing these athletes as students versus as employees. According to the court, the creation of a trust fund into which schools would put compensation for licensing a player's name, image, and likeness went too far toward treating the students as employees.²⁹ A number of other antitrust suits have been filed against the NCAA in the wake of *O'Bannon*. The *Jenkins v. NCAA* and *Alston v. NCAA* cases have been consolidated into *In re NCAA Grant-in-Aid Cap Antitrust Litigation*.³⁰ These cases challenge the NCAA's restriction on athlete compensation, and are currently scheduled to go to trial soon.³¹ These antitrust cases will not

27. *Id.* at 1066 (emphasis added).

28. *Id.* at 1065.

29. *Id.* at 1079. "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status." *Id.* at 1078-79 (footnote omitted).

30. *In re NCAA Grant-in-Aid Cap Antitrust Litigation*, No. 14-md-02541-CW, 2018 U.S. Dist. LEXIS 52230 (N.D. Cal. Mar. 2, 2018).

31. See 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, 78 (2019); Eleanor Tyler, *Know Your Judge: Claudia Wilken*

be discussed in this article simply because they do not tackle the question of whether college athletes are employees head on. The *O'Bannon* case is the exception because the litigation there is completed and the trial court and Ninth Circuit findings do have some important implications, as discussed above, for whether these college athletes should be viewed as employees.

B. The NLRB Implies and Expressly Urges that Elite College Athletes Should be Viewed as Employees

At around the same time that the *O'Bannon* case was working its way through the courts, the Northwestern University football team filed a petition with the National Labor Relations Board requesting a union election.³² Later that year, the NLRB's Chicago Regional Director made a determination that the players were "employees," and Northwestern an "employer," under the National Labor Relations Act ("NLRA"), and directed an election for a unit of players who were recipients of "grant-in-aid" scholarships.³³ The Regional Director thoroughly analyzed the relationship between the elite college football players at Northwestern and the University itself in finding that the students were employees.³⁴

Applying the common law definition of "employee," "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,"³⁵ the Regional Director (RD) easily found that Northwestern's football players qualified as employees under the common law test:

(1) Players perform services for compensation. The RD found that the football team hugely benefits Northwestern in a number of ways, including monetarily (\$235 Million dollars over a 9-year period), and the athletes perform for compensation in the form of grant-in-aid

Putting NCAA Amateur Rules to a Jury, BLOOMBERG LAW (July 13, 2018), <https://biglawbusiness.com/know-your-judge-claudia-wilken-putting-ncaa-amateur-rules-to-a-jury> [<https://perma.cc/4EHV-PDY7>]; Michael McCann, *NCAA Amateurism to Go Back Under Courtroom Spotlight in Jenkins Trial*, SPORTS ILLUSTRATED (Apr. 2, 2018), <https://www.si.com/college-football/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships> [<https://perma.cc/DS2W-3M3H>].

32. See, e.g., Daniel Uthman, *College Athletes Take Steps to Form Labor Union*, USA TODAY (Jan. 28, 2014), <https://www.usatoday.com/story/sports/ncaaf/2014/01/28/college-athletes-players-association-northwestern-football/4958861/> [<https://perma.cc/KL5B-P3LC>].

33. Northwestern Univ., 2014-15 NLRB Dec. (CCH) P15781, 2014 NLRB LEXIS 221 (Mar. 26, 2014).

34. *Id.* at *38-67.

35. *Id.* at *39-40 (citing *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)); *Brown Univ.*, 342 N.L.R.B. 483, 490, n.27 (2004); RESTATEMENT (SECOND) OF AGENCY §2(2) (AM. LAW INST. 1958).

scholarships (worth \$76,000 per calendar year);³⁶ and (2) Players are subject to the Employer's Control. The RD details just how much these athletes' lives are controlled by Northwestern University. Not only do they have to spend substantial hours engaged in football practice and play, their private lives are also controlled by the University, and, indeed, their student academic lives are also impinged by being on the football team.³⁷

The RD distinguished cases involving graduate assistants.³⁸ In addition to the RD decision in the Northwestern case, virtually all labor scholars analyzing the issue have likewise concluded that these elite college athletes meet the various legal definitions of "employee."³⁹

The NLRB has at least impliedly taken the position that college athletes are employees for purposes of the National Labor Relations Act. On appeal, the NLRB in the *Northwestern* case, though refusing to assert jurisdiction in the case, did strongly hint that the Northwestern Football players may indeed be employees.⁴⁰ The NLRB stated that parties and amici in the case largely focused on whether the scholarship players involved in the case are statutory employees.⁴¹ The Board also indicated that if the athletes were not statutory employees, the NLRB would lack the authority to direct an election or certify a representative.⁴² In fact, if the scholarship players were not statutory employees, the Board's analysis in that regard would seem to be the much better way to end the litigation. However, the Board instead chose expressly not to decide the issue of employee status, instead opting to decline jurisdiction based on a tenuous line of cases arguably not supporting the Board's ability to do so.⁴³ The

36. *Northwestern Univ.*, 2014 NLRB LEXIS 221, at *41-44.

37. *Id.* at *45-49. The Regional Director did find however that "walk ons" were not employees since they did not receive compensation. *Id.* at *49-51.

38. *Id.* at *53-59.

39. See, e.g., Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. EMP. & LAB. L. 31 (2018); Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627 (2017); Cesar F. Rosado Marzan & Alex Tillett-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players are Employees under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301 (2015); Jay D. Lonick, *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 (2015); William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014); Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65 (2014).

40. See generally *Northwestern Univ.*, 362 N.L.R.B. 1350 (2015).

41. *Id.* at 1351.

42. *Id.* at 1351-52.

43. *Id.* See also Roberto L. Corrada, *The Northwestern University Football Case: A Dissent*, 10 HARV. J. SPORTS & ENT. L. 201, 211-18 (2020).

Board actually says in the opinion, “we have determined that *even if the scholarship players were statutory employees . . . it would not effectuate the policies of the Act to assert jurisdiction.*”⁴⁴

The Board’s reticence to decide the issue of employee status suggests some discomfort on the part of the Board to do so, perhaps suggesting the NLRB at the time, and particularly Member Miscimarra, feared the answer to the question might indeed be yes. Moreover, the NLRB’s decision to avoid the question left intact the Regional Director’s comprehensive discussion of the question as the Board’s only cogent analysis of the issue. Importantly, after the *Northwestern* case, the NLRB’s General Counsel, Richard Griffin, issued a Memorandum establishing that student athletes are employees for the purpose of enforcing unfair labor practices against the colleges and universities that employ them.⁴⁵

The idea that athletes in revenue-generating sports like Division I football and basketball might be treated as employees while other college athletes would not be has been articulated in at least one federal circuit court opinion. *Berger v. NCAA*,⁴⁶ a case brought by track and field athletes at the University of Pennsylvania alleging that the Fair Labor Standards Act (FLSA) required their college to pay them a minimum wage, held that the student athletes involved were not employees for purposes of the FLSA since they are amateurs not entitled to compensation. However, Circuit Judge Hamilton, concurring in the result in that case, explained that the decision might be different for athletes in revenue-generating sports.⁴⁷ According to him, they might in fact be employees for purposes of the FLSA.⁴⁸ As he explains, “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.”⁴⁹ Hamilton felt the outcome might be different in those cases because those sports involve “billions of dollars of revenue for colleges and

44. *Northwestern Univ.*, 362 N.L.R.B. at 1352 (emphasis added).

45. See Memorandum from Richard F. Griffin, Jr., Gen. Counsel, N.L.R.B., on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context to all Reg’l Dirs., Officers-in-Charge, and Resident Officers, N.L.R.B. (Jan. 31, 2017) (on file with the NLRB) (based on the record developed in the *Northwestern University* case and other public information, “scholarship football players in Division I FBS [schools] are employees under the NLRA”). This GC Memorandum was later rescinded by President Trump’s appointed General Counsel Peter Robb on December 1, 2017. See Memorandum from Peter B. Robb, Gen. Counsel, N.L.R.B., on Mandatory Submissions to Advice to all Reg’l Dirs., Officers-in-Charge, and Resident Officers, N.L.R.B. (Dec. 1, 2017) (on file with the NLRB).

46. 843 F.3d 285 (7th Cir. 2016).

47. *Id.* at 294 (Hamilton, J., concurring).

48. *Id.*

49. *Id.*

universities,” and therefore an analysis of the economic reality of that relationship “may not point in the same direction” as in this case.⁵⁰ Hamilton suggested that in the appropriate case, with a developed factual record, the conclusion might be that there is in fact an employment relationship.⁵¹ Indeed, the extensive factual record developed by the Regional Director in the *Northwestern University* case seems to have been exactly what has caused the NLRB to lean in that direction.⁵²

50. *Id.*

51. *Id.*

52. Interestingly, in a later FLSA case, *Dawson v. NCAA*, the plaintiff, Lamar Dawson, a former University of Southern California football player, does make the argument that college athletes in revenue-generating sports should be employees. In rejecting the argument, the District Court, without any analysis, simply cites a string of decisions rejecting the premise that revenue generation is determinative of employment status. 250 F. Supp. 3d 401, 407 (N.D. Cal. 2017). These decisions involved providers of in-home care for public assistance recipients, volunteers at dance music festivals, and student trainees at cosmetology schools. These employees and employers are hardly analogizable to Division I football and basketball players. First, the employers in these cases operate student training at a loss or are involved with state subsidies for public assistance. The dance music festival is a similar for-profit enterprise, but the volunteers involved in that case are more like those working refreshment stands at football games rather than the players themselves. In the dance music festival case, an analogy might be made to college football and basketball if the employees involved were the rock stars or DJs that are the focus of the event and that actually are the source of the company’s income. In any case, the decisions cited are inapposite on the question whether college football or basketball players are employees. In *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), the court does not reject analysis of profit generation as important in determining employee status, rather the court says cases involving profit-seeking employers should not be automatically applied to public social service agencies. The court’s analysis serves both to distinguish the case from being applied to college students especially at private institutions but also to suggest that profit may indeed be an important factor in assessing economic reality. In *Valladares v. Insomniac, Inc.*, No. EDCV 14-00706-VAP (DTBx), 2015 U.S. Dist. LEXIS 190028, at *24–27 (C.D. Cal. Jan. 29, 2015), the court explains that revenue generation is irrelevant to deciding whether the employer in the case, *Insomniac, Inc.*, falls under the Amusement or Recreational Exemption (ARE) to the FLSA. The focus for that exemption is the intermittency of the events run by employers, not revenue generation. The case is completely inapposite to the question of the employment relationship between colleges, the NCAA and college football and basketball players. The last two cases cited by the court involve student trainees at a cosmetology school’s cosmetology clinic. In *Jochim v. Jean Madeline Educ. Ctr. Education Center of Cosmetology, Inc.*, the court found that a student trainee in a cosmetology clinic is not an employee despite the school’s alleged profit from student labor. According to the court, “[t]he economic reality of the relationship was that [the plaintiff] paid the [s]chool tuition in exchange for an education in cosmetology, and a significant part of her education included working in [the cosmetology school’s] clinic as a student.” 98 F. Supp. 3d 750, 759 (E.D. Pa. 2015). None of these situations has anything to do with college football and basketball players on revenue-generating teams. The legal statements in these cases about the profitability of the employer involved are inapposite and inapplicable to the issue of profit generation in the context of a revenue-generating college football or basketball team because the parts of the FLSA involved are not the same. Nor can these college athletes be analogized to student trainees, volunteers at dance music festivals, or public social service workers. College football and basketball players in Division I and FBS schools are at the very heart of the commercial enterprise involved. The better they play, the more money, in the millions, the school makes. Any test labelled an “economic reality” test must recognize the strength of the commercial, employer-employee, relationship involved here.

C. Emerging State Legislation Related to Elite College Athlete Pay and the NCAA's Response: O'Bannon Matures and Another Step is Taken toward College Athlete "Employee" Status

On September 9, 2019, the California Assembly passed a bill, SB 206 "The Fair Pay to Play Act," allowing student athletes in California colleges to hire agents and be paid for the use of their name, image, or likeness.⁵³ The bill also prohibited colleges from taking away scholarships of players who are paid for their name, image, or likeness.⁵⁴ Not too long after the California law, Florida, too, took up similar legislation.⁵⁵ As a consequence, the NCAA very recently agreed to allow college athletes to earn money for name, image, likeness rights while adamantly maintaining college athletes are not employees.⁵⁶ While the NCAA announced that it will allow athletes to benefit from the use of their name, image, likeness, probably to forestall any further state legislation, the NCAA has not yet developed a plan to allow those payments.⁵⁷ The NCAA Board of Governors has "directed each of the NCAA's three divisions to create the necessary new rules and have them in place by 2021."⁵⁸ It is hard to imagine what rules the NCAA might devise that will not further dilute their claim that student athletes in revenue generating sports are amateurs and not employees of a college or university. The Ninth Circuit, in striking down a proposed fund that would make name, image, likeness payments to student athletes upon graduation, in the *O'Bannon* case, said the following:

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have

53. See Berkowitz, *supra* note 5.

54. Wolf, *supra* note 5.

55. See Calvan, *supra* note 6. The Florida proposed legislation is modelled after California's. The biggest football states are likely to follow since none of them wants to cede a recruiting advantage. Indeed, as of the time of the writing of this article, bills modeled on California's have been passed or proposed in Illinois, New Jersey, Georgia, and Wisconsin. Not surprisingly, the NCAA was quick to change course after the possibility of Florida legislation was announced. See Russo, *supra* note 6. The NCAA Board of Governors will allow student athletes to receive pay for use of their NIL. However, the NCAA Board "is emphasizing that change must be consistent with the values of college sports and higher education and not turn student-athletes into employees of institutions. *Id.*

56. See Russo, *supra* note 6.

57. *Id.*

58. *Id.*

surrendered its amateurism principles entirely and transitioned from its “particular brand of football” to minor league status.⁵⁹

II. COLLEGE AND UNIVERSITY “WORK-STUDY” PROGRAMS AS A TEMPLATE FOR PAYING ELITE COLLEGE ATHLETES

A. *The Federal Work Study Program*

1. Overview

The Federal Work-Study Program provides college students the opportunity to earn up-to an awarded amount based on their financial need.⁶⁰ The goal of the program is to help both undergraduate and graduate students pay for their education expenses.⁶¹ While the program encourages students to work in community focused placements or in their field of study, students are not limited to those jobs.⁶² Students may work at either on-campus or off-campus placements.⁶³ In determining a student’s work placement the following factors are relevant: (1) “the student’s financial need”; (2) “the number of hours per week the student can work”; (3) “the period of employment”; (4) “the anticipated wage rate”; and (5) the “amount of other assistance available to the student.”⁶⁴ These same factors

59. *O’Bannon II*, 802 F.3d at 1078-79. The only real strategy for the NCAA might be to cut its losses in the way suggested in this article. Separate college athletes in revenue generating sports programs from the rest. For these athletes there should be a robust program of compensation across the three categories of earnings delineated by the trial court in the *O’Bannon* case: 1) Use of NIL in live game telecasts; 2) Use of NIL in Video Games; and 3) Use of NIL in Game Rebroadcasts, Advertisements, and Other Archival Footage. See *O’Bannon I*, 7 F. Supp. 3d at 968-71. The great bulk of these monies, one would imagine, would go to athletes and teams in Division I college basketball and FBS college football Power 5 Conferences. Some residual amount may go to other colleges in the context of live game telecasts and rebroadcasts (for example, when the occasional DIII or DII team plays a college powerhouse). These might be placed in some sort of escrow account and paid to students in non-revenue generating programs upon graduation while the others, acknowledged employees, would receive real-time payments from the schools along with work study checks for their labor on the college football or basketball team. The amateurism argument made with respect to athletes in non-revenue generating sports may have a chance of prevailing. Despite payments out of these funds to “employees,” the NCAA may still be able to justify substantial caps on payments, limiting payments to smaller amounts like \$5,000 (or even capping wages at the minimum wage level) on the theory that these restraints may be procompetitive, as Chief Justice Thomas argued in his dissent in *O’Bannon*, crediting expert testimony in the trial court on this point.

60. *Federal Work-Study Jobs Help Students Earn Money to Pay for College or Career School*, U.S. DEP’T EDUC., <https://studentaid.ed.gov/sa/types/work-study> [<https://perma.cc/P825-L3WJ>] [hereinafter *FWS Jobs Help Students Earn Money*] (last visited Dec. 16, 2019).

61. *Id.*

62. *Id.*

63. Info. for Fin. Aid Profs., *The Federal Work-Study Program*, U.S. DEP’T EDUC. 6-39 (2018), <https://ifap.ed.gov/fsahandbook/attachments/1819FSAHdbkVol6Ch2.pdf> [<https://perma.cc/C6PB-G9Z8>].

64. *Id.*

must be considered when determining the amount of a student's award.⁶⁵ A student's financial award letter dictates the number of hours that the student may work.⁶⁶ On average, students work between nine and twenty hours per week with most schools barring students from working over twenty hours per week.⁶⁷ Students are given the freedom to work multiple jobs with their work-study award, although, they have to split their awarded number of hours between each job.⁶⁸

Students are allowed to work during periods which they are not enrolled in classes including over summer or Christmas break.⁶⁹ However, the student must be enrolled or planning to enroll during the next period of enrollment.⁷⁰ If a student fails to attend that next period of enrollment, the school must be able to show that "the school had reason to believe the student intended to study at that school in the next period of enrollment."⁷¹

2. Funding

The federal government subsidizes the Federal Work-Study Program by providing up-to 75% of the wages paid to students.⁷² Schools and/or employers must pay the remaining 25% of the students' wages, however, they may choose to pay up to 50%.⁷³ In the case of placements with off-campus, for-profit jobs, the Federal Work-Study Program may only provide up-to 50% of the students' wages.⁷⁴ Schools are also barred from providing more than 25% of the total amount allocated to them for the year at for-profit placements.⁷⁵ These ratios vary from school to school. For example, at Stanford, the school and the federal government subsidize 90% of the

65. *Id.*

66. *Federal Work Study*, CORNELL UNIV., <https://studentemployment.cornell.edu/federal-work-study> (last visited Dec. 16, 2019) [<https://perma.cc/UB9K-VKDT>].

67. *Id.*; Student Emp. Off., *How Many Hours May a Student Work?*, BATES C., <https://www.bates.edu/student-employment/for-supervisors/policies/how-many-hours-may-a-student-work/> (last visited Dec. 16, 2019) [<https://perma.cc/8NRB-AES2>]; *2018-19 Term-Time Federal Work-Study Program Application*, HARV. MED. SCH., https://meded.hms.harvard.edu/files/hms-med-ed/files/term-time_fws_application_2018-19.pdf (last visited Dec. 16, 2019) [<https://perma.cc/4WRN-BJ53>].

68. Student Emp. Off., *Federal Work Study Program*, HARV. UNIV., <https://seo.harvard.edu/federal-work-study-program> (last visited Dec. 16, 2019) [<https://perma.cc/7JY7-UYC4>].

69. Info. for Fin. Aid Profs., *supra* note 63.

70. *Id.*

71. *Id.*

72. U.S. DEP'T OF EDUC., PROGRAMS: FEDERAL WORK-STUDY (FWS) PROGRAM, <https://www2.ed.gov/programs/fws/index.html> [<https://perma.cc/A5BH-QNUF>].

73. CORNELL UNIV., *supra* note 66.

74. Info. for Fin. Aid Profs., *supra* note 63.

75. *Id.*

students' wages in non-profit placements and the employer covers the remaining 10%.⁷⁶ In contrast, at Harvard Medical School, the school and federal government subsidize 70% of the students' wages and the employer covers the remaining 30%.⁷⁷ Schools can pay their share of the wages from their own funds or from outside sources including off-campus employers.⁷⁸

The federal funds are not allowed to be used to provide "fringe benefits" such as sick leave, paid-time off, or workers compensation.⁷⁹ However, schools can use their own funds to provide such benefits to students.⁸⁰ Another limitation on the use of federal funds, is that at least 7% of the federal funds allocated to a school in a given year must be used to pay students in community service jobs.⁸¹ Also, a minimum of one student per year must be employed as either a reading tutor or in a family literacy project.⁸² Schools may request waivers for these requirements, however, the difficulty of placing a student in one of these roles or in community service placements generally may not be the basis for a waiver.⁸³ Further, if schools pay for their share of the federal work-study program through non-cash sources such as books, tuition, fees, etc., the school can pay a federal work-study student through credit on their school account without written authorization from the student.⁸⁴

3. Wages

The program mandates that students are paid at least minimum wage, though some schools pay students upwards of \$19/hour.⁸⁵ If the state or local minimum wage is higher than the federal minimum wage, schools are held to the state or local minimum wage.⁸⁶ The Federal Student Aid Handbook specifically dictates that while the Small Business Job

76. STANFORD UNIV., HAAS CENTER FOR PUBLIC SERVICE: COMMUNITY SERVICE WORK-STUDY), <https://haas.stanford.edu/students/cardinal-quarter/community-service-work-study-csws> [<https://perma.cc/Y6LD-HM26>].

77. HARV. MED. SCH., *supra* note 67.

78. See Info. for Fin. Aid Profs., *supra* note 63.

79. *Id.* at 6-47.

80. *Id.*

81. *Id.* at 6-57.

82. *Id.*

83. *Id.* at 6-58.

84. *Id.* at 6-51.

85. U.S. DEP'T OF EDUC., FEDERAL WORK-STUDY (FWS) PROGRAM, <https://www2.ed.gov/programs/fws/index.html> [<https://perma.cc/DDR2-CL78>] (last modified Apr. 17, 2014); Haas Ctr. for Pub. Serv., *Community Service Work-Study (CSWS)*, STAN. U., <https://haas.stanford.edu/students/cardinal-quarter/community-service-work-study-csws> [<https://perma.cc/7VVZ-3EKX>] (last visited Dec. 16, 2019).

86. Info. for Fin. Aid Profs., *supra* note 63, at 6-46.

Protection Act of 1996 allows employers to pay wages under the federal minimum wage when individuals are in training, schools may not pay students less than minimum wage under this law.⁸⁷ A student may receive academic credit for his or her work-study position, however, students may not receive less pay than they would if they were not receiving credit.⁸⁸ The only circumstance under which a student may be paid less than minimum wage is if the student is receiving academic credit for the work-study position, and the employer would not normally pay someone for the same job.⁸⁹ Similarly, a student cannot be paid if they are “receiving instruction in a classroom, laboratory, or other academic setting.”⁹⁰

When deciding a student’s wages, schools must use the following factors: (1) “the skills needed to perform the job”; (2) “how much persons with those skills are paid in the local area for doing the same type of job”; (3) “rates the school would normally pay similar non-FWS employees”; and (4) “any applicable federal, state, or local laws that require a specific wage rate.”⁹¹ Schools are not allowed to base or determine a student’s wage rate on financial need.⁹² Further, “if a student’s skill level depends on his or her academic advancement, the school may pay a student on that basis.”⁹³ In most cases, though, a student who is performing comparable work to an employee should be paid a comparable amount.⁹⁴ The wages students are paid for work-study are taxable income and, thus, students are required to report work-study wages on their annual income forms.⁹⁵ Students must be paid hourly, with the exception of graduate students who can be salaried employees.⁹⁶ Further, the school is required to pay students directly at least once a month.⁹⁷ Federal work-study compensation can be paid directly to a student through an electronic funds transfer, by issuing a check (or a similar method), or if the student has given written authorization, the school can credit the payment to the student’s account.⁹⁸

87. *Id.*

88. *Id.* at 6-44.

89. *Id.*

90. *Id.*

91. *Id.* at 6-46.

92. *Id.* at 6-47.

93. *Id.*

94. *Id.*

95. Off. Fin. Aid & Student Emp., *Your FWS Earnings*, CORNELL UNIV., <https://studentemployment.cornell.edu/federal-work-study/your-fws-earnings> [https://perma.cc/BV4L-5SH6] (last visited Dec. 16, 2019).

96. *FWS Jobs Help Students Earn Money*, *supra* note 60.

97. *Id.*

98. Info. for Fin. Aid Profs., *supra* note 63, at 6-50.

However, if a credit to a student's account exceeds the amount the student owes in the account, the school must pay the student the remaining balance directly as soon as possible or at the most, 14 days after the account showed a credit balance.⁹⁹ "Regardless of who employs the student, the school is responsible for making sure the student is paid for work performed."¹⁰⁰ Because work-study students are deemed employees either of the university or of whatever employer the student works for, they are eligible for worker's compensation among other benefits.¹⁰¹

Students may be paid for training and travel related to their work-study positions.¹⁰² Regardless of the job type, federal work-study students can be paid up to around 20 hours of training time as well as time for ongoing preparation and evaluations that are "needed to accomplish" their work-study jobs.¹⁰³ Further, students may be compensated for "a reasonable amount of time for travel that is directly related to employment in community service activities."¹⁰⁴ Although, schools are encouraged to have students log their travel time separately from their work-time.¹⁰⁵

B. Work-Study's Applicability to College Athletes in Revenue-Generating Sports

1. Accommodating Revenue-Generating College Athletes within the definition of Employee under FLSA for the purpose of Work-Study

A number of payment mechanisms for college athletes have been proposed over the years by scholars.¹⁰⁶ They are by and large clever and certainly worth thinking about, but all of them would require creation of a

99. *Id.* at 6-52.

100. *Id.* at 6-46.

101. U. Iowa, *Handling Work-Related Injuries of Work-Study Employees*, OFF. STUDENT FIN. AID, <https://financialaid.uiowa.edu/studentemployment/employers/employers/injuries> (last visited Dec. 16, 2019) [<https://perma.cc/DL53-W6NR>].

102. Info. for Fin. Aid Profs., *supra* note 63, at 6-55.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See, e.g.*, William W. Berry III, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL'Y REV. 245, 271-72 (2017); David A. Grenardo, *The Duke Model: A Performance Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 163-64 (2017); William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference Athlete Revenue-Sharing*, 68 ALA. L. REV. 551, 556 (2016); Roger M. Groves, *A Solution for the Pay for Play Dilemma of College Athletes: A Novel Compensation Structure Tethered to Amateurism and Education*, 17 TEX. REV. ENT. & SPORTS L. 101, 117 (2016); Michael N. Widener, *Compensating College Athletes in "Store Credit,"* 47 U. MEM. L. REV. 431, 436-38 (2016); Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 78-82 (2000); C. Peter Gopelrud, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1089 (1997).

new administrative structure independent of current college and university organization. However, the Federal Work Study program can serve as an effective template for paying elite college athletes for their “work” on the playing field. Since the work study program exists within each university and has a history that would provide answers or solutions to almost any wrinkle or complication that might arise in the context of paying college athletes, it can easily be adapted to this end.

Indeed, a trio of cases brought under the Fair Labor Standards Act (FLSA) have analogized college athlete participation in their respective college sports to work done by students on campus as part of the federal work study program. These three cases, the aforementioned *Berger v. NCAA*,¹⁰⁷ *Dawson v. NCAA*,¹⁰⁸ and *Livers v. NCAA*,¹⁰⁹ all involved college athletes suing their respective colleges and universities for failing to pay them the minimum wage for their “work” on the athletic field of play. In *Berger*, two former women’s track and field stars, Gillian Berger and Taylor Hennig, were the lead plaintiffs in a class action lawsuit against the NCAA along with the University of Pennsylvania (their alma mater) and over 120 other NCAA Division I colleges and universities.¹¹⁰ In *Dawson*, the lead plaintiff in another class action suit, Lamar Dawson, had been a college football player for the University of Southern California (USC). He sued not only the NCAA but also the PAC 12 Conference (USC is a member of the PAC 12).¹¹¹ In *Livers*, plaintiff “Poppy” Livers, pursuing an FLSA claim by himself against the NCAA and Villanova University, was a former Division I football player at Villanova.¹¹²

The reason that the federal work study program is referenced in all of these lawsuits is that the Department of Labor Field Operations Handbook (FOH) defines federal work study students as “employees” for purposes of federal employment laws like the FLSA, and, simultaneously, defines college athletes as those involved in extracurricular activities who should not be viewed as employees and thus receive no pay.¹¹³ Section 10b24(b) defines circumstances in which an employment relationship will exist between colleges and students.¹¹⁴ In that subsection, students who

107. 843 F.3d 285, 293 (7th Cir. 2016).

108. 250 F. Supp. 3d 401 (N.D. Cal. 2017).

109. No. 17-4271, 2018 WL 3609839 (E.D. Pa. 2018).

110. 843 F.3d at 289.

111. 250 F. Supp. 3d at 402-03.

112. 2018 WL 3609839, at *1.

113. See U.S. DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK §10(b)(24)(b) (March 31, 2016), https://www.dol.gov/whd/FOH/FOH_Ch10.pdf [hereinafter FIELD OPERATIONS HANDBOOK]. See also *Berger*, 283 F.3d at 292-93; *Dawson*, 250 F. Supp. 3d at 406-407; *Livers*, 2018 WL 3609839 at *3-4.

114. See FIELD OPERATIONS HANDBOOK, *supra* note 113.

participate in work study programs are generally considered “employees” for FLSA purposes. “[A]n employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation. Thus, students who work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act.”¹¹⁵

By contrast, Section 10b24(a) of the FOH states, “University or college students who participate in activities generally recognized as extracurricular are not considered to be employees within the meaning of the Act.” Section 10b03(e) defines extracurricular activities as:

activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and *interscholastic athletics* and other similar endeavors. Activities of students in such programs, *conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution*, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution.¹¹⁶

Thus, work study students working at a food service counter are employees because they are working to benefit the school and not themselves, while students employed in extracurricular activities benefit themselves and not the school.¹¹⁷

Any attempts by courts, the NCAA, and colleges and universities to argue that revenue generating sports like college basketball or football are there exclusively for the benefit of the students and not the school should be met with a considerable degree of skepticism. It may be true that in the 1950’s and 1960’s all college and university athletic programs operated at a loss, and sports opportunities were provided by schools as part of an effort to educate the whole person and feed not only mind but body as well. With respect to substantial revenue generating sports like Division I college football and basketball, those days are long gone. Programs generating revenue in the millions of dollars have become a substantial source of revenue to fund many college programs. To say that a dishwasher in the school cafeteria is an employee, but a UCLA football player is not because

115. *Id.*

116. *Id.* at § 10b24(a), 10b03(e) (emphasis added).

117. *Id.*; see also *Berger v. NCAA*, 843 F.3d 285, 292-93 (7th Cir. 2016).

the dishwasher works for the benefit of the school while the football player does not is really the height of absurdity. The relationship between college football and basketball players and colleges and universities in revenue generating sports is clearly commercial in nature, and only incidentally academic and for the benefit of the student. This is proved by the Regional Director's findings in the Northwestern University case¹¹⁸ and by the Ninth Circuit's observations and conclusions in *O'Bannon*.¹¹⁹

A simple change in Department of Labor regulations will allow law to align properly with the economic reality of the relationship between revenue generating college athletes. The following changes should be made in the two provisions applying to the work study program. First, Section 10b24(b) of the Department of Labor Field Operations Handbook should be modified to expressly acknowledge: "An employment relationship will generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation. Thus, students who work *as athletes in revenue generating athletic programs* or at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act."¹²⁰ Second, the Handbook's definition of extracurricular activity in Section 10b03(e) should be changed accordingly. Extracurricular activities should be defined as:

activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics (*but not interscholastic athletics involving sports that generate revenue for colleges and universities*) and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution.¹²¹

2. The Alt-Labor Future: The Federal Work-Study Program as a Model for Paying Student-Athletes

Modeling the pay structure for student-athletes after the Federal Work-Study Program (FWS), schools would be required to pay student-

118. See *supra* notes 32-36 and accompanying text.

119. See *supra* notes 23-25 and accompanying text.

120. See FIELD OPERATIONS HANDBOOK, *supra* note 113. Proposed modification to the existing language is highlighted in bold and italics.

121. *Id.* at §§ 10(b)(24)(a), 10(b)(03)(e) (emphasis added).

athletes at least minimum wage.¹²² If the state or local minimum wage is higher than the federal minimum wage, schools would be held to the state or local minimum wage.¹²³ Schools would determine a student-athlete's wages based on: (1) the skills required for the particular sport and position that the athlete plays; (2) how much other athletes with similar skills in similar positions are paid; (3) if the athlete was not a student, how much would the school have to pay for their position; and (4) if there are any additional laws at the federal, state, or local level that dictate the particular athlete's pay rate.¹²⁴ Schools would not be allowed to determine a student-athlete's wages based on financial need.¹²⁵ Schools could pay student-athletes on a performance basis, however, they would still be required to pay the student at least minimum-wage.¹²⁶ In most cases, student-athletes would be paid a comparable amount to non-student athletes of similar skill levels.¹²⁷ However, this proposal envisions that student-athletes would only be paid minimum wage for their work study jobs as athletes. When the grant-in-aid scholarship monies are included as compensation (which will most likely be the case if these students are viewed as employees), then final compensation will be well above the minimum wage.

Further, student-athletes could be paid for training and travel related to their positions.¹²⁸ In such a case, student-athletes would be paid for their practice time as well as their travel time to and from various games and competitions.¹²⁹ Student-athletes would also be eligible to be paid during times in which they are not enrolled in courses, but when they are doing work related to the athletic team they are involved with, such as over summer break when they might be working out or learning the playbook under supervision, as long as they are enrolled or are planning to enroll in courses during the next period of enrollment.¹³⁰

122. Info. for Fin. Aid Profs., *supra* note 63, at 6-46.

123. *Id.*

124. *Id.* When deciding a student's wages in the Federal Work-Study program, schools must utilize the following factors: (1) "the skills needed to perform the job"; (2) "how much persons with those skills are paid in the local area for doing the same type of job"; (3) "rates the school would normally pay similar non-FWS employees"; and (4) "any applicable federal, state, or local laws that require a specific wage rate."

125. *Id.* at 6-47.

126. *Id.* The Federal Work-Study Program states that "if a student's skill level depends on his or her academic advancement, the school may pay a student on that basis."

127. *Id.*

128. *Id.* at 6-55.

129. *Id.*

130. *Id.* at 6-54.

Schools would have the option to pay student-athletes hourly or by salary, as long as they are meeting minimum-wage requirements.¹³¹ It would be the school's responsibility to ensure that student-athletes are paid directly at least once a month, and only by written authorization of the student could the school pay a student-athlete through his or her student account.¹³² Even if a student does authorize the school to pay his or her wages through credits to his or her account, if there is ever a credit balance in the account, the school would be required to pay the student the credit amount within fourteen days of the credit appearing.¹³³

Because student-athletes would be employees of the University, they would be eligible for "fringe benefits" such as sick leave, paid-time off, healthcare, and workers compensation.¹³⁴ Therefore, if a school provided student-athletes with workers compensation and the student-athlete was injured, workers compensation would cover the healthcare costs related to the incident.¹³⁵ Remember, fringe benefits are not federally funded, but provided by the school. This proposal also envisions that the funds for the program to pay college athletes in revenue generating sports a minimum wage for work study will come from the schools themselves, not the federal government, from revenues generated by the play of the athletes in their respective sports. This is entirely consistent with the current operation of the work-study program. The federal program contributes money to schools for work-study payments, but the government is not the sole funder.¹³⁶ Schools often provide 50% of funds, and it would be entirely consistent with the program for a school to cover 100% of the wage cost plus "fringe benefits."

The payment of wages to student-athletes through the federal work-study program may trigger a host of other employment-related obligations. For example, Title IX may require that student-athletes on some of a college's women's teams may also have to be paid work-study monies. Also, workers' compensation, unemployment insurance, and income tax obligations may be triggered.¹³⁷ For these reasons, a study conducted by

131. Undergraduate students in the work-study program are paid hourly while graduate students are paid either hourly or as a salaried employee. Federal Work-Study jobs help students earn money to pay for college or career school. See *FWS Jobs Help Students Earn Money*, *supra* note 60.

132. Info. for Fin. Aid Profs., *supra* note 63, at 6-50, 6-46.

133. *Id.* at 6-52.

134. *Id.* at 6-47.

135. See *id.*

136. See *supra* notes 72-78.

137. See Gould IV et al., *supra* note 39, at 52-62; Omar A. Barento, *NCAA, It's Time to Pay the Piper: The Aftermath of O'Bannon v. NCAA and Northwestern v. CAPA*, 12 RUTGERS BUS. L. REV. 1,

William Gould and Glenn Wong in 2014 concluded that the only schools that may be able to complete a successful financial transition to a system in which student athletes are deemed employees at least in the short term are athletes in Division I Power 5 Conference schools.¹³⁸

III. COLLEGE ATHLETES IN REVENUE-GENERATING SPORTS AS EMPLOYEES AND UNION MEMBERS: COLLECTIVE BARGAINING IN COLLEGE SPORTS

A. *The NCAA as Joint Employer*

The NCAA issues and enforces many of the rules governing college athletes.¹³⁹ For any meaningful collective bargaining to take place, the NCAA would have to be a party in negotiations and a co-signer of any collectively-bargained agreement.¹⁴⁰ The NCAA qualifies as a joint employer under any test that might be erected in a labor and employment context simply because of the substantial and strict control it has over college athletes. The current joint employer test promulgated by the NLRB, *Browning Ferris Industries of California*,¹⁴¹ was recently upheld by the United States Court of Appeals for the D. C. Circuit in *Browning-Ferris Industries of California, Inc. v. NLRB*.¹⁴² The new standard provides that “two or more entities are joint employers of a single work force if they are both employers within the meaning of common law, and if they share or co-determine those matters governing essential terms and conditions of employment.”¹⁴³ The new standard expands the joint employer test by allowing the Board to consider as a relevant factor in determining joint employer status: 1) whether an employer has “the *right* to control” the workforce beyond *actually exercising* control over it, and 2) whether an employer has “*indirect* control” over the workforce beyond exercising

32-33 (2015) (maintaining that while athlete compensation might be taxed, payments in the form of a scholarship should not be due to an exception from gross income for “any qualified tuition reduction”).

138. See Gould IV et al., *supra* note 39, at 61.

139. See Lonick, *supra* note 39, at 140, 162-64.

140. I know I seemed to argue differently in an earlier article, see *The Northwestern University Football Case: A Dissent*, 11 HARV. J. SPORTS & ENT. L. 201, 218-23 (2020), but in that article I was simply arguing that the NLRB *could* have found Northwestern University to be the employer and the football players on the Northwestern team to be in an appropriate bargaining unit. Bargaining would not have been as meaningful without the NCAA involved, but the parties could well have reached agreement on any number of issues not conflicting with NCAA rules or the Student Athlete Agreement.

141. 32 N.L.R.B. No. 186 (Aug. 27, 2015).

142. 911 F.3d 1195 (Dec. 28, 2018).

143. *Browning Ferris*, 32 N.L.R.B. No. 186, at 1613 (2015).

“direct and immediate” control. The decision places in question Trump Board efforts to again narrow the joint employer rule since the Court refused to defer to the NLRB on the question of the joint employer test, claiming that the test requires an analysis of the common law of agency, a determination squarely to be made by courts. The Court then found the Board’s new 2015 standard to be consistent with *common law* principles. This means that the new expanded joint employer test is likely to withstand change efforts by conservative administrations. There is very little doubt that the NCAA is a joint employer under the new standard if athletes are “employees” and colleges and universities are “employers.”¹⁴⁴ However, the NCAA is likely a joint employer under the narrower “strict control” test as well.¹⁴⁵

B. Alt-Labor Future of College Athletics in Revenue-Generating Sports: Unionization and Collective Bargaining

A future in which college football and basketball players in revenue-generating programs will be employees will necessarily require unionization by these athletes and collective bargaining. First, without

144. Lonick, *supra* note 39, at 163-64. (“Under the [new joint employer] standard, the extensive NCAA rules and university compliance requirements exemplify how the two entities ‘share or codetermine those matters governing the essential terms and conditions of employment.’ As a preliminary matter, many courts recognize that the student-athlete agreement itself is a binding contract. . . . It makes no difference which school a player attends because here, NCAA rules are inescapable. Put differently, all [student-athlete] laborers in college sports are bound by the [NCAA] contract. The student-athlete agreement and the 96-page NCAA Manual provides structure for the NCAA’s dependency on the student-athletes, which among other things, control the flow of benefits from athletes’ labor. . . . The detail of the NCAA bylaws is astounding, there are rules governing eligibility for participation in a variety of NCAA events, awards and benefits for enrolled student-athletes, scheduling of athletic events, and enforcement principles which include both individual student-athlete and university punishments.”) (footnotes omitted).

145. *Id.* at 165-66. (“In summary, even without the new [joint employer] standard, the NCAA exercises the ‘strict control’ . . . to be a joint employer of student-athletes. The NCAA controls the entry to the workforce—via the Student-Athlete Agreement—and the terms of ongoing employment through its rules regarding eligibility. Behind its bylaws is a clear threat of action, which shows not only a ‘right’ to control, but the NCAA exercising that right, as seen in countless cases against even the highest-profile athletes in college sports. Underlying these procedures is the economy of college sports, which depends on student-athletes agreeing to abide by NCAA rules and forces athletes to sacrifice the value of their skills on the open market for years. In the aggregate, these circumstances show the NCAA controls the field that student-athletes work in, and the purpose of the NLRA is served by finding they are ‘employees’ to the private ‘employer,’ the NCAA.”) (footnotes omitted); Edelman, *supra* note 39, at 1650-51 (“Yet, even though arguing that the NCAA is a joint employer of college athletes represents a novel argument, there are myriad factors that point in favor of finding the NCAA to serve as a joint employer. For example, the NCAA bylaws require all FBS football and Division I men’s basketball players to sign an identical letter of tender, which includes their ‘terms of employment.’ In addition, the NCAA bylaws set forth uniform rules for financially compensating college athletes. Finally, the NCAA even has enforced nationwide rules pertaining to academic eligibility and drug testing—evidence of the NCAA’s actual control over college athlete conduct at both private and public colleges.”).

unionization of, and collective bargaining with, these athletes, the NCAA will not be able to sustainably weather what will be crippling antitrust liability. The NCAA rules set out in its Student Athlete Agreement and its 96-page manual will not withstand antitrust scrutiny in its current form.¹⁴⁶ Second, a collective approach through unionization and collective bargaining is likely the only way for the NCAA to contain and control what would be a wage war between schools. The federal work study program only sets a floor for wages (the federal minimum wage), but schools can pay students whatever they want above the minimum. In the cutthroat arena of competition by colleges, particularly in Division I Power 5 Conferences, for the top recruits in both football and basketball, wage competition will soar as soon as these students are deemed employees unless a containment mechanism in a collective bargaining agreement governed wage practices, much like collective agreements in professional football and basketball control overall player salaries in those sports. It is possible, though, that the NCAA could put caps on wages and compensation and argue that those restraints are necessary to maintain the popularity of football and basketball to the consumer. In other words, the restraints would be procompetitive.¹⁴⁷ Those restraints could then possibly exist independent of the collective agreement.

1. Process: What will be the Extent and Scope of College Athlete Unionization and Collective Bargaining?

On the employee side, it probably makes the most sense for any college athlete union to be as big as possible in order to take advantage of

146. See Michael H. LeRoy, *How A "Labor Dispute" Would Help the NCAA*, 81 U. CI. L. REV. DIALOGUE 44, 45-46 (2014) ("In the long run, antitrust liability poses a bigger threat to NCAA interests than does player unionization. Therefore, it is in the NCAA's interest to embrace the union-representation process; engage in 'hard bargaining,' particularly because its bargaining strength is pitted against the weak bargaining power of college athletes; and anticipate implementing the terms and conditions of a collective bargaining agreement. By taking these actions, the NCAA would create a 'labor dispute' with players—and, according to the strictures of the Norris-LaGuardia Act and the Clayton Act, such a dispute would shield it from an injunction and potent antitrust remedies."); Edelman, *supra* note 39, at 1655, 1660 ("The 'non-statutory labor exemption' is a court-created exemption from antitrust law that insulates from scrutiny certain concerted conduct in labor markets. . . . [I]t is unlikely that the unionizing of a single college sports team would derail an antitrust lawsuit against the NCAA in any circuit. Simply stated, applying the exemption would not serve its core, intended purpose of protecting collective bargaining. Meanwhile, the greater the number of teams within any particular bargaining unit, the more likely that the 'non-statutory labor exemption' would preempt antitrust litigation under both the Majority View and the Second Circuit View.") (footnotes omitted).

147. According to one of the experts at the trial court level in *O'Bannon*, the payment of small amounts of compensation to athletes should not affect consumer taste for the sport, and hence would not be anticompetitive. See, e.g., *O'Bannon II*, 802 F.3d at 1079 (Thomas, C.J., concurring in part and dissenting in part).

the most leverage possible for any negotiations. Thus, most likely, any union suitor will try to organize one separate union involving all of the schools in the Division I Power 5 Conferences in football and basketball.¹⁴⁸

On the employer side it might be a bit trickier. The NCAA would most likely want the biggest multiemployer unit possible, and that might mean that it would want to negotiate and have all the schools together. This would allow for maximum leverage and would in the end create a single collective agreement, just like in professional football and basketball. A multiemployer group including all the schools and the NCAA will mean it will be much easier to set a cap on wages as well as other subjects of bargaining like healthcare that would apply to everyone. The NLRB, which would arguably have either jurisdiction or effective jurisdiction over everyone, including the public schools, if the NCAA is a joint employer,¹⁴⁹ has indicated, too, that it is concerned about labor stability in the context of college football and would favor a larger unit.¹⁵⁰ However, the NLRB explicitly left open in the *Northwestern University* case the question of the size of the bargaining unit, emphasizing that even a single college team unit, like Northwestern's, may be appropriate in the future.¹⁵¹

Nonetheless, given the money involved and the stakes generally, individual conferences and even individual schools might want to go it alone. While it is generally true that the Power 5 Conferences earn enough revenue through college football and basketball to be able to transition to an alt-labor world in which athletes are employees who share in program revenues,¹⁵² individual schools within those conferences and individual

148. Intercollegiate basketball organizing might be a bit more difficult to predict since there are a few teams outside the Power 5 Conferences that are ranked each year and are perennial contenders at the NCAA tournament. Some of these schools, including, for example, Gonzaga and Xavier, might be added to any list for potential organizing by a college union.

149. See Lonick, *supra* note 39, at 164-65 (arguing that the NCAA as a private employer controlling public and private colleges and universities may be viewed by the NLRB as a locus of control allowing the NLRB to assert jurisdiction over the NCAA and then through it to public institutions); *but cf.* Edelman, *supra* note 39, at 1648-49 ("If union organizers attempt to establish a multi-employer bargaining unit that includes all of the private colleges from within a single athletic conference (or multiple athletic conferences), the NLRB would likely have limited concern about 'stability in labor relations.' Indeed, this approach would likely lead to either the separation of the unionized schools into an independent, sustainable athletic conference, or an agreement by the non-unionized schools to voluntarily provide their athletes with the same terms of employment as schools where the athletes have the right to collectively bargain.").

150. See *Northwestern Univ.*, 362 N.L.R.B. 1350, 1355 n.28 (Aug. 17, 2015).

151. *Id.* at 1354 n.16; see also Edelman, *supra* note 39, at 1640.

152. See, e.g., Gould IV et al., *supra* note 39, at 58 ("However, it is important to note that the significant increase in revenues is already in place for schools in the Power Five conferences. This includes television contracts and revenues from the College Football playoff system. The schools in the Power Five conferences should clearly be able to afford significant increased benefits to student-

conferences within the Power 5 earn more revenue than others.¹⁵³ Thus, individual schools and conferences may try to break away from the others to achieve an advantage in recruitment. To a certain extent this is already materializing with respect to the stipends schools may now award to student-athletes as a result of the *O'Bannon* case allowing schools to pay student athletes an amount beyond a full scholarship that reflects the full cost of attending college.¹⁵⁴ One might imagine that a Notre Dame, an Alabama, an Ohio State, or a UCLA might well want to conduct their own negotiations and have their own agreement with players as to wages paid while signing on to any broad collective agreement for other terms and conditions of employment. So long as they pay more than the minimum required by any collective agreement, they would presumably be able to do so.¹⁵⁵ Teams may splinter along conference lines within the Power 5 as well. For example, if the SEC is much more well-heeled than the other Power 5 Conferences, as one suspects they might be, it might choose to try to encourage the NLRB to find an SEC-wide unit to be appropriate for purposes of unionization and collective bargaining. As a result of this, the NCAA may possibly try to cap wages independent of the collective

athletes (and this is without reducing the expense side of significant coaching salaries for coaches and staff, as well as significant facilities investments).”).

153. *Id.* (“Beyond the twenty programs in the Power Five conferences that reported a positive net generated revenue in 2013, the remaining 100 or so FBS institutions will face significant financial challenges [in converting to a system where student-athletes are employees] likely to have a substantial impact on their athletic department revenues. This group of institutions includes most of the forty-five remaining schools from the Power Five conferences.”).

154. See Jon Solomon, *Alabama's Cost of Attendance Stipend Will Rank Among Highest*, CBSSPORTS.COM (July 24, 2015), <https://www.cbssports.com/college-football/news/alabamas-cost-of-attendance-stipend-will-rank-among-highest-in-nation/> [<https://perma.cc/Y9G8-C5UD>] (“Alabama’s cost of attendance stipends will rank among the leaders nationally at \$5,386 for out-of-state players and \$4,172 for in-state players, according to information the university provided to CBSSports.com. . . . For years, athletic scholarships have not covered what university financial aid offices list as the full cost of attending college. That changes this August when athletic scholarships can include not only the traditional tuition, room, board, books and fees, but also incidental costs of attending college.”). See also Hank Kurz, Jr., *Stipend is helpful, moral, necessary*, Denver Post, Nov. 1, 2018, p. 7B; Will Hudson, *Cost of attendance stipends show which sports colleges want to spend on*, The Washington Post, May 22, 2015 (“The new “cost-of-attendance” stipends — money for gas, groceries, travel home and other similar expenses incurred by college students — are optional, and based on school financial aid office estimates. They vary widely between schools, but generally fall in the range of \$2,000 to \$5,000. . . . In and around Washington, how colleges are handling the stipends provides a microcosm of how this change is playing out across Division I, the financially disparate top tier of college athletics that includes wealthy powerhouses such as Texas and smaller institutions such as Howard. Many big schools in the so-called “power five conferences” are giving the extra spending money to all scholarship athletes, while some schools in smaller conferences are providing the stipends only to basketball players, or are declining to offer them altogether.”).

155. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (noting that individual contracts may add to, but not subtract from, collectively bargained contracts where there is great variation in the capacity of employees).

bargaining agreement and take their chances with antitrust liability since they conceivably can argue that such restraints might be procompetitive.

2. Substance: What will Athletes, Colleges, and the NCAA Bargain About?

Speculation about what elite student athletes and their union would want to negotiate about is not difficult. In fact, for guidance, one need not look much farther than the collective bargaining agreement between players and the NFL or the NBA. The revenue picture is very similar between college and professional football and basketball. Revenues include ticket sales; broadcast and rebroadcast rights; name, image and likeness (NIL) payments; and merchandising money. The NFL and NBA agreements also deal with player salaries, including salary caps. Likewise, any college agreement will probably discuss wages and scholarships, and the colleges and NCAA will likely insist on a wage cap for students. This cap might be as low as the minimum wage, depending upon whether the NCAA imposes such a cap or how much students will earn from other sources of revenue like NIL income and broadcast revenue. The most recent NFL agreement in 2011 provided for less share for players of locally generated revenue and merchandising but a greater percentage of TV broadcast money.¹⁵⁶ The NFL team owners were willing to share more of the money that the teams were not directly responsible for producing, like TV revenue.¹⁵⁷ College teams might approach bargaining the same way—allowing college athletes to keep more of the income coming from non-team/school dedicated sources like TV revenue and NIL monies while keeping more of ticket revenue, concession revenue, and merchandising dollars. Whatever revenue is allocated to students can be used to fund work study programs that will result in wage payments to college athletes.

Another area of possible bargaining will be in the area of healthcare. Healthcare concerns, including concerns about concussion protocols as well as the extent of medical coverage for college players, were the primary reason for the unionization effort at Northwestern University.¹⁵⁸ Here, also, student concerns coalesce with professional player concerns, at least in football. In the 2011 NFL collective bargaining agreement, for example,

156. See Katie Shonk, *For NFL Players, a win-win only in retrospect*, HARV. L. SCH. PROGRAM ON NEGOTIATION BLOG (Aug. 27, 2019), <https://www.pon.harvard.edu/daily/win-win-daily/for-nfl-players-a-win-win-contract-only-in-retrospect/> [https://perma.cc/BDN2-2AWS].

157. *Id.*

158. See Adam Gopnik, *Team Spirit*, NEW YORKER (May 12, 2014) (“The rationale for the players’ demands, which include concussion-testing, extended medical coverage, and more manageable practice schedules, is based on a real inequity.”); see also Gould IV et al., *supra* note 39, at 61.

professional football players bargained for and received a neurocognitive benefit for players with concussions and other injuries¹⁵⁹ as well as a decrease in the number of offseason practices¹⁶⁰ and contact practices¹⁶¹ as well as the elimination of “two-a-days.”¹⁶² College athletes may also be concerned about drug abuse and the overuse of pain killers.¹⁶³ They may well want these subjects addressed in any overall agreement.

Finally, and perhaps most importantly, college athletes will likely want to bargain about education. First, the matter of their survival as students. As the record developed by the Regional Director in the Northwestern University case shows, these athletes are already controlled to a significant degree in service of their work for the football team. And that’s under the present system where they are at least symbolically viewed as students and amateurs. Imagine the incentives for the schools to trample educational objectives when students are viewed as “employees” and therefore “professionals.” There may be protections in some NCAA rules, but true protection of educational objectives and outcomes will likely flow from a negotiated agreement. In addition, roughly one-fifth of men’s college football and basketball athletes fail to graduate, and although that figure is much lower than in the past,¹⁶⁴ it still might elicit concern by the players and their union. They might well want a collective agreement to address the topic.

IV. CONCLUSION

This article has maintained through an analysis of caselaw and recent developments involving states and the NCAA that the amateur status of student-athletes in revenue-generating college sports is no longer sustainable. The article discussed and analyzed what the future world of college athletes in revenue-generating sports as “employees” might look like, and in particular how such a world might be structured. The article has

159. NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, 2011 COLLECTIVE BARGAINING AGREEMENT, art. 65 (Aug. 4, 2011).

160. *Id.* at art. 21.

161. *Id.* at art. 22 §5, art. 23 §6.

162. *Id.* at art. 24.

163. See Gould IV et al., *supra* note 39, at 61 (“Unionization at the college level could have a dramatic impact, although instead of athlete compensation, the true focus of bargaining may turn out to be player concerns that are developing at the professional level as well, such as safety, concussions, and the abuse of painkillers.”).

164. See Michelle Brutlag Hosick, *DI student-athletes graduate at record high rates*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 16, 2009, 1:00 PM), <https://www.ncaa.org/about/resources/media-center/news/di-student-athletes-graduate-record-high-rates> [https://perma.cc/5Q24-TPV4].

shown that these student athletes can be paid through easy assimilation into existing college “work study” programs. The article has maintained that the transition from amateurs to employees will likely and necessarily lead to unionization and collective bargaining involving these particular athletes. In such a world, the NCAA, the Power 5 Conferences and the individual schools in those conferences will likely be “joint employers,” and there will be some issue about what might be appropriate bargaining units within which to bargain. The article ends by suggesting what might be the likely subjects of bargaining.

Importantly, this article steadfastly maintains that this future world must necessarily be a bifurcated one. Most college athletes will and should remain amateurs. Colleges, universities, the conferences and the NCAA will not be able to sustain financially an administrative structure in which all student athletes are viewed as employees. Nor is it necessary. The incentives for colleges and the NCAA to treat students as employees and not students, I argue, only exist with respect to those sports that bring in critical revenues for the college. Those sports are men’s college football and basketball (and possibly some women’s basketball teams) primarily in the Power 5 Division I Conferences. Fortunately, the revenues from these sports are so substantial that they can fund additional payments to these students for their work in generating this income. The practical and moral arguments for extending employee status to students in sports that do not generate this kind of revenue are much harder to make. In addition, extending employee status to students in non-revenue generating sports may lead to the elimination of those sports. Men’s college football and basketball are popular enough to survive the change.