

Pooja Patel

Labor Law

Professor Bonett

Teammates To Union Members: Why Student-Athletes Should Be Considered Employees

I. Introduction

Samuel Gompers, a key figure in American labor history, once said, “We do want more, and when it becomes more, we shall still want more. And we shall never cease to demand more until we have received the results of our labor.”¹ These words were spoken at a time when labor unions were fighting for recognition. Since then, labor unions have evolved into the standard rather than the exception, and Samuel Gompers’ words still articulate the goals of unions.

Labor organizations allow workers to come together regardless of their differences to fight for better working conditions, fair hours, fair wages, and much more. As of 2022, there were 14.3 million wage and salary workers belonging to labor unions.² Unions have come to create implications for employees, employers, and society in general. The implications that labor organizations have brought with them range from positive to negative and big to small. Common opinion holds that unionizing is always beneficial for workers. While it is true that labor unions are usually advantageous to workers, there are also some drawbacks. It is crucial to analyze both the pros and cons of unionization in general and then as applied to the group of people seeking to unionize, before concluding whether unionizing would ultimately be advantageous or disadvantageous for that group.

It is no surprise that a sense of hesitancy arises when people seek to classify new groups as employees that can unionize under the National Labor Relations Act (“NLRA”). In particular, the idea of student-athlete unionization has been met with immense hesitancy. There has been a long-standing debate about student-athletes and whether they should be recognized as employees who can unionize under the NLRA. The question has yet to be answered affirmatively, but supporters and non-supporters have had plenty to base their arguments on as the question gets

¹ The Samuel Gompers Papers, *What Does a Working Man Want?*, <http://www.gompers.umd.edu/quotes.htm>.

² Department of Labor, *News Release Bureau of Labor Statistics* (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf>

revisited by universities and courts time and time again. For student-athletes, the benefits of unionizing outweigh the negatives. While student-athletes have not been historically recognized as employees who have the opportunity to unionize, the realities of what it means to be a student-athlete today demand a change. Therefore, student-athletes should be considered employees who are allowed to unionize under the NLRA; this paradigm shift is crucial for the well-being and success of student-athletes.

II. Background and History

A. The NCAA

The National Collegiate Athletic Association (“NCAA”) is a nonprofit organization that regulates student athletic programs at colleges across the United States.³ The NCAA was formed to protect student-athletes from exploitation amid growing concerns that college football was too dangerous.⁴ The threat of football being abolished because of the danger it posed led football representatives to gather together in an attempt to develop new regulations and safety measures for college athletes.⁵ Since then, the NCAA has come a long way, with more than 522,000 college athletes making up the organization today.⁶ The NCAA develops and maintains a wide range of rules, from rules regarding player eligibility to rules that address the health and safety of student-athletes.⁷ These rules are developed by representatives from NCAA institutions across the country who act as members of a committee.⁸ The NCAA Board of Governors holds the ultimate authority and manages NCAA-wide issues that can range from deciding where to

³ Matthew Lynch, *What is the Purpose of the NCAA? Everything You Need to Know* (Apr. 15, 2021), <https://www.theedadvocate.org/what-is-the-purpose-of-the-ncaa-everything-you-need-to-know/>

⁴ Tyler Epps, *What is the NCAA?* (Oct. 14, 2020), <https://www.bestcolleges.com/blog/what-is-the-ncaa/>

⁵ *Id.*

⁶ Christina Gough, *Number of Student-Athletes in the United States in 2022* (Mar. 23, 2023), <https://www.statista.com/statistics/1098761/student-athletes-by-gender/>

⁷ Epps, *supra* note 4.

⁸ Epps, *supra* note 4.

allocate funds to upholding equal opportunity measures.⁹ The Board of Governors also has the authority to require all member schools to follow certain policies.¹⁰

The NCAA is divided into three divisions, Divisions I, II, and III. Each college or university that is a part of the NCAA is a part of one of these divisions.¹¹ Schools decide which division they would like to be in and apply for membership accordingly.¹² D1 consists of the largest colleges and universities, and D1 schools have well-known athletic programs with large athletic budgets.¹³ D2 and D3 are home to schools that are smaller in size.¹⁴ D3 is the largest NCAA division, consisting primarily of private schools.¹⁵

Each division has a slightly different approach to the level of commitment required to the sport by a student-athlete. D1 athletes are expected to dedicate almost all of their time to the sport, prioritizing it over all else.¹⁶ D2 programs have a more balanced approach, though student-athletes are still required to train and practice immensely.¹⁷ Lastly, D3 programs are less demanding and intense than both D1 and D2 programs and emphasize a well-rounded college experience.¹⁸ The NCAA governs the eligibility of players for D1 and D2 athletes, whereas the school sets D3 eligibility requirements.¹⁹ In terms of scholarships, D1 schools provide their student-athletes with full scholarships and cost-of-attendance stipends; D2 schools provide

⁹ Epps, *supra* note 4.

¹⁰ Epps, *supra* note 4.

¹¹ Lynch, *supra* note 3.

¹² Lynch, *supra* note 3.

¹³ Smarthlete for Athletes, *College Divisions*, <https://www.smarthlete.com/intercollegiate/divisions>; NCAA, *Our Division I Members*, <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx>

¹⁴ Smarthlete for Athletes, *College Divisions*, <https://www.smarthlete.com/intercollegiate/divisions>

¹⁵ *Id.*

¹⁶ NCSA College Recruiting, *The Differences Between NCAA Divisions*, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions>

¹⁷ NCSA College Recruiting, *The Differences Between NCAA Divisions*, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions>; *Our Division I Members*, <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx>

¹⁸ NCSA College Recruiting, *supra* note 16.

¹⁹ NCSA College Recruiting, *supra* note 16.

partial athletic scholarships that student-athletes can combine with academic or need-based grants; and D3 schools are not permitted to provide athletic scholarships.²⁰

B. The term “student-athlete” and amateur status

The term student-athlete was coined in the 1950s by the NCAA’s first executive director.²¹ The definition provides that student-athlete means “an individual who engages in, is eligible to engage in, or may be eligible in the future to engage in, any intercollegiate sport.”²² The literal definition, while seemingly harmless, was a calculated move to avoid workmen’s compensation insurance claims for injured football players.²³ It has since continued to be used to classify athletes in a manner that strips them of certain rights and rewards for their athleticism.²⁴ The term student-athlete allows the NCAA to consistently reinforce the idea that athletes are students before they are athletes, and because they are students, they are not employees and therefore are unable to utilize any benefits that an employee might be awarded. The term has become common usage, and the NCAA has found a way to integrate it into all of its rules.²⁵

Additionally, the NCAA has an amateur requirement for all athletes.²⁶ An amateur is someone who chooses to participate in a sport purely for the love of it and does not expect compensation for athletic performance.²⁷ An amateur does not profit above his actual and necessary expenses or gain a competitive advantage in his sport.²⁸ The NCAA takes amateurism very seriously, and no matter the form or triviality of a gift or prize, athletes have to be careful

²⁰ NCSA College Recruiting, *supra* note 16.

²¹ John Solomon, *The History Behind the Debate Over Paying NCAA Athletes* (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>

²² 15 U.S.C. § 7801(9).

²³ Solomon, *supra* note 21.

²⁴ Solomon, *supra* note 21.

²⁵ *Id.*

²⁶ Breakout Sports, *What is Amateurism? And why does the NCAA care about it?* (Jan. 29, 2019), <https://breakoutsports.net/2019/01/29/what-is-amateurism-and-why-does-the-ncaa-care-about-it/>

²⁷ *Id.*

²⁸ *Id.*

with the things that they accept from others.²⁹ Not only can they be punished by a fine or be denied NCAA eligibility based on their amateurism status, but the NCAA also establishes rules that limit the type of compensation that member schools are allowed to give student-athletes.³⁰ The NCAA justifies this by contending that it distinguishes college and professional athletes.³¹

This justification allowed the NCAA to limit the benefits that student-athletes received from member schools to athletic scholarships capped at the cost of attendance and to prohibit non-cash education-related benefits, such as scholarships to attend vocational school, tutoring, or other academic benefits such as computers, science equipment, and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies.³² The recent landmark decision in *NCAA v. Alston* addressed this issue and held that the practice of prohibiting member schools from providing non-cash education-related benefits to student-athletes was a violation of the law.³³

Alston was brought by a group of student-athletes who alleged that the NCAA's rules limiting student-athlete compensation for education and performance-related payments amounted to anticompetitive price-fixing in violation of the Sherman Antitrust Act.³⁴ The NCAA, in response, asserted that the compensation limits it set were in place to promote amateurism and draw a distinct line between student-athletes and professional athletes.³⁵ The NCAA further

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Kwanghyuk Yoo, *SCOTUS Analysis: NCAA v. Alston* (Aug. 2, 2021), <https://law.emory.edu/news-and-events/releases/2021/08/scotus-yoo-ncaa-v-alston.html>

³³ *National Collegiate Athletic Association v. Alston*, 594 U.S. (2021).

³⁴ The Sherman Antitrust Act outlaws unreasonable restraints on trade, including contracts in restraint of trade. See Federal Trade Commission, *The Antitrust Laws*, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>

³⁵ *National Collegiate Athletic Association v. Alston*, 594 U.S. (2021).

argued that ruling in favor of the athletes could lead to a blurring of the line that they had worked to create between college and professional sports.³⁶

The Supreme Court held that the NCAA limit on education and performance-related payments violated the Sherman Antitrust Act and that while these limits did aid in drawing a line between college and professional athletes, the NCAA could have adopted less restrictive rules to reach the same result.³⁷ The Court further held that the NCAA had to allow for certain types of academic educational benefits beyond athletic scholarships and that benefits related to education are discernible from the compensation paid to professional athletes.³⁸ While the Supreme Court's decision did not provide a review of rules regarding compensation unrelated to education, the *Alston* decision has laid the foundation for potentially pulling apart these rules and dismantling the strict student-athlete label in future proceedings.

The NCAA is adamant in upholding the idea that the student-athlete label and the amateurism requirement and limits on compensation that come with it are meant to solidify the distinction between college and professional sports.³⁹ In reality, however, the label seems to do much more than that. The consequences created by these NCAA rules are ultimately beneficial for the NCAA, but they deprive student-athletes. First, it means that players cannot take advantage of workers' compensation for injuries because they are not employees but instead student-athletes.⁴⁰ Second, because they are students and are required to meet amateur status, they do not have to be compensated for their participation in the sport.⁴¹

The student-athlete label is a powerful one; it has helped the NCAA avoid numerous liability cases, kept the NCAA from being required to compensate student-athletes, and most

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *NCAA v. Alston*, 135 HARV. L. REV. 471, (2021).

⁴⁰ Solomon, *supra* note 21.

⁴¹ Solomon, *supra* note 21.

importantly, it has thus far prevented student-athletes from any attempts at unionization because under the NLRA, the right to unionize is only afforded to employees, and student-athletes are not considered employees, a concept that was solidified with the coining of the term student-athlete.⁴²

In many cases, the issue of unionization hinges less on whether a particular group of individuals should have the right to unionize and more on the reluctance of employers to permit such unionization. However, student-athletes are not faced with simply being unable to unionize despite having the right to do so; rather, they are faced with fighting to be recognized as employees under the NLRA, with powerful organizations and long-held legal traditions stacked against them. At the forefront of the unionization debate is the battle that supporters for student-athlete unionization confront in attempting to dismantle the antiquated term to fight for student-athletes to be recognized as employees.

III. Arguments For and Against Considering Student-Athletes Employees

The question of whether student-athletes should be considered employees of the universities that they play at has been a long and passionate debate that has far-reaching implications for both student-athletes as well as the world of college sports overall. On one side of the debate are those who champion the recognition of student-athletes as employees, contending that student-athletes dedication, commitment, effort, exposure to risk, and contributions to university revenue earn them employee status. Alternatively, those who oppose such employee status argue that the traditional understanding of the term student-athlete and the NCAA's model of amateurism needs to remain intact because granting student-athletes employee status has the impact of inherently altering collegiate sports. As this paper dives into the

⁴² Molly Harry, *A Reckoning for the Term "Student-Athlete"* (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete>,

arguments for and against considering student-athletes employees, it becomes increasingly clear that the intersection of sports and labor rights is not only complex but also evolving, and it challenges us to rethink the way we have traditionally looked at college athletics.

A. Arguments For

A handful of arguments in favor of recognizing student-athletes as employees have emerged since the start of this debate. This shift in people supporting the recognition of student-athletes as employees comes from a growth in acknowledgment that the student-athlete experience is not the same as it was when the NCAA first came into existence. A national survey conducted in August 2023 indicated that 64% of the Americans surveyed believe that athletes should be able to claim status as employees.⁴³ The changes in what it means to be a student-athlete have fueled people to believe that it is necessary to change the rights and recognition that are granted to student-athlete individuals, especially when they are already being treated as employees. Among the many arguments in favor of student-athletes being recognized as employees, the most convincing and popular are fair compensation, time commitment, injury protections, and unionization rights.

1. Fair Compensation

Currently, student-athletes do not have the right to ask for a salary from the universities that they play for; this is a consequence of NCAA rules that ban direct compensation to athletes.⁴⁴ The NCAA argues that a ban on direct compensation upholds the spirit of amateurism and draws a distinct line between professional athletes and student-athletes.⁴⁵ Those who

⁴³ Dan Wolken, *Survey Shows Most People Want College Athletes to be Paid. You Hear That, NCAA?* (Aug. 17, 2023),

<https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2023/08/17/ncaa-wake-up-college-athletes-paid-majority-survey/70613517007/>

⁴⁴ Grand Canyon University, *Should College Athletes be Paid?* (Jul. 26, 2023),

<https://www.gcu.edu/blog/business-management/should-college-athletes-be-paid>

⁴⁵ *Id.*

advocate for student-athletes to be recognized as employees believe that employee classification would enable student-athletes to demand the pay that they deserve.⁴⁶ Advocates believe that student-athletes deserve to be paid for several reasons. First, college sports generate a tremendous amount of revenue for universities through ticket sales, merchandise sales, and advertisements, while student-athletes are prohibited from profiting in any way from these revenues.⁴⁷ In 2022, the NCAA generated revenue of \$1.14 billion, which leads advocates to contend that if college sports generate billions of dollars, it is only fair that the athletes who are contributing to this revenue receive compensation.⁴⁸

Student-athletes' participation in revenue-generating sports allows universities to profit; this can be compared to employees contributing to a company's profitability. In response, people argue that student-athletes are already compensated in the form of scholarships.⁴⁹ However, not every athlete receives a scholarship, not every scholarship is for full tuition (only 1% of student-athletes receive a full tuition scholarship⁵⁰), and there are expenses beyond tuition that can add up.⁵¹ Moreover, not every school offers its athletes scholarships.⁵² For example, D3 schools do not give out any type of scholarship related to athletics.⁵³

Additionally, until recently, athletes were even restricted from profiting off of their name, image, and likeness ("NIL"), and universities and the NCAA were the only beneficiaries of the profit generated from a student-athlete's NIL.⁵⁴ This meant that student-athletes could not be paid for things such as autographs, personal appearances, affiliate/ambassador roles, public speaking,

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ ProCon, *Paying College Athletes - Top 3 Pros and Cons* (Mar. 27, 2023) <https://www.procon.org/headlines/paying-college-athletes-top-3-pros-and-cons/#arguments>

etc.⁵⁵ With the heat rising around the question of whether student-athletes should be considered employees and thus paid, the NCAA responded by implementing an interim NIL policy.⁵⁶ The policy allows student-athletes to benefit from their NIL as long as they follow the state NIL laws of where their school is located.⁵⁷ This temporary policy will govern until the NCAA adopts new NIL rules or federal legislation related to NIL is passed.⁵⁸ Advocates argue that this interim policy feels like a blurring of the line between professional and college athletics that the NCAA continuously refers to when justifying compensation restrictions. However, the NCAA still allowed it, and the next logical step forward would be to allow direct compensation.

Second, with their intense training, practice, and game schedules, being a student-athlete is akin to a full-time job, and athletes have no time to work an actual paid job that could help cover their expenses.⁵⁹ College athletes often struggle financially, with many living below the poverty line, despite the average football or basketball player being valued at well over six figures.⁶⁰ According to a study done by the National College Players Association in 2019, 86% of college athletes lived below the poverty line.⁶¹ Compensation would help combat some of the stress that athletes face by alleviating financial stress.

2. Time Commitment

Following the fair compensation argument is the contention that student-athletes spend as many hours a week practicing and training for their sport as employees spend working.⁶² Often,

⁵⁵ NCSA College Recruiting, *NCAA, Name, Image, Likeness Rule*, <https://www.ncsasports.org/name-image-likeness>

⁵⁶ Michelle Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy* (Jun. 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ ProCon, *supra* note 54. See also Michael A. Bongiovanni, *Compensation for the Players: An Analysis of the Compensation for an NCAA Athlete* 2020,

<https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1005&context=fulr-online-blog>

⁶¹ Ramogi Huma, *The Price of Poverty in Big Time College Sport*, <http://assets.usw.org/nca/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>

⁶² NCSA College Recruiting, *This Study Proves Just How Much Time College Athletes Spend on their Sport* <https://www.ncsasports.org/blog/study-time-demands-d1-studentathletes-excessive>

student-athletes may be left with even less free time than employees have because athletes have to split their time between being students and athletes. So, many advocates believe that student-athletes are already employees in all but name because of the expectations placed on them in terms of how much time they are required to dedicate to the sport, in addition to the fact that student-athletes are under the direct supervision and control of coaches who make decisions about their training regimens, conduct, playing time, etc., similar to how a supervisor would manage an employee's schedule.⁶³ While the NCAA limits the amount of time that student-athletes are allowed to dedicate per day for athletic activities to four hours, the reality is that student-athletes often end up committing at least 30 hours, and often more than 40, every week to their sport.⁶⁴ It seems that student-athletes are expected to perform for their universities in all the ways that employees do for their companies, but are not given any of the benefits in return for their commitment like employees are.

3. Injury Protection

A major argument for recognizing student-athletes as employees is that employee status will allow student-athletes to take advantage of workers' compensation. Workers' compensation is mandatory employer-financed insurance that protects people who are injured or disabled while working at their jobs through monetary awards.⁶⁵ Workers' compensation laws also provide benefits to the dependants of those who are killed because of work-related injuries.⁶⁶ An individual cannot utilize workers' compensation unless they are an employee of the organization.⁶⁷ This means that student-athletes are unable to receive workers' compensation

⁶³ *Id.*

⁶⁴ Brian Wakamo, *Student Athletes Are Workers - They Should Get Paid* (Oct. 24, 2019), <https://ips-dc.org/student-athletes-are-workers-they-should-get-paid/>

⁶⁵ Cornell Law Legal Information Institute, *Workers Compensation*.

⁶⁶ *Id.*

⁶⁷ Amy DelPo, *Are You Eligible For Workers' Compensation Benefits?* <https://www.nolo.com/legal-encyclopedia/are-you-eligible-workers-compensation-32963.html>

protection, despite the risky nature of sports and the high probability of not only minor, but potentially life-threatening, occurrences of sports injuries.

There have been many instances in which courts have denied providing workers' compensation benefits for college athletes, declining to do so on similar reasoning, namely that student-athletes are not employees and scholarships and the like do not constitute employment contracts that make them employees for purposes of workers' compensation. Many courts have also denied workers' compensation benefits on the basis that employment agreements do not exist between a university and a student-athlete because universities do not receive any direct benefits from an athlete's participation in university sports programs.⁶⁸

For example, in *Rensing v. Indiana State University*, the court decided against providing workers' compensation benefits to a student who fractured his spine while playing football, explaining that the student's athletic scholarship did not equate to pay, and the athlete was not an employee by any other means.⁶⁹ In *Cheatham v. Workers' Compensation Appeals Board*, the court denied workers' compensation to an injured wrestler, contending that the university received no benefit from the student's participation in the wrestling program and was therefore not an employee of the university entitled to workers' compensation benefits.⁷⁰ Courts have also declined such benefits to student-athletes by citing amateurism and the fact that the NCAA did not intend for student-athletes to be treated as employees who receive the same treatment as professional athletes.⁷¹

⁶⁸ Cori Smith, 118 CONN. INS. L. REV. 471, (2022).

⁶⁹ *Rensing v. Indiana State University*, 444 N.E.2d 1170 (1983).

⁷⁰ *Cheatham v. Workers' Comp. Appeals Bd.*, 49 Cal. Comp. Cases 54,55 (Ct. App. 1984); See also *Coleman v. Western Michigan University* 336 N.W.2d (Mich. Ct. App. 1986) (holding that plaintiff was not an employee entitled to workers' compensation because a university does not have a sense of control and discipline over a scholarship athlete and a scholarship does not constitute wages).

⁷¹ See *Waldrep v. Texas Employers Insurance Association*, 21 S.W.3d 692 (2000).

Many people strongly disagree with courts and the NCAA routinely denying workers' compensation benefits to student-athletes considering the risk that student-athletes face in playing sports. According to a 2015 report by the Centers for Disease Control, of the 500,000 college athletes competing between 2009 and 2014, there were more than 210,000 injuries per year.⁷² Research suggests that student-athletes who sustain injuries in college are likely to be left with lingering and chronic physical damage later in their lives.⁷³ Further, the injuries that student-athletes face can range from minor injuries such as ankle sprains, to life-altering injuries, such as traumatic head injuries and paralysis. Depending on the severity of the injury, there is a possibility that it will eliminate any chances that a student-athlete has to go pro, in addition to having to quit the sport indefinitely.

Moreover, a Harvard study has found that student-athletes often underestimate the risk of injury.⁷⁴ This means that student-athletes may not be making informed decisions when it comes to sports because of their lack of appreciation for potential health risks.⁷⁵ On top of this, athletes also feel internal and external pressures to play through their injuries and tend to ignore the severity of their injury to continue playing, ultimately making the injury worse.⁷⁶ While some injury insurance policies exist within the NCAA for student-athletes, injury insurance is a luxury reserved for the few, rather than the norm.⁷⁷ Allowing student-athletes the employment-related

⁷² Tom Dart, *College Athletes are Unpaid. What if Injury Ruins their Chance of Turning Pro?* (Sep. 6, 2021), <https://www.theguardian.com/sport/2021/sep/06/college-athletes-are-unpaid-what-if-injury-ruins-their-chance-of-turning-pro>

⁷³ J.D. DeFreese, *Health and Well-Being Measures of Collegiate Athlete and Non-Athlete Graduates* (2021), <https://journals.ku.edu/jis/article/view/13498/13739>

⁷⁴ Lauren Jett, *College Athletes Underestimate Risk of Injury* (Jan 7, 2021), <https://hcp.hms.harvard.edu/news/college-athletes-underestimate-risk-injury>

⁷⁵ *Id.*

⁷⁶ Anna Novoselov, *Athletes Feel Internal Pressure to Play Through Injuries* (Oct. 14, 2019), <https://saratogafalcon.org/content/athletes-feel-internal-pressure-play-through-injuries/>

⁷⁷ Savannah Putnam, *Protection for Play: Student-Athletes and the Renewed Fight for Workers' Compensation Benefits* (Jun. 23, 2022), <http://campbelllawobserver.com/protection-for-play-student-athletes-and-the-renewed-fight-for-workers-compensation-benefits/>

benefit of workers' compensation would provide athletes and their dependents with financial support for medical expenses and rehabilitation, as well as a source of money for some time if they were to sustain an injury that disqualified them from ever playing again.

4. Unionization Rights

Another argument for granting student-athletes employee recognition is that it would afford them the general rights that come with unionization. It would give athletes the ability to express their opinions on decisions that impact their lives as both students and athletes. First, being a part of a union would give student-athletes collective bargaining power. This allows all of the student-athletes at a university to band together and have a collective voice in discussions with the university, athletic departments, and the NCAA. Negotiating together as one uniform voice would provide student-athletes with more leverage than they would otherwise have, and provide them with more power to gain ground on the terms that they are seeking.

Second, a union can negotiate for improved playing conditions for student-athletes. Student-athletes commit an immense amount of time to their sport, and a union can attempt to implement hard limits on practice hours. A union would also enable athletes to negotiate for better healthcare benefits and medical coverage, as well as for safer playing conditions to limit the high risk of injuries faced by players. Another important benefit that a union could negotiate on behalf of student-athletes would be fair compensation. Compensation could be in whichever form the students at a specific university desire, ranging from hourly wages to stipends to scholarships. Regardless of the form, student-athletes need to be able to bargain for what they believe is fair.

In addition to support for physical protection, student-athletes would also be able to negotiate for mental health support through union membership. While mental health is often

overlooked, especially in collegiate sports, student-athletes experience a range of mental health struggles.⁷⁸ A 2021 survey by the NCAA found that approximately 30% of student-athletes self-reported that they had experienced mental health difficulties, while only 10% of student-athletes who struggle with mental illness seek help from professionals.⁷⁹ Student-athletes face pressures from both their academic responsibilities and athletic responsibilities. They are driven by high expectations and face pressure to perform well both on and off the field.⁸⁰ It is imperative to provide student-athletes with the ability to have their mental health struggles addressed. Being a part of a union would provide them with that ability, especially for those student-athletes who struggle to come forward about their mental health troubles, because it would allow them to take advantage of collective bargaining by not actually having to step forward and individually advocate for such benefits on their own behalf.

One of the primary benefits that student-athletes currently receive is athletic scholarships. Currently, there is nothing that protects student-athletes from scholarships being revoked or decreased; scholarships are only guaranteed for one year and are renewed if a student-athlete meets the coach's expectations and has no academic issues.⁸¹ Unions could ensure scholarship protection and work to make sure that the scholarship a student-athlete receives will not be revoked or decreased in amount and will remain for the full duration of a student-athlete's attendance at a university. Unions could work to create fair terms and conditions for the

⁷⁸American College of Sports Medicine, Statement on Mental Health Challenges for Athletes (Aug. 9, 2021), <https://www.acsm.org/news-detail/2021/08/09/the-american-college-of-sports-medicine-statement-on-mental-health-challenges-for-athletes>

⁷⁹ Trine University, *Prioritizing Mental Health in College Athletes*, https://www.trine.edu/academics/centers/center-for-sports-studies/blog/2022/prioritizing_mental_health_in_college_athletes.aspx; Grace Van Atta, *A Quiet Crisis in College Sports* (Sep. 8, 2022), <https://www.jhunewsletter.com/article/2022/09/a-quiet-crisis-in-college-sports>

⁸⁰ Trine University, *supra* note 79.

⁸¹ Thomas Anderson, *The Truth About "Athletic Scholarships"* (Feb. 15, 2020), <https://universitiesports.com/n/the-truth-about-athletic-scholarships#:~:text=With%20the%20exception%20of%20major,no%20academic%20or%20conduct%20issues.>

implications that an injury might have for a student-athlete's scholarships if they were unable to play so that the scholarship is still protected and an athlete's education is prioritized.

A union would also allow student-athletes to negotiate for educational support through services at school that would allow them to balance their sport and education better. Through their unions, students could advocate for universities to provide them with better assistance as they transition to post-college careers. While such things might seem costly, as established, college athletics generate a large amount of revenue for universities. Unions would encourage universities to be more transparent about how they are using the revenue generated by sports and insist that a portion be used for the benefit of the athletes through things like education support and assistance. In addition to advocating for academic support, union negotiations also have the potential to provide student-athletes with flexible class schedules and other resources that can help them balance both their academic and athletic responsibilities. Finally, an unexpected benefit of being a part of a union is that it would also provide student-athletes with a medium in which they could voice their thoughts and grievances about issues such as gender equity and diversity in college sports.

Overall, a union for student-athletes would provide them with a platform to collectively address the many challenges that they face living the life of both a student and an athlete. It would allow them to bargain for rights important to them and incentivize universities to treat them fairly and provide them with the compensation and benefits they deserve for the commitment that student-athletes make to the university and sport. A union would help level the playing field for student-athletes in that it would provide them with the power and leverage to advocate for themselves against universities and the NCAA in a manner that would be impossible on their own. Unionization participation has the power to make student-athletes

happier overall, which would subsequently make them better players on the field and better students off the field, ultimately benefiting the university in more ways than one.

B. Arguments Against

While the number of people supporting and advocating for student-athletes to be recognized as employees has been growing, many people, including influential organizations like the NCAA, remain opposed. They continue to fight against this idea and argue that recognizing student-athletes as employees has the potential to create far-reaching consequences that extend beyond the college athletics space. Among the arguments against recognizing student-athletes as employees, the most convincing and popular are the impact on amateurism, financial challenges for universities, and legal and administrative challenges.

1. Impact on Amateurism

One of the biggest arguments against student-athlete unionization that individuals, as well as the NCAA, rest on is that deeming student-athletes employees would destroy the concept of amateurism that collegiate sports are built on, blur the line between college and professional sports, and cause many students to prioritize the “athlete” in “student-athlete” before the “student” when the point of the student-athlete concept is to be a student first and an athlete second. If student-athletes were treated as employees, everything that would come with it would slowly chip away at amateurism.

First, it is built into the definition of amateur that amateur athletes do not receive direct financial compensation. If student-athletes were given employee status, they would be entitled to receive direct compensation, which goes directly against what amateurism stands for and brings collegiate sports one step closer to resembling professional sports. Opponents also argue that the amateurism model provides student-athletes with many opportunities and benefits, such that they

do not need to be compensated or treated as employees.⁸² Amateurism enables universities to provide athletic scholarships to students, which allows many students who would otherwise not be able to afford college to access it. If student-athletes were employees, universities may no longer give athletic scholarships, and be hesitant about how many athletes they take on a team.

Further, amateurism is meant to provide student-athletes with a balanced approach to being a student and an athlete, and it encourages students to commit to excellence in both areas rather than place more importance on one over the other. While being an athlete is part of their life, being a student should be the top priority for student-athletes, which is what the amateurism model attempts to protect.⁸³ If student-athletes were paid, opponents argue that it would cause them to prioritize the wrong thing when they should be focusing on their education and participating in sports because they love it, not because they are motivated by pay or other employee-related benefits.⁸⁴ Some opponents go as far as to say that student-athletes should not be able to profit off of their NIL either.⁸⁵ They believe that compensating student-athletes in any manner will wear away at the spirit of sports at all levels by creating a domino effect on the professional industry in addition to chipping away at the amateurism spirit of collegiate-level sports.⁸⁶ If money became the driving force for students or universities, it would have the devastating impact of turning collegiate sports into a profit-chasing entity that may lead to the unintended consequence of putting student-athletes' academic success and well-being on the back burner.⁸⁷

⁸²James Heckman, *Ending Amateurism Would be Disastrous for Student-Athletes* (Mar. 10, 2021),

<https://thehill.com/opinion/education/542471-ending-amateurism-would-be-disastrous-for-student-athletes/>

⁸³ Karissa Niehoff, *The NFHS Voice: Amateurism Must be Maintained to Preserve Education-based Sports* (Oct. 9, 2019),

<https://www.nfhs.org/articles/the-nfhs-voice-amateurism-must-be-maintained-to-preserve-education-based-sports/>

⁸⁴ Heckman, *supra* note 82.

⁸⁵ Niehoff, *supra* note 83.

⁸⁶ Niehoff, *supra* note 83.

⁸⁷ Jobs in Sports, *Why College Athletes Should Not Be Paid: A Complete Analysis* (May 29, 2023),

<https://www.jobsinsports.com/blog/2023/05/29/college-athletes-should-not-be-paid/>

2. Financial Challenges for Universities

There are many potential financial challenges that a university would face if student-athletes were treated as employees. Colleges would have to find the extra money to be able to make salary payments for a large number of student-athletes when athletic programs already seem to be struggling to break even.⁸⁸ While it is true that some large schools make millions in revenue from their sports programs, most institutions operate on tight budgets.⁸⁹

The financial strain of paying student-athletes may force universities to avert funds from not only other sports programs but also non-sport programs.⁹⁰ It could even lead universities to cut sports programs that do not bring in as much revenue as the more popular sports because there would not be enough funds to pay all student-athletes equally while also keeping all sports, making it inevitable that colleges would have to pick and choose between sports programs.⁹¹ The obvious choice would be to cut those sports programs that bring in less revenue because otherwise, it would lead to a cycle of never having enough money to pay the athletes on the high-revenue-generating sports teams. This would lead to decisions made by universities that impart the message that they believe other sports programs are not as important as the high-revenue-generating sports, creating a negative environment for those athletes.⁹²

The financial strain that universities would face from compensation responsibilities would also impact student-athletes directly.⁹³ The financial strain would cause a domino effect, with universities indirectly placing pressure on athletic programs to generate more revenue, in

⁸⁸ Maxwell Strachan, *NCAA Schools Can Absolutely Afford to Pay College Athletes, Economists Say* (Mar. 27, 2015), https://www.huffpost.com/entry/ncaa-pay-student-athletes_n_6940836

⁸⁹ Jobs in Sports, *supra* note 87.

⁹⁰ Jobs in Sports, *supra* note 87.

⁹¹ Alexandra Laurence, *Student-Athletes Shouldn't be Paid by Their Universities* (Aug. 31, 2021), <https://baylorlariat.com/2021/08/31/student-athletes-shouldnt-be-paid-by-their-universities/#:~:text=If%20a%20university%20starts%20paying,program%20would%20definitely%20get%20cut.>

⁹² *Id.*

⁹³ Jobs in Sports, *supra* note 87.

turn causing the athletic department to put pressure on student-athletes to win more than they have ever done before.⁹⁴ This emphasis on winning may dominate the importance of education and lead to burnout, injury, or academic difficulties as student-athletes navigate the pressure of prioritizing sports over their education.⁹⁵

Moreover, treating student-athletes as employees would also have implications for other students at universities in general.⁹⁶ Students may have their own tuition bills raised through higher athletic fees if student-athletes were to be paid.⁹⁷ Students at some universities already pay \$1,000 in athletic fees.⁹⁸ Others pay significantly more and are not even aware of it.⁹⁹ These fees account for multiple things related to a university's athletic department.¹⁰⁰ Additionally, schools with less successful or revenue-generating athletic programs might struggle to compensate student-athletes, which would lead to an imbalance between universities in addition to making it challenging for those universities to attract talent. Finally, paying student-athletes would require some sort of administrative support, which would lead to compliance and regulation costs, further straining university resources and increasing university costs.

3. Legal and Administrative Challenges

Opponents of student-athlete categorization as employees also argue that doing so would lead to extensive legal and administrative challenges for universities. First, treating student-athletes as employees would mean that universities would become responsible for a

⁹⁴ Jobs in Sports, *supra* note 87.

⁹⁵ Jobs in Sports, *supra* note 87.

⁹⁶ Matt Krupnick, *Would Your Tuition Bill Go Up If College Athletes Got Paid?* (Nov. 28, 2014), <https://money.com/college-athletes-sports-costs-students/>

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Merritt Enright, *Hidden Figures: College Students May Be Paying Thousands in Athletic Fees and Not Know It* (Mar. 8, 2020),

<https://www.nbcnews.com/news/education/hidden-figures-college-students-may-be-paying-thousands-athletic-fees-n-1145171>

¹⁰⁰ *Id.*

range of laws and regulations that do not currently apply to student-athletes.¹⁰¹ These laws include compliance with both federal and state labor laws, minimum wage laws, overtime regulations, and workers' compensation laws.¹⁰² Additionally, if student-athletes were to become part of a union, universities would need to arrange the staff, time, and effort to make it happen. Compliance with laws and regulations, in addition to meeting the demands of collective bargaining, would lead to administrative burdens for universities.¹⁰³

Further, the more laws and regulations that a university is required to comply with, the greater the risk of exposure to liability from lawsuits, which would place a further financial strain on universities and lead them to become more risk-averse in making decisions for the university. Additionally, employee status would create tax implications for universities and student-athletes. It may require universities to deal with additional tax obligations because of the compensation given to student-athletes, in addition to posing the question of whether athletic scholarships that student-athletes receive should be taxed in addition to compensation and how much.¹⁰⁴

Opponents also focus on the Title IX compliance issues that would come with categorizing student-athletes as employees.¹⁰⁵ Title IX prohibits discrimination on the basis of sex in any federally funded program or activity.¹⁰⁶ With college athletic programs, this means that universities are required to treat male and female student-athletes equally. Ensuring equal treatment for male and female students with compensation, benefits, workers' compensation premiums, and so forth would pose a massive challenge for universities.¹⁰⁷ As elaborated on

¹⁰¹ Ivan Maisel, *Paying Players Might Create Havoc* (Jul. 15, 2011), https://www.espn.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Jobs in Sports, *supra* note 87.

¹⁰⁶ U.S. Department of Education, *Title IX and Sex Discrimination*, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html

¹⁰⁷ Jobs in Sports, *supra* note 87.

earlier, compensating student-athletes is tied to a focus on revenue-generating sports, which historically have been football and basketball.¹⁰⁸ This leads to concerns about potential differences in compensation between male and female athletes.¹⁰⁹

IV. My Position: Why The Pros Outweigh The Cons

In the ongoing debate about whether student-athletes should be categorized as employees, a great number of perspectives and arguments have emerged. The many opinions on both sides shed light on the complexity surrounding the issue. There are many challenges and potential negative consequences in redefining the relationship between universities and their student-athletes. However, I believe that a compelling case has emerged in favor of recognizing student-athletes as employees, and the pros ultimately outweigh the cons.

To begin with, by common law definition, student-athletes are employees. The common law contends that generally, an individual is an employee if the person that the individual works for may tell the individual what to do and how, when, and where to do it.¹¹⁰ Additionally, the person who an individual works for does not have to give these orders but only has to have the right to do so.¹¹¹ It is no hidden fact that universities and the coaches they employ, in addition to the NCAA, have the right to tell student-athletes what to do, how to do it, and when and where to do it.

During my externship with a judge in the Eastern District of Pennsylvania, I was able to observe the third circuit oral argument hearing for *Johnson v. NCAA*.¹¹² The plaintiffs in *Johnson* made it pointedly clear that the NCAA and its member schools exercise significant control over student-athletes for their school schedules, travel, practice, and the extent of participation in

¹⁰⁸ Jobs in Sports, *supra* note 87.

¹⁰⁹ Jobs in Sports, *supra* note 87.

¹¹⁰ 20 CFR § 404.1007

¹¹¹ *Id.*

¹¹² *Johnson v. NCAA*, E.D. Pa. Oral Arguments Feb. 15, 2023.

athletic activities.¹¹³ The plaintiffs further stated that universities and their coaches can and do go so far as to keep student-athletes from majoring in certain subjects, such as biology, because of the demanding nature of the major, which would cause time to be taken away from practice schedules. Observing the hearing made me realize the extent of control universities hold over student-athletes, which solidified to me that an employee-employer relationship, as defined under the common law, does exist between universities and student-athletes. This notion is further supported by the National Labor Relations Board's General Counsel Jennifer Abruzzo's 2021 memo, in which she contended that she believes that student-athletes are employees under the NLRA and should be afforded all corresponding statutory protections.¹¹⁴

The three major drawbacks of categorizing student-athletes as employees that opponents focus on are the impact on amateurism, the financial strain it would cause on universities, and legal and administrative challenges. As for amateurism, I believe that it is an outdated concept that the NCAA continues to use as a shield from the obligations that would come with deeming student-athletes employees. College sports is vastly different from what it used to be; it has become a commercialized industry that generates significant revenue for universities and the NCAA, so much so that it is time to revisit the amateurism model. This is especially true given that athletes can now profit off of their NIL. This seems to go directly against the amateurism arguments posed by the NCAA and opponents alike, yet athletes are now able to do so. The progress in NIL seems to be a line blurred between professional athletics and college sports, yet it was deemed allowable, and in my opinion, it seems like one step away from compensation.

¹¹³ Josh Goldberg, *What You Need to Know About Johnson v. NCAA* (May 1, 2023), <https://www.gmlaw.com/news/what-you-need-to-know-about-johnson-v-ncaa/>

¹¹⁴ Jennifer Abruzzo, *Memo on Employee Status of Players at Academic Institutions* (Sep. 29, 2021), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>

Additionally, the demands on student-athletes are substantially higher than they used to be in terms of time and the physical and mental toll, and this requires a new approach away from amateurism that acknowledges the commitment that student-athletes make to their sport. Many people also argue that amateurism is important to keep student-athletes priorities straight and that they should only be playing the sport because they love it, not for money. If anything, having a stable source of income would decrease athletes' stress and allow them to do what they love with more passion, as well as focus on their studies and be able to afford what they need to succeed in school. Moreover, many employees also choose to work in industries because it is something that they love, but they get benefits and pay; just because someone is doing something that they love does not mean that they should not be given recognition for it.

Regarding the financial argument, it is true that it would create additional financial obligations for universities. However, they can likely afford it; even schools that generate less money seem to have the excess money available that would be needed, which could be made possible with a simple reallocation of resources or adjusting already high coach salaries.¹¹⁵ Finally, universities are already employers subject to federal and state labor laws. Adding an additional group of employees under their belt would not create so much of an administrative or legal burden that it would be impossible to manage. While in the context of student-athletes, it would be an unorthodox and new group, it would simply require some adjustment and trial before getting it right, as is the case with anything new in the law.

V. Conclusion

In conclusion, I believe that categorizing student-athletes as employees would lead to benefits that outweigh the potential drawbacks. Acknowledging student-athletes as employees addresses longstanding issues and is a step toward rectifying imbalances within college sports. It

¹¹⁵ Strachan, *supra* note 88.

has the ability to create a fair distribution of the immense revenue generated by college sports, which I think would ultimately encourage student-athletes to take advantage of their talents without compromising their educational aspirations. Some people also say that student-athletes should be paid, but not as employees.¹¹⁶ However, I do not agree. I think that students need to be recognized as employees so that they can unionize, which I believe is more important than simply being paid. Without a union, the inherent power imbalance between student-athletes and the university has the potential to cause further student-athlete exploitation. They need to be recognized as employees so that unions can speak up for them; payment alone, without a union, will not solve the many issues that student-athletes face. A right to unionize will guarantee that student-athletes rights are upheld and their concerns are heard.

How this would translate into reality is a difficult topic. Ideally, every sport should be able to unionize. However, I do not think this is realistic, so starting with the popular and most revenue-generating sports that seem to go through the most rigorous training with intense schedules like football and basketball seems like a good place to start. Additionally, it would likely be most effective to organize these unions on a school-by-school basis. I do not think that the unions would need to be organized on a sport-by-sport basis, as most student-athletes will generally have the same concerns, and trying to organize by sport would likely be too overwhelming. Regardless of how it is ultimately executed, student-athletes are employees in all but name and deserve to be recognized as employees who have access to the benefits that come with employee status under the NLRA.

¹¹⁶Adam Miner, *Student-Athletes Should be Paid - But Not as Employees* (Sep. 2, 2023), https://www.washingtonpost.com/business/2023/09/02/colleges-should-not-be-forced-to-pay-athletes-like-employee-s/d91ef142-498b-11ee-b76b-0b6e5e92090d_story.html