NLRB General Counsel Seeks to Expand Labor Rights for Student Athletes

October 1, 2021

On September 29, 2021, the General Counsel for the National Labor Relations Board ("NLRB"), put colleges and universities on notice that she plans to prosecute cases against them for denying student athletes their rights under the National Labor Relations Act ("NLRA"). In a memorandum sent to all NLRB regional directors, the General Counsel clearly set out her position that the NLRA "fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions are employees under the NLRA."

The General Counsel's memorandum reignited the issue of whether student athletes are "employees" under the NLRA—an issue that had been largely dormant for the past several years. The issue is significant because if student athletes are employees, then they enjoy all the rights afforded to private sector employees under the NLRA, including the right to organize and to engage in protected, concerted activities. In 2015, the NLRB declined to exercise jurisdiction over football players at Northwestern University who were trying to form a union. Although at that time the NLRB effectively denied the players the ability to form a union, it explicitly left open the question of whether such student athletes could be employees under the Act.

In coming to her conclusion that student athletes can be employees under the NLRA, the General Counsel relied on the following factors presented in the Northwestern University case:

- The athletes perform services for the university which generate tens of millions of dollars in profit and provide a positive impact on the university's reputation, which in turn boosts student applications and alumni donations;
- The athletes receive significant compensation, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare;
- The NCAA controls the players' terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept; and
- The university controls the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules, and penalizes players for any college or NCAA infractions, which could result in removal from the team and loss of their scholarship.

The General Counsel also noted the following recent developments that, in her opinion, underscore the appropriateness and the need for expanding NLRA protections to student athletes:

- Increased activism by student athletes on racial justice issues;
- Activism by student athletes related to being able to play during the COVID-19 pandemic;
- The Supreme Court's ruling in *NCAA v. Alston*, which held that college sports is a profit-making enterprise and that NCAA rules limiting compensation for student athletes violates antitrust law; and
- The NCAA's decision to suspend the Name, Image, and Likeness ("NIL") rules for student athletes, allowing them to generate revenue for themselves through endorsements.

Finally, the General Counsel expressed a radical position that the mere labeling of players as "student athletes" is likely a violation of the NLRA because the label is "leading them to believe that they are not entitled to the Act's protection, [and] has a chilling effect on Section 7 [protected, concerted] activity." The General Counsel stated that, in "appropriate cases," it would pursue this independent violation of the NLRA, in addition to whatever rights an institution violated under the NLRA with regard to its student athletes.

Based on this memorandum, private institutions at all levels should be paying close attention to the activities of all student athletes—not just football players—and how they respond to them. As student athletes become more vocal in raising their concerns, they will likely pursue multiple avenues for redress. The General Counsel has paved the way for student athletes to air their grievances before the NLRB, creating additional risk for institutions who completely ignore how the NLRA may affect their relationships with student athletes.

Lathrop GPM is the designated representative firm for Minnesota, western Missouri and Kansas in the Employment Law Alliance (ELA), a powerful global practice network designed to help employers effectively deal with the highly complex and rapidly changing world of employment law and labor relations. For additional resources on labor and employment topics that pertain to higher education, please visit this ELA webpage.