Having trouble viewing this message? Please click here.

December 21, 2023

Cash for College Athletes, NIL Only Scratches the Surface

Authored by Natale V. DiNatale

Allowing college athletes to be paid for their name, image, and likeness (NIL) has changed college sports, but several decisions that are due in the coming months could make college sports unrecognizable. First, several tribunals could decide that college athletes are employees, not only of their college but also of the NCAA. Second, the NCAA and the "Power Five" Conferences could find themselves owing former college athletes billions of dollars because of past restrictions on NIL compensation. Third, if the NCAA's lobbying efforts are successful, Congress could intervene with a solution of its own. What's certain is that college sports will be different than they are today. This article provides some background on the various decisions that will serve as the basis for these changes.

Can College Athletes Unionize?

In September 2023, the Dartmouth College men's basketball team filed a petition seeking to be represented by a labor union. Employees can unionize, so the petition presents the question of whether college athletes are employees under the National Labor Relations Act (NLRA). That question requires that the National Labor Relations Board (NLRB) answer two questions: (1) can students be employees of their college and (2) is being an athlete employment?

The NLRB has already decided that being a student at a university doesn't prevent a person from also being an employee of that university. Recently, labor organizing has been rampant among both graduate and undergraduate students, *e.g.*, graduate teaching assistants, resident assistants, student dining service workers, and tour guides. The next question is whether an athlete can be an employee. Of course, many athletes have long been unionized, *e.g.*, NFL, NBA, MLB and NHL. Does it follow then that a student who is also an athlete can be an "employee." In 2015, football players from Northwestern University tested that question, but the NLRB refused to assert jurisdiction without deciding the question. In the Dartmouth case, that question is now pending before the Regional Director (RD) for the NLRB. A decision could come at any time.

A similar question is before an NLRB administrative law judge, where the NLRB's General Counsel is arguing that the University of Southern California's athletes are employees. Those athletes aren't seeking to unionize, but because the NLRA applies to non-union employees, the GC is arguing that both USC and the NCAA (as a joint employer) are violating the NLRA by not characterizing them as employees. That case is scheduled to be heard in December 2023 and January 2024, with a decision not likely until later in 2024.

Are College Athletes Due a Minimum Wage?

In February of 2023, in *Johnson vs. NCAA, No. 19-5230,* the Third Circuit Court of Appeals heard argument that the Fair Labor Standard Act applies to certain college athletes. Again, that question turns on whether these athletes can be employees, and, on this question, it's important to understand the difference between wages and NIL. Wages, such as a minimum wage, would be compensation directly from the college to the athlete. NIL payments come from arrangements with third parties, not the college or university. To draw an analogy with professional sports, wages are what a team pays an athlete (*e.g.*, Shohei Ohtani's 700 million dollar contract with the Los Angeles Dodgers) and NIL money is similar to what athletes get for promoting products (*e.g.*, Shohei Ohtani endorsing New Balance).

In the *Johnson* appeal, the NCAA and the universities involved in the case had asked the district court to dismiss the case, arguing that athletes are amateurs, not employees. The district court rejected the idea that the athletes could not, under some circumstances, be employees. The defendants appealed, arguing that current conditions

don't justify employee status. During argument, at least one of the three judges on the panel seemed inclined to agree with the athletes. As with the NLRA, a decision could issue at any time. Of course, if these athletes are employees, and colleges must pay them a minimum wage, could the colleges also elect to pay them more than the minimum wage?

More Antitrust Issues in the NCAA's House

In 2021, the United States Supreme Court concluded in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), that the NCAA had violated the Sherman Antitrust Act by limiting the education-related benefits schools could offer athletes, such as rules limiting scholarships for graduate or vocational school, payments for academic tutoring, and paid post-eligibility internships. Three days after the Supreme Court decided that case, a District Court judge refused to dismiss a different antitrust case against the NCAA. In *House v. NCAA*, 545 F. Supp. 3d 804 (2021), the plaintiff, a college athlete, argued that the NCAA's rules prohibiting the commercial use of his name, image, and likeness violated the Sherman Act. Recall, it was not until July 2021 that the NCAA began allowing college athletes to profit from their name, image, and likeness. Also, while the NCAA currently permits athletes to commercialize their name, image, and likeness, NCAA rules still prohibit conferences and schools from sharing the revenue that they earn from sporting events with the athletes. The complaint seeks both an injunction and damages for the period starting four years before the complaint was brought. In June 2021, the trial court refused to dismiss the case, and in November of 2023 the court certified class action status. As in *Johnson*, the NCAA has appealed the case to a circuit court of appeals.

The case is significant for at least two reasons. First, it would allow colleges to pay athletes *i.e.*, schools could share revenue they earn from athletics (*e.g.*, television broadcast revenue) with athletes, arguably allowing colleges and/or conferences to compete with each other for athletes on the basis of how much of that revenue they share with athletes. Second, because the trial court certified the case as a class action under the Sherman Act, possible damages are astronomical. Some have estimated damages at close to $4 billion.

NCAA Lobbying Efforts & A Recent Proposal to Pay Athletes

Against this avalanche of litigation, it's understandable why the NCAA is seeking legislative cover. The NCAA is lobbying Congress on these issues. Also, the NCAA recently suggested a proposal that would, among other things, allow schools to pay athletes $30,000. More specifically, the NCAA's proposal would do the following:

- In an apparent nod to *NCAA v. Alston*, it would allow Division I colleges and universities to offer athletes "any level of enhanced educational benefits they deem appropriate."
- In an apparent nod to *House v. NCAA*, it would allow Division I schools to enter into NIL licensing opportunities with athletes.
- In an apparent nod to *Johnson v. NCAA* and antitrust concerns, certain institutions (those with the highest resources) would be required to pay at least $30,000 into an educational trust fund for at least half of the institution's "eligible" athletes, who the proposal doesn't define. The proposal adds that these payments must be made within the framework of Title IX. These institutions would also be required to work with each other on certain policies (*e.g.*, scholarship commitment and roster size, recruitment, transfers, NIL). Interestingly, these are all policies that the NCAA currently regulates.

The NCAA suggests this model as an operating model for ongoing discussions with Congress about the future of college athletics. In other words, they've suggested it as a legislative solution for Congress to consider.

What's Clear is that College Athletics is Changing

Whether by judicial action, congressional action, or both, the world is changing for college athletics. With a proposal from the NCAA, compensation in some or multiple forms seems a forgone conclusion. What's unclear is how institutions will move forward with athletics in this new world. If Division I athletes are due wages and the revenue from broadcast rights must be shared, colleges and universities will almost certainly see less revenue. If that's the case, will many colleges and universities simply forgo Division I athletics for some or all students? If so, what will that look like and is that what will truly restore amateurism to college sports? And, if an institution elects to move away from Division I athletics, it should be aware of and prepare for the possible legal claims associated with that transition. In that regard, institutions will want to consult with competent legal counsel about what representations and promises they may have made in that regard, such as to students, coaches, sponsors, and benefactors.

For more information, contact the author listed above.

ABOUT ROBINSON + COLE

Robinson+Cole is an AmLaw 200 law firm established over 178 years ago, with a deeply-rooted culture of collaboration, civility, and inclusion. The Mansfield Rule Certified Plus-firm has more than 250 lawyers in eleven offices throughout the Northeast, Mid-Atlantic, Florida, and California, serving regional, national, and international clients, from start-ups to Fortune 50 companies. For more information, please visit www.rc.com.

Mansfield Rule Certified Plus 2022-2023

Boston | Hartford | New York | Washington, DC | Providence | Miami
Stamford | Wilmington | Philadelphia | Los Angeles | Albany | **rc.com**

© 2023 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson+Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson+Cole or any other individual attorney of Robinson+Cole. The contents of this communication may contain ATTORNEY ADVERTISING under the laws of various states. Prior results do not guarantee a similar outcome.

Robinson & Cole LLP | 280 Trumbull Street, Hartford, CT 06103 | rc.com

Unsubscribe gcarriuolo@rc.com

Our Privacy Policy |Constant Contact Data Notice

Sent byrobinson_and_cole_mailer@rc.com