NLRB Regional Director Rules Northwestern Football Players Are Employees and Can Unionize

Client Advisories

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A National Labor Relations Board (NLRB) Regional Director announced a jaw-dropping decision this week that has the potential to forever change the face of college athletics in private universities. The NLRB Office in Chicago ruled this week that members of Northwestern University's football team who are receiving academic scholarships are "employees" within the meaning of the National Labor Relations Act (NLRA) and therefore, have the right to form a labor union. The decision has sparked a flurry of activity on both sports and legal blogs, as analysts speculate about the potential fallout of this unprecedented ruling. At this stage, more questions than answers have been raised, all of which will need to be sorted out as the case proceeds on appeal.

By way of background, the NLRB has jurisdiction under the NLRA, which applies only to *private* sector employers (and not *public* employers, such as state-run universities). The Act vaguely defines "employee" as "any employee..." Given this lack of guidance, federal courts have looked to the common law definition of "employee" in applying this definition. Under the common law, an employee is a person who performs services for another under a contract for hire, subject to the other's control or right of control, in return for payment.

The NLRB Regional Director used this broad definition to determine that players receiving scholarships are indeed "employees" under the NLRA, and therefore are permitted to unionize. In doing so, the NLRB relied heavily on the following facts:

- The University's football program generated revenues of approximately $235 million between 2003 and 2012, such that the players performed valuable services for the University.
- The players were "compensated" via scholarships equal in value of up to $76,000 per year.
- The players are engaged in football activities all year-round and devote between 40-50 hours a week to football activities during many months, which is often more time than they devote to academics.

- The football coaching staff exerted incredible control over the players, not only requiring them to practice and attend meetings on a rigid schedule throughout the day but also requiring them to seek some type of approval before they could make living arrangements, apply for employment, purchase vehicles, travel off campus, post items on social media forums, and speak to the media.

The Regional Director drew a distinction for "walk-on" players who were not receiving scholarships, noting that they were not "employees" because they were not getting paid these scholarship monies. So, he concluded that only *current* players who are receiving scholarships can legally seek to form a union.

The end result of the decision is that the NLRB ordered a union election among scholarship football players, who would be given the choice of whether they want to form a union to represent them against Northwestern University. A secret ballot election was scheduled for April 2014. However, this is not likely to take place at that time, because Northwestern University promptly announced that it will appeal the decision to the full National Labor Relations Board in Washington, D.C. In the event the full Board upholds the decision, this matter would almost certainly be appealed to the next level of appeal, a federal appeals court.

The Regional Director's ruling is detailed but also peculiar in several respects. For example, it is not clear why the level of revenues generated by the football program would matter, as a business's success (or lack thereof) is not a factor in the employees' right to organize. It is also unclear if scholarship players at private universities with less profitable football programs, or in less profitable other programs (e.g., the diving team), will also be given the right to unionize. And, the decision to exclude walk-ons seems debatable because they admittedly receive some minor compensation in the form of per diem funds.

Beyond the questions related to this case, going forward, the Regional Director's decision raises other questions as well:

- Are minimum wage and overtime laws somehow implicated under the Fair Labor Standards Act? While the answer would appear to be "no," because of the more specific definition of employee under that Act, there are virtually no case decisions on the subject.
- Will individual States use this as a guide to apply the same rationale to State-run universities (who are not subject to the federal Act but may be subject to State labor laws)?
- If the right to a union was upheld and a union was voted in, what exactly would the students seek to negotiate? More "pay" when the NCAA strictly regulates what can be paid? Would the amount of time spent at practice or at film study be negotiable? Would designing plays be within the University's "management rights" and therefore non-negotiable?
- And, critically, how the NCAA will respond, given its strict rules about how student athletes can be compensated and still maintain their amateur standing?

The Regional Director's decision has certainly caused a stir, so readers should stay tuned for how this issue is finally decided in the appeal process. If nothing else, the NLRB has stepped into the longstanding debate about whether student athletes at prominent sports programs should be paid.

If you have any questions about this advisory or other labor and employment matter, please contact any member of Archer's Labor & Employment Law Group in Haddonfield, N.J., at (856) 795-2121, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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