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# TOPIC:

**Student Athletes: The Times They Are A-Changin'**

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# INTRODUCTION:

In June 2021, the Supreme Court of the United States issued its opinion in *National Collegiate Athletic Association v. Alston*, which narrowly addressed education-related benefits for student athletes in two Division I sports. The case, although limited in scope, put on display the changing landscape around student athletes and the benefits and payments they receive. As the summer of 2021 turned to fall, this changing landscape became more apparent. On the heels of the *Alston* decision, and facing mounting pressure from student athletes, schools, and state and federal lawmakers, the NCAA suspended its rules regarding name, image, and likeness; a class action lawsuit on behalf of student athletes alleging they are employees under the Fair Labor Standards Act took an unexpected turn; and the National Labor Relations Board's General Counsel issued a memorandum opining that certain student athletes at private institutions (and possibly public institutions) are employees under the National Labor Relations Act. In January 2022, the NCAA adopted a revised constitution that reflects the changing times. While much is still uncertain, it is clear that colleges and universities should reassess education-related benefits; name, image, and likeness policies; and the potential applicability of labor and employment laws with respect to student athletes.

# DISCUSSION:

A. The 9-0 *Alston* Decision

In late June 2021, the Supreme Court of the United States unanimously decided in the *Alston* case that college sports are a profit-making enterprise and rejected the NCAA's position that college athletics are exempt from the normal operation of the antitrust laws.[2] Justice Kavanaugh authored a much-discussed concurring opinion, in which he questioned whether academic institutions can continue to "justify not paying student athletes a fair share" of billions of dollars in revenue and suggested that student athletes could "engage in collective bargaining" to solve this problem.[3] He further noted that "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[4] Although the *Alston* decision was itself quite narrow, addressing the NCAA's rules on only certain education-related benefits provided to Division I Football Bowl Subdivision players and Division I men's and women's basketball players, the opinion—and Justice Kavanaugh's concurrence in particular—reflects changing attitudes about college athletes. As a result of *Alston*, schools are now free to offer a variety of education-related benefits to student athletes, such as study abroad scholarships, paid internships, computers and other equipment, tutoring, and up to $5,980 for "academic awards."[5]

Schools are already taking action. In the wake of *Alston*, the majority of the Power Five Conferences[6] stated they will allow their member schools to provide education-related benefits to student athletes, which could include the annual $5,980 per student payment for "academic awards." In November 2021, Ole Miss became the first school to provide such academic awards to its student athletes who meet certain academic requirements and are on an active roster (including walk-ons).[7] Sports Illustrated reported that Ole Miss will spend about $2.48 million dollars a year on the additional payments for eligible student athletes.[8] This year's payments will be funded by football season-ticket sales; going forward the payments will be a line item in the annual budget.[9] The University of Texas also announced in late November that it will provide eligible student athletes with a total of $5,980 in "academic achievement awards" beginning in Spring 2022.[10] These payments will arguably provide a recruiting advantage to these schools, and it is reasonable to assume many other institutions will soon follow suit.

B. Name, Image, and Likeness

The changes during the summer of 2021 did not stop with *Alston*. Typically, individuals have the right to control the commercial use of their identity, including their name, image, and likeness, which is known as the "right of publicity" or "personality rights." Historically, NCAA rules prohibited athletes from profiting from their name, image, and likeness. However, as of July 1, 2021, the NCAA adopted an interim policy suspending NCAA name, image, and likeness rules for all incoming and current student athletes in all sports.[11] At the same time, several state laws went into effect that allow student athletes to profit from their name, image, and likeness.[12] The key components of the NCAA's interim NIL policy are:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.
- Individuals can use a professional services provider (such as an agent) for NIL activities.
- Student athletes should report NIL activities to their school, consistent with state law or school and conference requirements.[13]

Importantly, NCAA Bylaws prohibiting improper recruiting inducements and "pay-for-play" (*i.e.*, compensation for athletic performance) are still in effect.[14] The NCAA's interim policy will remain in place until federal NIL legislation is enacted or new NCAA rules are promulgated. Notably, the NCAA's new constitution, which goes into effect in August 2022, requires each division and member institution to have a name, image, and likeness policy. There is currently an antitrust lawsuit pending in the same federal court in California that initially decided *Alston* in which student athletes seek damages against the NCAA and Power Five conferences for allegedly violating the antitrust laws by previously restricting their ability to profit from their NIL.[15] If damages are awarded in that case, they could be quite costly for the defendants.

C. NLRB General Counsel's Memo and Overview of the NLRB Process

The movement to provide additional compensation to student athletes is expanding to federal regulatory agencies. On September 29, 2021, the General Counsel of the National Labor Relations Board ("NLRB"), Jennifer Abruzzo, issued a memorandum (the "memo") setting forth her position that scholarship football players and "similarly situated"[16] players at private universities are employees under the National Labor Relations Act ("NLRA"). The memo relies on a common law definition of employee, which includes "a person 'who perform[s] services for another and [is] subject to the other's control or right of control," and notes that payment is "strongly indicative of employee status."[17] The memo further relies on "evidence" set forth in a prior memo from the NLRB, which concluded that scholarship football players in particular perform services for their institutions and the NCAA and receive compensation in the form of athletic scholarships; the NCAA controls the "terms and conditions of employment" (such as practice time, minimum GPAs, and scholarship eligibility); and the institutions also control 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."[18]

The memo states that, as employees under the NLRA, scholarship student athletes at private institutions have the right to engage in concerted activity, including seeking to form a union, protesting their working conditions, and striking or withholding their labor. Significantly, the memo asserts that the mere classification of football players (and similarly situated athletes) as "student athletes" violates the NLRA because it has a chilling effect on their right under the NLRA to address working conditions.[19] The memo also states that players engaging in demonstrations related to racial justice and the COVID-19 pandemic are organizing on issues directly related to their working conditions, and therefore are protected from retaliation.[20] Accordingly, although the memo is only advisory as to how the NLRB will process cases and not a statement of law, it opens the door for scholarship student athletes at private institutions to immediately seek recourse under the NLRA.

There are three main avenues of recourse student athletes at private universities might pursue: 1) filing an unfair labor practice charge with the National Labor Relations Board; 2) trying to form a union; and/or 3) striking or engaging in other concerted activity to protest allegedly unfair labor practices and/or to make economic demands (such as higher wages, shorter hours, or better working conditions).

Unlike the process for forming a union, a single student athlete can file an unfair labor practice ("ULP") charge. There are two likely grounds for filing a ULP charge: 1) an allegation that failing to recognize student athletes as employees violates the NLRA; or 2) an allegation that the institution interfered with the student athletes' rights to organize and engaged in a concerted activity under the NLRA (including, for example, that the institution took action against the students for raising concerns about racial inequities or COVID-19). If a student athlete or group

of student athletes file an ULP charge, the applicable Regional Office will investigate the charge, and, if found meritorious, will issue a complaint.

Given the position set forth in the memo, it is likely the Regional Offices will issue complaints in cases brought by student athletes seeking employee status. If a complaint is issued, one of the NLRB's administrative law judges will hold an evidentiary hearing and issue a decision. The decision can then be appealed to the NLRB, which accepts briefs from the parties and then issues a decision. The losing party can then appeal the matter to the federal circuit court of appeals with jurisdiction and ultimately can seek review by the United States Supreme Court.

On February 8, 2022, the National College Players Association ("NCPA") filed a ULP against the NCAA, Pac-12 Conference, the University of Southern California (a private school), and the University of California, Los Angeles (a public school), alleging the schools and organizations violated the employee rights of football and basketball players under the NLRA, including by misclassifying them as non-employee student athletes. It seems likely that similar ULPs will follow in other regions.

Another option is for student athletes to seek to form a union, although this process is more complicated than filing a ULP charge. In order to start the election process, a petition must be filed with the nearest Regional Office with at least 30% of the relevant group signing authorization cards.[21] Under ordinary circumstances, the NLRB will then conduct an election and if the majority of those who vote choose a union, the NLRB will certify the union as the representative for collective bargaining.

It is possible that the NLRB could be asked to rule on whether student athletes are employees entitled to form a union in the context of the union certification process, which would delay certification while the hearing process plays out with the NLRB and possibly the courts. For example, the memo notes that in 2014, student athletes at Northwestern University filed a petition with the NLRB's Chicago Regional Office to form a union of scholarship football players.[22] The issue of whether the scholarship football players were employees went to an administrative trial in front of the Regional Office, which determined that the players were employees entitled to the protections of the NLRA. The scholarship players then participated in an election. The university appealed that decision to the full NLRB and the votes were impounded. The NLRB did not issue a decision on the employee issue, but rather declined jurisdiction for other reasons, including that unionizing a small subset of student athletes at a private school would be chaotic since public schools in the same athletic conference are subject to different rules on unionization. In light of the changed legal landscape, the NLRB seems more likely to confront the issue now.

The NLRA applies only to private sector employers, and state and local government entities, such as public colleges and universities, typically are exempt from the NLRB's jurisdiction.[23] The memo, however, includes a significant footnote stating that "it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions."[24] The memo concludes that the NLRB's General Counsel would "consider pursuing charges against an athletic conference or association even if some member schools are state institutions."[25] As joint employers, the public school would be obliged to follow whatever rules and regulations the association or athletic conference must follow because the association and athletic conference would not be permitted to continue employing an athlete in a manner that violates the NLRA. Hypothetically, the public school ultimately may choose to leave the association or athletic conference so as not to be considered a joint employer such that the NLRA may apply. Alternatively, the association or athletic conference could ask the public school

to leave the association or conference if the public school refuses to comply with obligations of the NLRA that apply to the association or athletic conference. Moreover, state public relations boards could follow NLRB's lead and entertain petitions from student athletes seeking employee status. Public colleges and universities should consider the potential impacts of the expansive NLRB jurisdiction and the possibility that federal or state boards will recognize the employee classification of student athletes.

In short, while the memo is not a statement of the law, the NLRB's General Counsel (and the NLRB's regional offices) likely will take the position in investigations and litigation that certain student athletes at private schools are employees, and this could lead to impactful decisions from the NLRB and spawn additional litigation.

D. Litigation Involving Student Athletes as Employees

The question of whether student athletes should be considered employees also has been addressed by courts in recent years in the context of the Fair Labor Standards Act ("FLSA"). Specifically, two federal appellate courts have ruled that student athletes are not "employees" entitled to minimum wage compensation under the FLSA. In *Berger v. NCAA*, the United States Court of Appeals for the Seventh Circuit considered the "economic reality" of the relationship between student athletes and their schools and, relying in part on the "revered tradition of amateurism," concluded that the Department of Labor did not intend for the FLSA to apply to student athletics, which were "extracurricular" and "interscholastic" activities.[ 26] Similarly, in *Dawson v. NCAA*, the United States Court of Appeals for the Ninth Circuit ruled that student athletes were not employees of the NCAA or their athletic conference as the NCAA is more akin to a regulator than an employer.[27]

More recent rulings, however, indicate that this analysis is evolving. Relying heavily on Justice Kavanaugh's concurrence in *Alston*,[28] on August 25, 2021, a federal district judge in the Eastern District of Pennsylvania denied a motion to dismiss a complaint against the NCAA and institutions attended by the plaintiffs in which the plaintiff-student-athletes allege they are employees. In doing so, the court held that plaintiffs had plausibly alleged they are employees within the meaning of the FLSA.[29] Applying the same "economic realities standard" as in *Berger* and *Dawson*, the court reached the opposite conclusion—that student athletes can, depending on a totality of the circumstances, be employees within the meaning of the FLSA. The court reasoned that relying on the amateur status of student athletes to find they are not employees is "circular reasoning"—not paying student athletes is what makes them amateurs, but because they are amateurs, they are not entitled to compensation.[30] The court is currently considering Plaintiffs' Motion for Conditional Class Certification, to certify FLSA collectives encompassing all Division I student athletes who were regulated by the NCAA during the relevant period, and all Division I student athletes who played for the defendant-schools.[31] The NCAA and defendant schools sought permission from the district court to file interlocutory appeals of the motion to dismiss, which would require the U.S. Court of Appeals for the Third Circuit to review whether student athletes can be considered employees.[32] On December 28, 2021, the district court denied the NCAA's request for an interlocutory appeal, but granted the request from the defendant schools. Specifically, the district court certified the following question for appeal to the Third Circuit: "Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics."[33] On February 3, 2022, the Third Circuit agreed to hear the interlocutory appeal and will now consider this issue before the case proceeds in the lower court.

The analysis applied in such cases may be further impacted by the NLRB General Counsel's memo and her reliance on the common law definition of "employee" to conclude that student athletes are employees. Most courts incorporate the common law "right to control" test into their analysis of the economic realities of the relationship, either viewing the right to control as the most significant factor of the test, or as one part of a two-part analysis in which a court must consider *both* who has the right to control the worker *and* the economic realities of the relationship.[34] A shift in how student athletes are treated under the common law "right to control" test could expand the applicability of the FLSA and other labor and employment laws like Title VII and the ADEA to encompass student athletes.

E. Important Considerations, Title IX, Student Financial Aid, and International Student Athletes

While much is still unclear, education-related benefits, NIL policies and programs, and possibly treating student athletes as employees will have repercussions for compliance with other laws and regulations. In particular, educational institutions should anticipate compliance issues involving Title IX of the Education Amendments of 1972 (Title IX), eligibility for federal financial student aid under Title IV of the Higher Education Act of 1965, as amended (HEA), and visa conditions and immigration.

F. Title IX

The availability of education-related benefits, the administration of any NIL laws or policies, and student athletes as employees certainly raise novel Title IX considerations. Any institution of higher education that receives federal financial assistance is subject to Title IX and its prohibition of sex discrimination in education programs and activities, including in athletics and employment. If certain student athletes, such as NCAA Division I male athletes, receive education-related benefits or are employees who receive compensation from the institution, then an institution must consider how to provide "equal athletic opportunity for members of both sexes."[35] If, for example, male football players are considered "employees" and receive the benefit of compensation, then the institution may be required to provide female athletes similar opportunities. In large part because of this Title IX consideration, following *Alston*, many colleges and universities elected to provide education-related benefits to all eligible women's and men's sports teams even though the case only involved Division I football and basketball programs. Similarly, with respect to NIL laws, if a state law requires that an institution receive notice of and review NIL contracts, then the institution should make sure that it processes the NIL contracts as quickly for women as for men and provide similar support and resources. An institution likely will not be held liable under Title IX for any disparities between male and female student athletes with respect to outside organizations that may choose to engage in NIL agreements with individual athletes. The institution is not discriminating on the basis of sex in opportunities that organizations outside the institution may offer to student athletes. An institution, however, may be held liable under Title IX if the institution is part of an agreement or helps facilitate an agreement that allows only male or female student athletes to opt in or elect to receive NIL benefits. For example, if an institution enters into a collective licensing agreement with a company or brand and any student athlete, regardless of the team or sport, may opt in or elect to participate in an agreement directly with that company or brand to receive NIL benefits, then Title IX likely will not be implicated. If an institution's agreement with a company or brand provides that only male or only female student athletes or only athletes from male sports teams or female sports teams may elect to participate directly in agreements with a company or brand, then Title IX may be implicated. An institution may wish to carefully review its own agreements to determine whether these agreements provide equal athletic opportunity for both sexes.

Although one may argue that Title IX only applies to education programs and activities and should not apply to athletes if they are eventually considered employees and are part of the business operations of the institution, such an argument likely fails. Even if student athletes are employees, they receive the opportunity to participate in employment only because they are part of the education program and activity of the institution. If they were not students and if they were not part of the education program and activity of the institution, then they would not have the opportunity for employment as an athlete. Congress amended Title IX after the Supreme Court's ruling in *Grove City College v. Bell*,[36] limiting Title IX only to the specific program or activity that received federal financial assistance, and expressly stated that "program or activity" means all of the operations of a college, university, or other postsecondary institution, or a public system of higher education.[37] The Supreme Court also has ruled that Title IX applies to the employment of athletic coaches.[38] It would be inconsistent to conclude that Title IX applies to the employment of athletic coaches but not student athletes who may be considered employees.

The Title IX regulations regarding athletic scholarships may not be directly on point with respect to employment unless the scholarships are considered compensation. If scholarships are considered compensation, then federal courts and the U.S. Department of Education likely will turn to the substantial proportionality test in the U.S. Department of Education's Office for Civil Rights' ("OCR") 1979 Policy Interpretation: Title IX and Intercollegiate Athletics to determine whether proportionately equal amounts of "compensation" are available to men's and women's athletic programs.[39] If student athletes receive actual wages and not just scholarships, OCR may choose to enforce its regulations regarding employment to ensure that "employment is made available without discrimination on the basis of sex."[40]

G. Student Financial Aid

If student athletes receive additional payments, including academic achievement awards or NIL benefits, and/or are considered employees, federal student aid administrators will need to grapple with federal student aid regulations under Title IV of the HEA regarding the cost of attendance, estimated financial assistance, and income on the Free Application for Federal Student Aid (FAFSA). The FAFSA is a need-based financial aid application, and student athletes who are classified as employees or receive additional funding likely will qualify for less need-based financial aid. Additionally, student athletes who are employees may no longer be eligible to receive certain types of federal student aid. Title IV of the HEA requires the U.S. Department of Education to use a formula to determine financial need. A student's "expected family contribution" is calculated using a formula, and the "expected family contribution" is subtracted from the cost of attendance.[41] The student's income, if any, may be taken into account in calculating the "expected family contribution."[42] Accordingly, a student's financial need likely will be less if the student has sufficient income. Federal Pell Grants, for example, are awarded to undergraduate students who display exceptional financial need and do not need to be repaid. For example, in 2021-2022 the maximum expected family contribution for Pell grant eligibility is $5,846, which is quite low. As explained, above, if the student makes an income, then the student's income affects the calculation of the expected family contribution. The National Association of Student Financial Aid Administrators reported that in 2015-16, 48.5% of students on athletic scholarships also received need-based aid and 31.3% of scholarship athletes received a Federal Pell Grant.[43] Students on athletic scholarships currently may use a Federal Pell Grant for costs that the scholarship may not cover.[44] Colleges and universities should be mindful of changes to federal student aid for student athletes as a result of academic achievement awards, NIL benefits, or employment.

These concerns are already becoming a reality. In November 2021, *Sports Illustrated* reported that the U.S. Department of Education advised ACC officials that the academic payments stemming from *Alston* are part of a student athlete's financial aid package, are taxable, and must be reported on the FAFSA.[45] The U.S. Department of Education stated, however, that the academic payments will not impact a student athlete's Pell Grant funding.[46] Colleges and universities should carefully consider how to provide student athletes with any payments. For example, Ole Miss student athletes who receive federal financial student aid do not receive a check; rather, their payment goes directly toward paying off their student loans.[47] Other institutions like Iowa State University are planning to deposit the payments into a trust to be disbursed to athletes once they graduate.[48] How an institution distributes such payments may impact the cost of attendance and a student's eligibility to receive certain types of federal student aid as well as the amount of aid.

H. International Student Athletes

Classifying student athletes as employees or allowing student athletes to receive NIL benefits also impacts international student athletes residing in the United States on F-1 student visas. Generally, students on F-1 visas are permitted to work on campus but their off-campus employment opportunities are limited.[49] Authorized employment cannot exceed 20 hours per week while school is in session.[50] After their first full academic year, F-1 students may be authorized to pursue off-campus employment unrelated to their studies, but they remain limited to 20 hours per week while school is in session and must demonstrate that they are experiencing financial hardship. Under rare circumstances, F-1 students who can demonstrate that they are experiencing severe economic hardship may request employment authorization to work off-campus in a field unrelated to their studies.

Employment as a student athlete may be incompatible with many of the restrictions applicable to students on F-1 visas. If international students receive income from unauthorized sources (such as NIL in many circumstances) they may violate the conditions of their F-1 visas and the visas could be terminated. Educational institutions have a responsibility to inform their F-1 students about F-1 compliance rules, including the scope of permissible employment. This puts institutions in a very challenging position when it comes to fully including and supporting their international student athletes in their educational communities.

I. Where are we today?

Recognizing the need to "transform college sports," in late July 2021, the NCAA Board of Governors created a Constitution Committee to provide recommendations for restructuring the NCAA across all three divisions (I, II, and III).[51] The 22-person Constitution Committee[52] redrafted the NCAA Constitution with input from stakeholders in order to "propose dramatic changes . . . [and] to reimagine aspects of college sports so the Association can more effectively meet the needs of current and future college athletes."[53] The Committee proposed a draft Constitution in early November 2021, and provided its final recommendations to the Board of Governors in December 2021.[54] The new Constitution was approved at the 2022 NCAA Convention on January 20, 2022, with changes going into effect August 1, 2022.[55] The new Constitution embraces name, image, and likeness, ensures student athlete representation on governance bodies, and provides significant autonomy and authority to each of the three divisions.[56] For example, it requires each division and institution to maintain policies related to name, image, and likeness.[57]

As noted above, at the same time the NCAA and its member institutions are engaging in this work, litigation is winding its way through the courts related to name, image, and likeness and student athletes as employees, and the NLRB has made its position clear. There are significant challenges ahead, and institutions may wish to be prepared to address NIL policies, be aware of concerns under the NLRA, keep apprised of relevant FLSA cases, assess the Title IX implications of changes with respect to student athletes, raise awareness of potential tax consequences of compensation for student athletes, and determine any impact on visas for international student athletes. Institutions may take advantage of all the opportunities to support their student athletes through education-related benefits, proactive NIL support, and other legally permissible incentives. In doing so, colleges and universities may avoid student athlete dissatisfaction and in turn avoid lawsuits, ULPs, union campaigns, or other actions that may detract from the important role student athletes play at institutions.

# ENDNOTES:

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[2] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2152, 2158 (2021).

[3] *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J. concurring).

[4] *Id.* at 2167.

[5] Although the *Alston* decision pertained to only Division I FBS and basketball student athletes, the NCAA recently revised its operating bylaws (specifically, in Article 16) to make it clear that such education-related benefits may be provided to all student athletes – not just football and basketball players. (*See, e.g.*, 2021-22 NCAA Division I Manual, Operating Bylaw 16.3.4, at 238: "A conference or institution may provide the following benefits related to education without limitations: (a) Computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies; (b) Tutoring; (c) Expenses related to studying abroad that are not included in the cost of attendance calculation; and (d) Paid post-eligibility internships." (Adopted: 8/12/20, Revised: 10/6/21))

[6] The "Power Five" refers to the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and the Southeastern Conference (SEC).

[7] Ross Dellenger, "Ole Miss Breaks Ground on Post-Alston Ruling 'Extra Benefits'", *Sports Illustrated* (Nov. 20, 2021). Notably, Ole Miss wisely did not limit the payments to football or basketball players.

[8] *Id*.

[9] *Id*.

[10] "Texas student-athletes set to receive additional financial support", University of Texas Athletics (Nov. 24, 2021).

[11] Michelle Brutlag Hosick, "NCAA adopts interim name, image and likeness policy", NCAA (June 30, 2021).

[12] There are currently NIL laws or Executive Orders in effect in Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Washington, and West Virginia.

[13] *Id.*

[14] NCAA Interim NIL Policy (last accessed Feb. 16, 2022).

[15] *See In re College Athlete NIL Litig.*, Case No. 4:20-cv-03919 (C.D. Cal. filed June 15, 2020)*; see also Oliver v. Nat'l Collegiate Athletic Ass'n, et al.*, Case No. 4:20-cv-04527 (C.D. Cal. filed July 8, 2020).

[16] It is unclear exactly what Abruzzo means by "similarly situated" student athletes.

[17] Memorandum from the Office of the General Counsel, NLRB, at 3 (Sep. 29, 2021).

[18] *Id.* at 3–4.

[19] *Id.* at 4.

[20] *Id.* at 7.

[21] Alternatively, student athletes could demand voluntary recognition from their institution with 50% of the relevant group showing interest.

[22] Memo at pg. 2.

[23] 29 U.S.C. § 152(2).

[24] Memo at 9 n.34.

[25] *Id.*

[26] *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 291–93 (7th Cir. 2016).

[27] *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905 (9th Cir. 2019).

[28] *Johnson v. Nat'l Collegiate Athletic Ass'n*, --- F. Supp. 3d ----, 2021 WL 3771810, at *6 (E.D. Pa. Aug. 25, 2021).

[29] *Id.* at *6, 10–15.

[30] *Id.* at *5.

[31] Mem. in Support of Plaintiffs' Second Mot. For Conditional Class Cert., *Johnson v. Nat'l Collegiate Athletic Ass'n*, ECF No. 75, No. 2:19-cv-05230 (E.D. Pa. Oct. 13, 2021).

[32] Def.'s Mot. for Leave to Appeal, *Johnson v. Nat'l Collegiate Athletic Ass'n*, ECF No. 72, No. 2:19-cv-05230 (E.D. Pa. Oct. 8, 2021); Defs.' Mot. for Leave to Appeal, *Johnson v. Nat'l Collegiate Athletic Ass'n*, ECF No. 69, No. 2:19-cv-05230 (E.D. Pa. Sept. 29, 2021).

[33] Order-Memorandum, *Johnson v. Nat'l Collegiate Athletic Ass'n*, ECF No. 97, No. 2:19-cv-05230 (E.D. Pa. Dec. 28, 2021).

[34] *See, e.g., Miller v. Sam Houston State Univ.*, 986 F.3d 880, 890–91 (5th Cir. 2021) ("This court applies a two-step process for determining whether a defendant is an employer under Title VII. [O]ne component of this test is the right to control the employee's conduct. . . . Another component focuses on the 'economic realities' of the relationship . . . ." (omitting quotation and citations)); *Levitin v. N.W. Cmty. Hosp.*, 923 F.3d 499, 501 (7th Cir. 2019) (applying in a Title VII case the hybrid approach by looking to the factors of the economic realities test but concluding that the "right to control" is the most important factor).

[35] 34 C.F.R. § 106.41(c).

[36] 465 U.S. 555 (1984).

[37] 20 U.S.C. § 1687.

[38] 544 U.S. 167 (2005).

[39] 34 C.F.R. § 106.37(c).

[40] 34 C.F.R. § 106.38(a)(1).

[41] U.S. Dep't of Educ., Federal Student Aid, "Wondering how the amount of your federal student aid is determined?" (last accessed Feb. 14, 2022).

[42] U.S. Dep't of Educ., Federal Student Aid, Federal Need Analysis Methodology for the 2021-22 Award Year – Federal Pell Grant, Federal Work-Study, Federal Supplemental Educational Opportunity Grant, William D. Ford Federal Direct Loan, Iraq and Afghanistan Service Grant, and TEACH Grant Programs, 85 Fed. Reg. 34,605 (June 5, 2020).

[43] Owen Daugherty, Nat'l Ass'n of Student Financial Aid Adm'rs, "NCAA Permitting College Athletes to Profit Off of Name, Image, and Likeness Comes with Questions for Financial Aid Offices" (July 21, 2021).

[44] *Id.*

[45] Ross Dellenger, "Ole Miss Breaks Ground on Post-Alston Ruling 'Extra Benefits'", *Sports Illustrated* (Nov. 20, 2021).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] U.S. Citizenship and Immigration Services (USCIS), Students and Employment (last accessed Feb. 14, 2022).

[50] *Id.*

[51] Meghan Durham, "NCAA Board of Governors to convene constitutional convention", NCAA (July 30, 2021).

[52] The Committee is comprised of presidents, commissioners, athletic directors, and students from Divisions I, II, and III and independent members of the NCAA Board of Governors.

[53] Durham, "NCAA Board of Governors to convene constitutional convention", NCAA (July 30, 2021).

[54] Charlie Henry, "Constitution Committee introduces draft constitution", NCAA (Nov. 8, 2021).

[55] *Id.*

[56] *Id.*

[57] *Id.* Throughout this NACUANOTE, the authors have addressed student athletes in the same manner as the Supreme Court in *Alston* for consistency.

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