



# Game On: College Athlete Employment Status

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## A Few Questions

- Are college athletes really “working” when they get to compete at the highest levels in a sport that they love?
- How would the injection of unions into college sports change the game?
- What’s the difference between getting paid to sell hot dogs in the concession booth and playing ball on the field, generating the reason why there are hot dogs to be sold? Why is one an employee, and one not (at least for now)?
- As the *House* and *Johnson* cases continue to play out, what can schools be doing to put themselves in the best possible position?



## Agenda

- 1 | How Did We Get Here? A Brief Overview
- 2 | Revenue Sharing for College Athletes Under House v. NCAA
- 3 | Current Employment Status of College Athletes Under the FLSA
- 4 | Current Bargaining Rights of College Athletes Under the NLRA
- 5 | Round Table Discussion: What Does This All Mean?



## The NCAA Is Rooted In the Concept of Amateurism

- **1906: NCAA's First Constitution**

“Amateurism” defined:

“No student shall represent a College or University in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial concession . . .”

# Key Challenges to Employment Status of College Athletes in the Last Decade

**2013-2014:** College Athletes Players Association filed a petition to represent Northwestern University football players on scholarship.

NLRA enacted in 1935. Section 7 provides:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”



## Key Challenges to Employment Status of College Athletes in the Last Decade

- **2014:** Chicago NLRB Regional Director rules that Northwestern University football players *who receive scholarships* are employees of the university, have the right to form a union and bargain. Northwestern appeals to full NLRB.
- **2015:** NLRB unanimously dismissed the petition, but did not address the merits.

“Even if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team’s players.”



# Key Challenges to Employment Status of College Athletes in the Last Decade

***Berger v. NCAA (7th Cir. 2016)*** Former U. Penn. women's track and field athletes sued Penn, NCAA and 120 D1 colleges and universities seeking minimum wage under the federal Fair Labor Standards Act

FLSA enacted in 1938. Some key definitions:

- “Employee” means “any individual employed by an employer”
- “Employer” “ includes “any person acting directly or indirectly in the interest of an employer in relation to an employee”
- “Employ” means “to suffer or permit to work”
- “Work” is not defined.

## Key Challenges to Employment Status of College Athletes in the Last Decade

*Berger* upheld District Court's decision to dismiss Plaintiff's complaint for failure to state a claim. Declines to adopt **any** multifactor test.

Key factors:

- “[T]here exists a revered tradition of amateurism in college sports.” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 120 (1984)
- DOL’s Field Operations Handbook exempts students in extracurricular, interscholastic athletics.
- Voluntary participation: Student-athletes play without expectation of income; their play is not “work” under FLSA.

## Key Challenges to Employment Status of College Athletes in the Last Decade

***Dawson v. NCAA, Pac-12 (9th Cir. 2019)***. Plaintiff, a USC football player, claimed employment by NCAA and Pac-12 under FLSA, not USC.

Applied economic realities test to determine employment status under FLSA. Looks at:

- Expectation of compensation.
- Power to hire and fire.
- Evidence of evading the law.

Upholds District Court's dismissal, finding Plaintiff did not meet the test; NCAA and Pac-12 did not perform these factors.

- **Conclusion:** NCAA and Pac-12 are regulatory bodies, not employers under FLSA.



## ***Alston v. NCAA* (2021) Disrupts the Landscape**

- **Question:** Do NCAA rules limiting education-related benefits for student-athletes violate antitrust law (Sherman Act, § 1)?
  - **Trial and appellate courts:** Declined to enjoin NCAA's rules on non-education-related compensation (e.g., athletic scholarships). Enjoined NCAA from limiting education-related compensation/benefits for D1 football and basketball players. Supreme Court affirmed.
  - Clarified that “stray comments” on amateurism in *NCAA v. Board of Regents* “were dicta and have no bearing on whether the NCAA’s current compensation rules are lawful. . .”



## ***Alston v. NCAA (2021)*** **Kavanaugh's Concurrence**

- “[T]he NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive. “
- “The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: **The NCAA’s business model would be flatly illegal in almost any other industry in America.**”
- “If it turns out that some or all of the NCAA’s remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue.”



## ***Alston v. NCAA (2021)*** **The Immediate Fallout**

- NCAA voted of its own accord to allow NIL compensation for student athletes.
  - **The idea: let players endorse products, and be paid for those endorsements**
- September 2021 – Then NLRB General Counsel Jennifer Abruzzo issues memo to all NLRB Field Offices on the classification of college athletes as employees under the NLRA.
  - Citing *Alston*, she states that the General Counsel’s position is that “the scholarship football players at issue in Northwestern University clearly satisfy the broad Section 2(3) definition of employee and the common-law test.”

## Where Are We Now

### *House v. NCAA Settlement*

- **House v. NCAA:** Class-action lawsuit on NCAA's restrictions on student-athlete compensation, NIL rights, and revenue sharing.
- **May 2024:** NCAA settles for ~\$2.8 billion, allowing funds distribution to Division I athletes since 2016 and introducing a revenue-sharing model.
- **September 2024:** U.S. District Judge Claudia Wilken halts final approval, citing concerns and third-party objections. Final approval hearing set for April 7, 2025.
- **If Approved:** New revenue-sharing model to start in the 2025-26 academic year.

## Where Are We Now

### *House v. NCAA Settlement – The Changes*

- **Revenue Allocation:** Schools can allocate up to 22% of annual revenue, capped at ~\$22 million per institution, to student-athletes.
- **Optional Model:** Revenue-sharing is optional, not mandatory.
- **Title IX Compliance:** Payments are capped for fairness and Title IX compliance.
- **Non-Participation:** Schools opting out cannot directly pay athletes.
- **Third-Party Collectives:** Schools may use third-party collectives for athlete compensation.
- **Potential Issues:** Inconsistencies and conflicts with the settlement framework.



## Where Are We Now

### *House v. NCAA Settlement – The Concerns*

- **Employment Status:** Revenue sharing resembles an employer-employee relationship, prompting scrutiny and legal challenges.
- **Tax Implications:** Reported on Form 1099-NEC as self-employment income, subject to income and self-employment taxes.
- **Release:** Settlement includes a waiver of past compensation claims.
- **Title IX:** Payments must balance gender equity, ensuring equitable treatment and opportunities for female athletes.
- **NCAA Guidelines:** NCAA has issued guidelines for fund disbursement by member schools.

## Where Are We Now



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### ***Johnson v. NCAA* – FLSA Employment Status**

- **November 2019:** Collective action filed against NCAA and 25 Division 1 universities, claiming joint employment of athletes under FLSA and state law. Defendants moved to dismiss, citing *Berger*, *Dawson*, and the entire premise of amateurism. District Court denied the motion.
- **July 2024:** Third Circuit affirmed, creating a split with *Berger* and *Dawson*.
- ***Alston* Influence:** Relied heavily on *Alston*, introduced a new FLSA test for college athlete employment:
  - Perform services for another party.
  - Primarily benefit the other party.
  - Under the other party's control or right of control.
  - Receive express or implied compensation or in-kind benefits.

## Where Are We Now

### Unionization Efforts At Dartmouth College

- **September 2023:** SEIU filed a petition to represent Dartmouth men's basketball players with the NLRB.
- **February 2024:** NLRB Regional Director Laura Sacks ruled the players are employees due to Dartmouth's control and compensation.
- **Appeal:** Dartmouth filed a request for review, but the NLRB had not yet decided it.
- **December 31:** SEIU withdrew its petition.

## Where Are We Now



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## Unfair Labor Practice Charge at USC

- **February 2022:** National College Players Association (NCPA) filed a charge with the NLRB alleging USC football and basketball players were misclassified as employees and allowed to unionize.
- **May 2023:** Region 31 director issued a complaint against the NCAA, Pac-12, and USC for misclassifying players as "non-employee student-athletes."
- **April 2024:** An ALJ held an evidentiary hearing; no decision issued.
- **January 2025:** NCPA filed a motion to withdraw the charge, citing new state laws on name, image, and likeness rights, and the House settlement.



SCAN ME

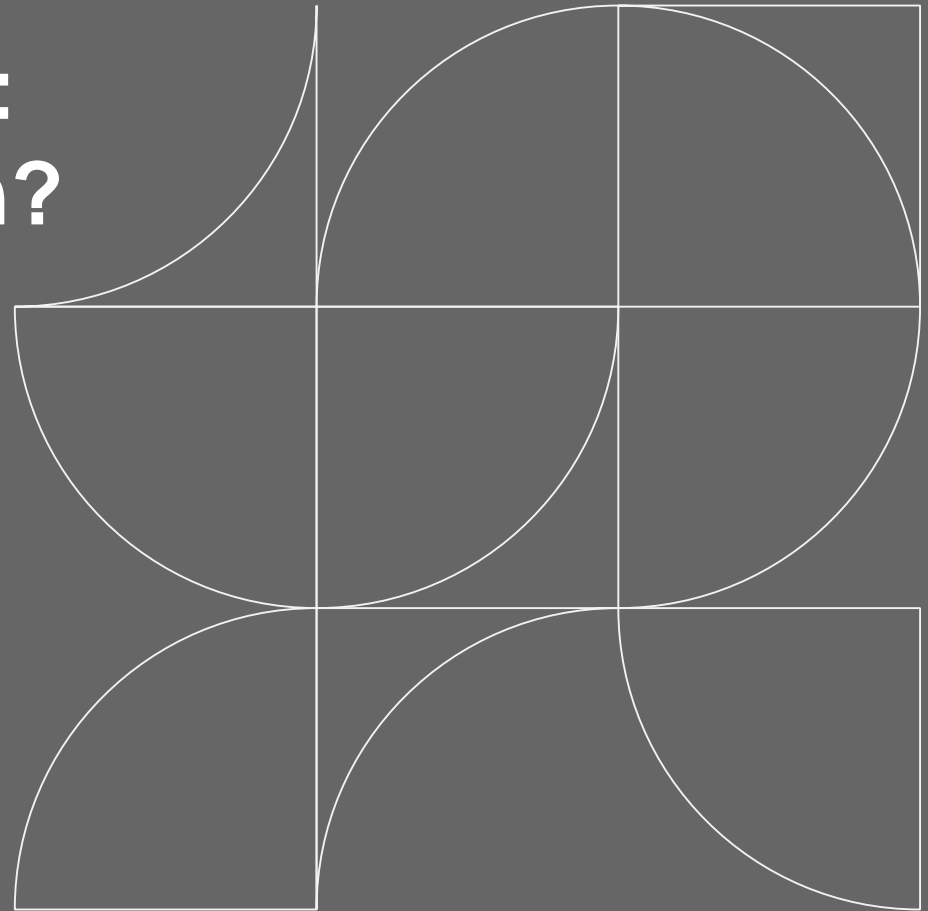
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# Round Table Discussion: What Does This All Mean?



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