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Another Loss for the Claim That College Athletes Are Employees

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Last year the National Labor Relations Board ruled that it did not have jurisdiction to consider a petition by undergraduate football players at Northwestern University for recognition of a union and collective bargaining rights. The NLRB did not rule directly on whether student athletes could be considered employees, instead holding that college teams could not be bargaining units with organizing rights under the National Labor Relations Act.

Now the movement to have student athletes deemed employees has suffered a second loss. In the case of Berger v. National Collegiate Athletic Association, et. al., a federal judge in Indiana has rejected a claim by former track and field athletes from the University of Pennsylvania that they should be considered employees pursuant to the Fair Labor Standards Act. (See the opinion here.) The case was in Indiana because the plaintiffs sued not only Penn, but also the NCAA, which is headquartered in Indianapolis.

The plaintiffs offered what was essentially a fairness argument. They asserted that student athletes work just as hard on behalf of the university as students in work-study programs who are paid for part-time jobs. They also tried to analogize student athletics to internships, applying Department of Labor guidelines as to when interns should be recognized as employees.

In brief, the DOL's Intern Fact Sheet Test provides that interns should be paid the minimum wage and overtime pursuant to the FLSA unless the internship satisfies all of the following factors:

- Training in the internship is similar to what would be given in an educational environment;
- The internship experience benefits the intern and does not displace regular employees;
- The employer does not derive an immediate advantage from the intern's work;
- The intern is not entitled to a job at the conclusion of the internship;
- The intern and the employer have an understanding that the internship is unpaid.

The Indiana district court first held that regardless of the merits of the claim, the plaintiffs could at most proceed against Penn, and not against all of the members of the NCAA. As to Penn, the court did not directly address the factors on the Intern Fact Sheet, instead holding that the Intern Fact Sheet Test was plainly never intended to apply to student athletes, and that interns have always been considered to be in a working

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environment, and student athletes have not. The court then applied the "economic realities test" and held that athletic participation is part of the undergraduate experience and that student athletes have never been paid a minimum wage nor expected to be paid a minimum wage.

This was a very peculiar lawsuit. The main argument for treating players in major college football programs (like Northwestern in the Big Ten Conference) as employees is that the football programs act as a sort of minor league for professional football and earn significant revenue for the universities, with athletic scholarships being a form of compensation. It is no derogation of student athletics to point out that the track and field program at an Ivy League school such as Penn does not have any such commercial aspect. Although expressed in appropriate legalese, the court's ruling was essentially that the claim defied reality and that the definition of employment for purposes of the FLSA simply cannot be expanded to include interscholastic sports.

Tags: U.S. Department of Labor