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Insights

NLRB REGIONAL DIRECTOR DETERMINES DARTMOUTH BASKETBALL PLAYERS ARE EMPLOYEES

Feb 07, 2024

In a much-anticipated decision issued on Monday, February 5, 2024, Region 01 of the National Labor Relations Board (the "NLRB") decided that the players on the Dartmouth College men's basketball team qualify as employees under the National Labor Relations Act (the "NLRA") and have the right to unionize. The question of whether scholarship athletes at private colleges and universities in the biggest collegiate conferences in revenue sports like football and basketball should be considered employees is not a new one. But the Dartmouth case represents the first time the NLRB has been asked to address whether athletes who do not receive athletic scholarships in programs that are not profitable are employees. The Regional Director's answer—that the athletes are employees entitled to unionize and thus to collectively bargain for wages and other employment-related benefits—could impact the status of all athletes across all divisions and all sports, and therefore should be on the radar of every college and university sponsoring sports programs.

Though the Dartmouth decision is likely to be appealed and is an adjudication only of the rights of the single team, this alert provides insight now into the potentially wide-ranging implications that are worth taking note of because of two fundamental aspects of the decision. First, nearly every college athlete likely receives compensation under the Regional Director's broad definition of compensation. Second, most college athletic departments that implement NCAA, school, and team rules are likely to be considered to exercise "control" over their athletes. The combination of compensation and control could very well be sufficient for nearly all college athletes to be considered employees of their colleges and universities if the Dartmouth decision is upheld and the statutory framework applied similarly to future NLRB adjudications.

NLRB'S HISTORIC POSITION ON ATHLETES AS EMPLOYEES

The NLRB's position on the employee status of certain college athletes has vacillated over the past ten years. In 2014, the Northwestern University football team who received grant-in-aid scholarships sought to be recognized as employees under the NLRA. The NLRB Regional Director determined that those student-athletes were employees within the meaning of Section 2(3) of the NLRA. In 2014, the NLRB, however, declined to assert jurisdiction because the other schools in Northwestern's

conference, the Big Ten, were state-run institutions over whom the NLRB did not have jurisdiction. In 2017, the NLRB's general counsel issued a memo concluding that Division I FBS scholarship football players are employees under the NLRA. That memo was later rescinded. In 2021, the NLRB's current general counsel, Jennifer Abruzzo, issued a memo reinstating the 2017 memo and stating her position that certain college athletes are employees under the NLRA and thus are entitled to statutory protections. Abruzzo did not clarify which cohorts of college athletes will be considered employees beyond Division I FBS scholarship football players, leaving open questions for school-by-school and sport-by-sport adjudications.

DARTMOUTH: TEST CASE FOR NON-SCHOLARSHIP ATHLETES AT PRIVATE UNIVERSITIES

The Dartmouth case is the first instance in which non-scholarship college athletes have petitioned the NLRB for the right to unionize. The NLRB's memos have not addressed whether such athletes should be considered employees. Dartmouth argued that they should not be because its athletes are not receiving athletic scholarships, and thus are not receiving compensation to trigger the NLRA. Monday's decision makes clear that NLRB Region 01 believes that receiving an athletic scholarship is not the measure of "compensation" for purposes of determining if an athlete is an employee. The Regional Director took an expansive approach, finding that the "rudimentary economic relationship" between employer and employee "considers payments other than traditional wages" and does not require payments to be "large or otherwise significant in amount." Instead, a variety of benefits provided to college athletes will be considered compensation. For example, providing recruited athletes an "early read" for admissions (through which recruited athletes are provided an estimate of their financial aid packages early) provides clear, if intangible, value. The decision defines other "fringe benefits," such as equipment and apparel, tickets to games, lodging and meals, academic support, career development, sports and counseling psychology, sports nutrition, leadership and mental performance training, strength and conditioning training, sports medicine, and integrative health and wellness as compensation to athletes.

Most college athletes receive at least some of the aforementioned "fringe benefits" as a result of their participation in intercollegiate sports, whether they are scholarship Division I athletes in revenue sports or Division III athletes in less high-profile sports, none of whom receive athletic scholarships. Many college athletes also receive early consideration for financial aid and a thumb on the scale in the college admissions process, even if they are not scholarship recipients. Given the NLRB Regional Director's broad definition of compensation, this means practically any college athlete could be considered to receive compensation for purposes of determining if they are employees of their institutions if the combination of fringe benefits is deemed sufficient. This is important for colleges and universities who are engaging in preemptive strategic and financial planning to keep in mind because it is possible, if the Dartmouth decision is upheld and extended to other institutions' athletes, that practically all college athletes have the requisite economic relationship with their colleges and universities to satisfy the NLRA's definition of employee.

THE EXERCISE OF CONTROL OVER COLLEGE ATHLETES

The second key determination from the Regional Director is that Dartmouth exercises significant control over its basketball players' work so as to satisfy the NLRA's requirement that one be subject to the employer's control to be an employee. The Regional Director described in great detail the various ways in which Dartmouth exercises the right to control the work performed by its men's basketball team. Dartmouth's players are governed by the NCAA's extensive regulatory framework, as well as conference and school rules. The Regional Director focused in on the detailed ways in which those rules and regulations control athlete recruiting, how much an athlete can train, what benefits they can receive, how they must behave to maintain their amateur status, and whether they can engage in sports wagering, among many other areas of an athlete's life. The Regional Director also examined how the Dartmouth coaches often instructed their athletes to schedule their classes around practice schedules, and that there were consequences (running laps) if one were late for or missed a practice. The combination of all of these rules, combined with the Regional Director's conclusion that participation in athletic practice and competition had priority over academics, led her to find that Dartmouth has the right to control the work performed by its men's basketball team.

Any college or university sports program is governed by the rules of its various governing bodies (whether that is the NCAA, the NAIA, the NJCAA, or some other governing body), its conference, and its own institution. Though the rules may be more strictly enforced or impose more onerous demands on college athletes at the highest level of Division I revenue sports than for Division III athletes in relatively obscure sports, institutions should be on notice that the more regulated its athletes' participation in sports becomes, the more likely the NLRB is to find a level of control sufficient to trigger the NLRA.

KEY TAKE-AWAY: START STRATEGIZING NOW

These two key aspects of the Dartmouth decision suggest a broad swathe of the college athlete community may qualify as employees under the NLRA. It is important to remember, however, that the Regional Director's decision most likely will be appealed, and, even if upheld, is not binding precedent on any other group of athletes or institutions. Moreover, the decision does not address if and how the NLRB may assert jurisdiction over state-run institutions, though the NLRB's pending USC case asserts that the NCAA and Pac-12 conference are joint employers of USC athletes, which could trigger an extension of these rules to state schools around the country. With so many open questions remaining, the Dartmouth decision should not cause your institution immediate anxiety. Remember that every adjudication mandates a fact-specific analysis of the particular circumstances for each unit petitioning for approval to collectively bargain and the specific facts of your sports program's operations may yield a different result. Systemic change will not happen unless and until the NLRB engages in a rulemaking, a court determines that athletes are employees, or Congress acts. But the Dartmouth decision should be seen as a harbinger of potentially similar outcomes in the pending NLRB adjudication of similar claims regarding USC, and, potentially, with

respect to pending litigation under the Fair Labor Standards Act. As such, we advise college and university athletics departments to continue following these issues closely, and to continue to develop strategies for how your institution will finance and operate your sports programs if you must treat athletes as employees.

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