Bloomberg Tax

Tax Management Memorandum™

Student-Athletes as Employees Spells Legal Stressors for Schools

By Jamila Brinson, John Jansonius, Greta Cowart, and Sang Shin

Jackson Walker LLP

The union-aspiring Dartmouth College men's basketball team has put the full court press on their "employer," labor agencies, and courts of law — with far-reaching legal and financial implications, according to Jackson Walker LLP practitioners.

Despite missing out on March Madness with a 6-21 record, the Dartmouth College men's basketball team created a little madness on their own when they successfully joined the Service Employees International Union Local 560.

This unprecedented maneuver has sent shockwaves across the National Collegiate Athletic Association, which has already been rattled due to new regulations on name, image and likeness ("NIL"). It came just one month after Laura Sacks, a Regional Director at the National Labor Relations Board, issued a ruling ("Sacks ruling") specifying that the Dartmouth players were "employees" of the New Hampshire-based institution and thus entitled to unionize. The 13-2 vote was said to be a quick one, as players had to warm up before the final game of the season. Dartmouth, the "employer," has filed an appeal.

Dartmouth has expressed that it will not bargain with the group, likely resulting in a refusal-to-bargain charge from the union. This charge will be filed at the Regional Office of the NLRB, which will review the process before the case goes to the First Circuit Court of Appeals. So the basketball team will have to wait a long time before they will have union representation at the bargaining table, and by the time that happens many of the players who voted Yes for organizing will have graduated.

Let's explore some of the far-reaching legal consequences of student-athletes becoming employees of their school, and discuss the impact it will have on employers in the private sector through various federal laws designed to protect employees.

Schools Looking at Potential New Financial, Legal Burdens

By way of the National Labor Relations Act, this decision will impose new or additional bargaining obligations on college and universities whose student-athletes decide to join a union. Section 7 of the NLRA specifically states in part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection … ." This, of course, will impose new obligations on school Human Resources departments, which often serve as key contact points between unions and companies.

Although the NLRB cannot assess monetary fines or impose punitive damages under the statute, colleges and universities will still encounter a new set of issues if they are charged with engaging in unfair labor practices as it relates to the unionized student-athletes, including forced investigations and possible financial liability. For example, assuming Dartmouth loses its appeal, the university could face charges in the future for refusing to bargain with the basketball team. The current basketball team, statistically one of the worst in the nation, could bring a charge against the school even though they have very little leverage to bargain. And this would be exacerbated if players from other sports decide to join a union as well. With 35 Division I athletic programs, Dartmouth could see the other 34 soon follow suit.

And employee charges to the NLRB are far from rare. Each year, the NLRB receives from employees and unions about 20,000 to 30,000 charges covering a range of unfair labor practices, according to its initial inquiry page on investigating charges. Each of these charges is followed by a lengthy investigation with a typical decision made within 7 to 14 weeks. *Id.* However, certain cases may take much longer. Fundamental to any investigation is fact gathering, and the NLRB is empowered to gather evidence and take affidavits from various parties and witnesses. *Id.*

While a final decision on the Dartmouth matter may be years in coming, future issues already loom large. The amount of time and resources that it will take to bar-

gain with student-athletes is substantial enough. But if a charge is asserted against schools, HR departments and administrative staff will likely be tasked with complying with the legal demands of a lengthy investigation. This, in turn, will take their attention away from the school's main purpose: providing an elite education to students. With this in mind, the NLRB importantly notes that monetary remedies for employees in 2023 were $56.9 million split among back pay and fines. There is a question of what back pay would even look like for student-athletes, as Sacks noted in her decision that the players were being compensated in the form of equipment, tickets, and meals. Aside from this, back pay and fines would add yet another financial stressor on schools and universities.

NLRB General Counsel Jennifer Abruzzo said a couple years ago that she may step away from the Board's historical refusal to exercise jurisdiction over state universities. Athletes at some Power 5 public universities reportedly are considering representation petitions — and that will test Abruzzo's willingness to break from tradition. The universe of higher learning institutions with sports programs that generate major revenue is very limited among private universities — not so in the public sector.

Another issue of interest is how NIL rights could pit teammates against each other if they were to become union represented. The union has a duty to represent the best interests of the whole unit, which could compromise the best interests of the star athletes on a team. Presumably a hybrid arrangement similar to that in professional sports could be worked out, but there would be multiple details to address for that to happen.

Employee Benefits, State and Federal Tax Responsibilities

With a push to label student-athletes as employees, this may not only lead to protection under various federal labor and employment laws, but will likely lead to a push for employee benefit programs such as health insurance, retirement savings, paid vacation days, and more. While employee benefits are beneficial to the worker, their costs could pose many problems for the school, its administrative staff, and the NCAA. Schools, which have never had to offer health insurance, retirement planning, and paid time off to student-athletes, will be put into a precarious position of figuring out how to implement these packages for athletes in various sports programs — many of which operate at a loss. It is unclear whether schools and their HR departments would be able to handle these new programs.

If new compensation and other forms of benefits flow to students, federal and state taxing authorities will want to have a say in the matter. If a student is classified as an employee on the HRIS system for employment law purposes, a student/employee will need to be allowed to defer into a 403(b) plan under the uniform availability rule if they will defer $200 per year or enter a 401(k) plan, and while retirement saving starting early is a good goal, most systems are not set up to offer student-athletes eligibility to enroll in the benefit plans to contribute toward retirement savings. *See* I.R.C. §403(b)(12).

A new group subject to employment tax means more financial and reporting responsibilities for the employer. Generally, employers must withhold federal income tax from employees' wages, including Social Security and Medicare taxes, the IRS explains. Employers will then have to deposit the withholdings. A failure to do so will result in an imposition of penalties by the IRS. *Id.* The schools and the NCAA are most likely familiar with this process because they already employ hundreds of people. But an influx of new taxable wages being paid to employees who have not provided tax identification numbers could cause an upheaval within these institutions, and for states that impose an income tax, the problems will only grow as state tax regulations will vary across the nation.

The problem does not end there. If a worker is misclassified for federal tax purposes, the IRS warns, the employer may be held liable for back taxes, penalties, and fines. Due to appeals, it will not be certain for a while whether student-athletes will be "employees" under the NLRA. In the meantime, it will remain unclear whether they are employees for federal tax purposes. However, the lack of clarity could impose stress on schools who do not wish to subject themselves to possible penalties for misclassifying their students.

Employers are also required to verify that a new employee is eligible to work in the United States, and under these circumstances,would need to obtain work authorization documentation from the employed athletes. However, many of these non-U.S. athletes would likely be attending school under a student visa, which does not allow for work authorization unless permitted by U.S. immigration officials. A newly recharacterized relationship with the school or university as an employed student athlete would certainly confuse the various governmental entities (i.e. U.S. Citizenship and Immigration Services and Immigration Customs Enforcement) that oversee visa compliance.

A Domino Effect?

Different laws define who is an "employee" using different standards due to the different purposes of the various laws. However, some laws may cause an employer to track each individual's employee status in the payroll or human resources information system (collectively the "HRIS"). Employers are not likely to maintain records of employee status under the separate laws. So while the laws have different definitions, a law requiring the inclu-

ISSN 0148-8295

sion of the individual as an employee in an employer's HRIS may dictate how the individual is treated for other purposes because the system says the individual is an employee. Once an individual is in the HRIS as an employee for calculation of overtime, it will include that individual for tax withholding and for benefits. So the potential domino effect is driven by the computer systems and not analysis under the various applicable laws. The NLRA is not likely to drive characterization in the HRIS, but the FLSA, which impacts how the individual is paid, is more likely to be reflected in the HRIS. Since the ability of these individuals to be treated as employees under the NLRA may not be fully resolved for years, any domino effect may be delayed for some time.

National Labor Relations Act

The NLRA does not apply to public employers. This was made clear when the NLRB declined to assert jurisdiction in a case concerning the Northwestern University football team's attempt to unionize, citing the disparity this would create among Big Ten Conference schools, the majority of which are not private, as referenced in the Sacks ruling. However, this ruling is still subject to change. The NLRB as well as its general counsel have taken the position that the NCAA and its conferences are "joint-employers" of student athletes. This position, though, has just become more difficult to justify due to a Texas district court's decision to strike down the NLRB's broad joint employer rule, as reported in a Bloomberg article. Even so, if this position is upheld under a more narrow view, both private and public schools would be subject to the NLRB's jurisdiction. And, as the Sacks ruling indicates, the NLRB would have no issue considering student-athletes as "employees" as most public schools offer the students athletic scholarships along with access to equipment, meals, and tickets.

So, what would this domino effect mean with regards to employment law outside of the NLRA? Once unions start to represent student-athletes, there may be a large push for employment laws to follow suit.

Title VII and Other Civil Rights Act Titles

To start, just because the NLRB found that the Dartmouth men's basketball team's players are employees of the school, this does not necessarily mean they are "employees" under other federal employment laws. Various federal laws differ in what constitutes an "employee." For example, the NLRA uses the common law test based on agency principles, where an employment relationship exists if the employer has the right to control the work process, as determined by evaluating the totality of the circumstances and specific factors, Charles J. Muhl explained in a Bureau of Labor Statistics publication. On the other hand, what constitutes an employee under Title VII of the Civil Rights Act of 1964 ("Title VII") depends on either the economic realities test or a hybrid of this test and the common law agency test. *Id.* Further, federal and state laws as well as the Employment Retirement Income Security Act of 1974 ("ERISA") supply their own definition of employee. *Id.* Complicating matters further, most employers keep track of their employees on a single HRIS, which does not differentiate whether an individual is an employee under different federal laws.

Regardless, we can reasonably imagine that some courts would follow the lead of the NLRB in finding that student-athletes are "employees" under Title VII. Title VII makes it unlawful for an employer to discriminate against an employee on the basis of race, color, religion, sex (including pregnancy, gender identity and sexual orientation), or national origin. Unlike the NLRA, Title VII calls for employers to be fined $50,000 or more ($300,000 for large companies) if they are in violation, the U.S. Equal Opportunity Employment Commission says on its website. Therefore, if the domino effect were to take place, larger public and private schools for whom the addition of student athletes may cause them to have more than 500 employees may be liable for large fines if they violate Title VII. Further, these violations and fines could tarnish the names of these schools and impact fundraising efforts. Even short of these worst-case scenarios, the EEOC's Formal Complaint and Investigation Process makes clear that the agency is empowered to investigate charges filed against employers alleged to have violated Title VII. Similar to investigations under the NLRA, schools and HR departments will be subjected to lengthy investigations and will likely be forced to expend time and resources to address new risks related to the conversion of athletes into employees.

Title VII also makes it unlawful for an employer to take a negative action, or retaliate, against a person because they either complained about discrimination or filed a charge of discrimination with an agency such as the EEOC.

Could "negative action" or "retaliation" include something like benching a player — or would it have to be a suspension or expulsion? If a school had to face allegations and investigations into a coach's decision to bench a player for another every time it happens, that would be a major detriment to the school and players alike.

Another issue that comes to mind is harassment. There is an element of tough coaching in college athletics — coaches yelling at players and imposing physical discipline in the form of exercise. This, under certain circumstances, could lead to a charge of harassment against a school. And, again, the school would have to face investigation and possible fines for tough coaching despite that ultimately being what is best for the team.

ISSN 0148-8295

Although most schools are subject to Title VI and IX, which prevent schools and universities from discrimination on the basis of race, color, national origin, and sex, student-athletes who become classified as "employees" will have new avenues of relief under Title VII, allowing them to bring complaints for circumstances described above.

Given the possibilities of these penalties, public schools may find it more suitable to restructure and outsource their athletic department. Even so, they would still be subject to Title VII under certain circumstances. Title VII applies to private-sector employers and state and local government employers with more than 15 employees. Avoiding the scope of Title VII would be immensely difficult due to the size of athletic departments. Keeping employment to less than 15 employees would be nearly impossible for even the smallest private schools.

Fair Labor Standards Act

In January, the U.S. Department of Labor issued its final rule on employee or independent contractor classification under the Fair Labor Standards Act, stating that the DOL will rely on the economic realities test to determine whether an individual is an employee. Before issuance of the new rule, when student-athletes had attempted to classify as employees of the NCAA under the FLSA. The Seventh and Ninth Circuit Courts of Appeal both ruled that student-athletes are not employees of the NCAA or their conference under the FLSA. However, the Third Circuit is still considering the issue in *Johnson v. NCAA*, the National Law Review reported.

If student-athletes were found to be employees under the FLSA, they would then be entitled to a minimum wage of $7.25 per hour and overtime pay at a rate not less than 1.5 times the regular rate of pay for every hour over 40 the student-athletes have worked during a week, under the Fair Labor Standards Act, according to a DOL page. According to NCAA bylaws, a student-athlete's participation in countable athletic activities shall be limited to a maximum of four hours per day and 20 hours per week. However, even if this is true across the country, the total amount of minimum wage owed to these athletes would be astronomical.

If the Third Circuit rules in the student-athletes' favor, this would further exacerbate problems due to a lack of uniformity. Take, for example, the Big Ten Conference. The conference consists of several schools in the Seventh Circuit, where the court already ruled that student-athletes are not employees. However, if the Third Circuit took an opposite view, schools like Penn State and Rutgers would fall within the FLSA's scope and their student-athletes would be entitled to minimum wage and other FLSA protections. This would create an odd dilemma where athletes of some schools within a conference would be entitled to benefits that athletes at other schools could not get. This would be a major administrative and operational headache for students, colleges and universities, and the NCAA.

Impact on Employers Outside of the University Setting

We will have to wait and see if this recharacterization of student athletes can spread to any other situations. Volunteers are able to walk away from their volunteer efforts and are in a different situation. We cannot address any of the other unique situations where unionization might be attempted.

Conclusion

The Dartmouth men's basketball team has truly made an unprecedented step in voting to unionize on March 5. The consequences of the team's decision don't stop with that team but could extend to all of collegiate athletics and might eventually touch on many areas of the law outside of the NLRA due to HRIS limitations, Title VII of the Civil Rights Act, the FLSA, and employment benefits and tax considerations. It remains to be seen how much bargaining power the Dartmouth team will have while they sit in last place in the Ivy League standings. While this decision may be good for some players, it could have a detrimental impact on their "employers" — colleges and universities — across the country, especially more budget-constrained ones for whom having to pay compensation and benefits to football and basketball players could mean revenue-negative sports programs.

How this evolves will be interesting to watch as it impacts college sports, recruitment and retention of players and how a coach interacts with the players with the threat of unionization on the horizon. Coaching in the collegiate ranks has always been a tough job. Player unionization won't make it any easier.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Jackson Walker LLP Partners Jamila Brinson and Sang Shin are based in Houston, Texas, while Partners John Jansonius and Greta Cowart are based in the firm's Dallas office. The authors thank Crespin Linton II for his substantial assistance in researching the article.

ISSN 0148-8295