



A Robinson+Cole Legal Update

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The College Athlete Right to Organize Act – Labor Unions Enter the Pay-for-Play Debate

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The debate about compensating college athletes has presented itself in many forms recently, including a recent argument before the United States Supreme Court. As that notion gains momentum, U.S. legislators have stepped in by presenting legislation to ensure that labor organizations have their place at the table. On May 27, 2021, Senators Chris Murphy (D-CT) and Bernie Sanders (I-VT) and several members of the House of Representatives introduced legislation that would extend collective bargaining rights and the other protections of the National Labor Relations Act (NLRA or Act) to any athlete who receives any form of compensation from their public or private college or university and is required to participate in an intercollegiate sport. They call it the “College Athlete Right to Organize Act.”

The 2014 Union Petition by Northwestern Football Players

This legislation is not the first attempt to gain bargaining rights for college athletes. In 2014, members of Northwestern University’s football team filed a petition with the National Labor Relations Board (Board) asking that the University recognize the College Athletes Players Association as their exclusive representative for purposes of bargaining. While the Regional Director, Peter Sung Ohr (who is now the Board’s Acting General Counsel), agreed that players who receive scholarships are employees entitled to the rights and protections of the NLRA, the Board declined to assert jurisdiction. It did so without deciding whether the players are employees under the Act. In part, the Board declined because it does not have jurisdiction over public institutions, meaning that it maintains jurisdiction over only 17 of the 125 colleges and universities that participate in the same football division as Northwestern. The others are public institutions exempt from the Act.

The College Athlete Right to Organize Act Declares College Athletes Common Law Employees and Would Cover Both Private and Public Universities

The College Athlete Right to Organize Act addresses both of those issues. First, after denouncing the NCAA and its member institutions’ practices as “exploitive and unfair,” the College Athlete Right to Organize Act broadly declares that college athletes meet the common law definition of an “employee” because they “perform a valuable service... under a contract for hire in the form of grant-in-aid agreement.” Second, and more significant, the Act extends the NLRA to public institutions of higher education with respect to the employment of college athletes. Currently, the NLRA broadly excludes government entities.

Mandatory Multiemployer Bargaining Within an Athletic Conference

The College Athlete Right to Organize Act also introduces multiemployer bargaining as a matter of right by stating that “college athletes must be able to form collective bargaining units across institutions of higher education that compete against each other.” Thus, the College Athlete Right to Organize Act provides that the “Board shall recognize multiple institutions of higher education within an intercollegiate athletic conference as a multiemployer bargaining unit, but only if consented to by the employee representatives” of the players, meaning that multiemployer bargaining may proceed without the consent and over the objection of the colleges and universities. This change could have significant implications for colleges and universities operating within the same athletic conference, as it would require institutions with different resources, priorities and goals to approach negotiations with players in a generally uniform manner, which may not be suitable for a particular institution.

The Act’s Future

Whether the College Athlete Right to Organize Act gains any momentum remains to be seen. What’s clear is that debate around the issue of compensating college athletes is intensifying. As that debate matures, it seems that at least some legislators want to ensure that labor unions have a seat at the table.

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