Play for Pay? Bombshell Ruling Upends Amateurism in College Sports

Insights
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Earlier today, a federal appeals court became the first to rule that student-athletes at NCAA Division I schools can bring a lawsuit claiming they are employees and may be entitled to minimum wage and overtime payments under federal law. While not a final decision on the issue, today's ruling from the 3rd U.S. Circuit Court of Appeals paves the way for continued litigation and a potential trial, while also opening the floodgates for copycat litigation throughout the country. What does your athletic department need to know about this stunning ruling and what should you consider doing now?

How Did We Get Here?

In November 2019, former Villanova football player Ralph "Trey" Johnson, along with other former student-athletes, filed suit in federal court in Pennsylvania against the NCAA and several member institutions alleging that they were "employees" under state and federal wage and hour law and therefore entitled to unpaid minimum wage and overtime for time spent representing their institution in collegiate sports.

Several member institutions asked the court to dismiss the lawsuit, arguing that the student-athletes failed to allege facts establishing that they were "employees" under the Fair Labor Standards Act (FLSA). Specifically, they claimed:

- student-athletes are amateurs;
- the Department of Labor (DOL) has determined that interscholastic athletes are not employees under the FLSA; and
- the student-athletes did not plausibly allege they are employees under a number of multi-factor tests used to determine whether individuals are employees.

These arguments relied on decades of court precedent and DOL guidance, each concluding student-athletes were not employees. Despite this guidance, the district court denied the motion to dismiss the lawsuit, concluding that the complaint "plausibly alleges that NCAA D1 interscholastic athletics are not conducted primarily for the benefit of the student-athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student-athletes attend." Therefore, according to the district court, the student-athletes had "plausibly" alleged an employment relationship.

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employment relationship.

Flag Thrown: District Court Ignores Tradition of Amateurism, Finding Employee Status "Plausible"

Under the FLSA, plaintiffs must first establish that they are "employees." The FLSA intentionally defines "employee" in broad terms, leading courts to develop various multi-factor tests that assess all of the circumstances involving the whole relationship between the parties.

The schools argued that student-athletes have never been considered employees. Indeed, the 7th and 9th Circuits have expressly rejected such arguments. Moreover, the DOL reinforced that position with administrative guidance stating that interscholastic athlete participation in extracurricular activities does not create an employment relationship.

In *Johnson,* the district court applied a test that was developed for assessing whether and when an unpaid intern should be classified as an employee. The court used this test, known as the "primary beneficiary test" or the "*Glatt* test," to weigh seven factors:

1. the expectation of compensation;
2. the extent of training similar to that provided in an educational environment;
3. how much the activity is tied to the formal education program;
4. the level of accommodation of academic commitments corresponding to the academic calendar;
5. the extent to which the internship's duration is limited to the period it provides the intern with beneficial learning;
6. the extent of educational benefits from participation in the activity; and
7. if the activity is performed with entitlement to a paid job at its conclusion.

Ultimately, the district court found:

- the first and seventh factor supported amateur status;
- the second and fifth factors were neutral; and
- the third, fourth, and sixth factors weighed in favor of an employment relationship.

"Balancing all of these factors, and mindful that none of these factors is dispositive and that every factor need not point in the same direction," the district court ruled that the complaint "plausibly" alleged employee status, teeing up today's 3rd Circuit opinion.

3rd Circuit Carries Student-Athletes to the Goal Line

After more than fifteen months of deliberation, the much-anticipated decision adopted an even broader interpretation of "employee" with respect to student-athletes, holding "college athletes may be employees under the FLSA when they (a) perform services for another party, (b) necessarily and

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primarily for the other party's benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits."

The court did this, in part, by drawing on interpretations by the National Labor Relations Board in decisions involving graduate students and basketball players.

The 3rd Circuit flatly rejected the defense that the "history and tradition of amateurism in college athletics" should have any impact on the court's assessment of the claim. Instead, the appeals court found that the argument "that colleges may decline to pay student-athletes because the defining feature of college sports is that the student-athletes are not paid" is "circular, unpersuasive, and increasingly untrue."

Nevertheless, the appeals court critiqued the use of multifactor tests, noting these tests are not entirely appropriate for assessing the status of student-athletes due to the unique nature of their relationship with their universities. Therefore, the court vacated the district court's decision and remanded the case back to the district court "for application of an economic realities analysis grounded in common-law agency principles."

How Should Your School Respond?

While not the final say on the issue, the 3rd Circuit's decision will have a major impact on collegiate athletics throughout the country. As the concurring opinion noted, "the economic reality surrounding the compensation-bargain factor is in flux and will dramatically change even as the ink on this opinion is drying." Now is the time for athletic departments across all NCAA divisions to consider contingency planning in the following areas:

- **Financial Implications**: Universities might face significant financial burdens, needing to allocate substantial portions of their athletic budgets to athlete compensation. This shift could lead to increased tuition, cuts to non-revenue sports, or a reevaluation of the overall financial model of college athletics.
- **Legal and Administrative Changes**: Universities would need to establish frameworks for compliance with wage and hour laws (both federal and state), the National Labor Relations Act, potential collective bargaining agreements, and revenue-sharing mechanisms. This administrative overhaul will be complex and resource intensive.
- **Retroactive Liability**: A definitive ruling that some or all student-athletes are employees could result in wide-ranging retroactive liability under federal and state wage and hour laws, many of which include lengthy statutes of limitations and liquidated or punitive damages provisions.
- **Equity and Inclusion**: Any compensation models must address equity issues, ensuring that all athletes, regardless of sport or gender, benefit fairly. This consideration is crucial to maintaining Title IX compliance and promoting inclusivity in college sports, while also complying with federal and state equal pay laws.

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Conclusion

We will continue to monitor developments as they unfold. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. If you have any questions on how these developments may impact your operations, please do not hesitate to contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Sports Industry Group or our Higher Education Team or Wage and Hour Practice Group for additional guidance.

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