Unionizing Student Athletes: One Opinion But Many Questions
Aron Karabel, Attorney, Labor & Employment

Inter-Collegiate athletics have traditionally been considered an avocation and not a vocation. Regardless of the size of the institution, athletic budget, or revenues generated, student-athletes have long been viewed as students first and athletes second. In a March 26, 2014 decision issued out of Region 13 of the National Labor Relations Board (“NLRB”), the traditional view strictly prohibiting compensation to student-athletes was squarely rejected, raising the specter of unionization of college athletics across the country. While the Decision will first be reviewed by the full NLRB and then by federal courts if the NLRB attempts to enforce it, in the meantime, TICUA members would be well served to review their athletic programs and scholarship criteria.

On January 28, 2014, Northwestern University’s scholarship football players filed a petition with the NLRB to be represented by the newly formed College Athletics Players Association (“CAPA”), a union formed specifically for this purpose and one that commentators suspect is affiliated with the United Steelworkers Union. The players asserted that they were entitled to union representation because their relationship with the institution was predominantly economic as opposed to academic, and that they met the definition of an “employee” (i.e., performing services under a contract-for-hire subject to control of an employer and in return for payment) under the National Labor Relations Act (“NLRA”). Northwestern opposed the petition, arguing that the players who received financial aid in the form of scholarships could not be considered “employees” because, among other things, the core mission of the University is academics first, and scholarships received by students have nothing to do with their on-the-field performance.

On March 26, 2014, the Regional Director issued a decision agreeing with the players and holding that they performed services for Northwestern under a contract-for-hire, subject to the University's control. Notwithstanding that scholarships are not taxable, and that none of the students had employment agreements, the Regional Director concluded that what players receive in scholarships for tuition, fees, room, and board, is compensation solely for athletic services provided to Northwestern, and that Northwestern benefited from these services that generate millions of dollars in revenue. The Regional Director further found that the relationship between Northwestern and its players was primarily economic in nature based upon the control Northwestern exerted over the players both on and off the field, and the number of hours expended by players in pursuit of football. What appeared to be most compelling, according to the Regional Director, was that players spent more time in pursuit of football than engaged in academics. While Northwestern has already indicated that it will appeal the decision, many commentators believe that the full NLRB will approve it, which will in turn likely lead to further litigation that could work its way all the way up to the United States Supreme Court.

What does this mean for colleges and universities with athletic programs in Tennessee?
While the legal wrangling has just begun and is far from over, there are several high level points to consider:

1. The Decision only applies to “private” institutions with inter-collegiate athletic programs because the NLRB lacks jurisdiction over “public” universities or “religious” based educational institutions.

2. The Decision may be extended to non-NCAA member institutions. While the Decision analyzes the status of football players that receive grant-in-aid scholarships within the context of the rules applicable to NCAA members, that analysis can equally apply to non-NCAA member institutions because those institutions can impose similar, if not, greater restrictions on student-athletes.
3. The Decision incites colleges and universities to avoid the "pay-to-play" mentality by encouraging them to analyze scholarship-based athletic programs by scrutinizing the purpose of athletic scholarships, the control exerted over student-athletes, the amount of time they expend on athletic pursuits as opposed to academic pursuits, and the revenues generated through such activities.

Even if the Decision becomes the law of the land, the analysis of whether student-athletes are "employees" for purposes of the NLRA will not only vary between institutions but also between intercollegiate activities within the same institution. The NLRB's analysis suggests that a powerhouse SEC school will be viewed differently by the NLRB than a smaller school with less revenue and fewer student-athletes. Those potential differences among schools who compete athletically in the same associations and divisions raises fundamental questions about whether the NCAA, NAIA, or any other association can function if participating institutions are subject to fundamentally different rules regarding their athletes.

If you have additional questions about the NLRB, please do not hesitate to contact the author or any member of Waller.

Waller is pleased to have partnered with TICUA to bring you this series of Legal Notes. If you have questions or suggestions for future topics, please contact Claude Pressnell (pressnell@ticua.org) or Waverly D. Crenshaw, Jr. (waverly.crenshaw@wallerlaw.com).

The opinions expressed in this article are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance.