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## Biden Administration Deems Some College Athletes Employees under the National Labor Relations Act

### Employees, not “Student-Athletes”

On September 29, 2021, Jennifer Abruzzo, the recently appointed General Counsel of the National Labor Relations Board (“NLRB”), announced that Players at Academic Institutions<sup>1</sup> should be considered employees for purposes of federal labor law, and therefore are protected by the National Labor Relations Act (“the Act”).<sup>2</sup>

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Abruzzo stated that because “Players at Academic Institutions perform services for institutions in return for compensation and subject to their control,” Section 2(3) of the Act and common law principles “support the conclusion that certain Players . . . are statutory employees.”<sup>3</sup> She also noted the recent Supreme Court decision *NCAA v. Alston*, which acknowledged that college sports are “profitable enterprises,” bolstering the argument that student-athletes are employees.<sup>4</sup>

The memorandum proposes that Players be characterized as employees because classifying them as “student-athletes” may lead them to believe that they are not entitled to the Act’s protection, which would “ha[ve] a chilling effect on Section 7 activity.”<sup>5</sup> Abruzzo alleges that use of terms like “student-athlete” and “amateurism” long have been used to shield schools from providing athletes with the rights granted to employees.

Abruzzo concludes the memorandum by reiterating that she will be taking the legal position that Players at Academic Institutions are employees and that the misclassification of Players as anything other than employees may result in a violation of Section 8(a)(1) of the Act.<sup>6</sup> Although the NLRB cannot assess penalties for violations, it “may seek make-whole remedies, such as reinstatement and back pay for discharged workers, and informational remedies, such as the posting of a notice by the employer promising to not violate the law.”<sup>7</sup>

### A Path to Unionization

In *NCAA v. Alston*, Justice Kavanaugh’s concurrence suggested that colleges and student-athletes could engage in collective bargaining in a manner similar to professional sports teams and athletes.<sup>8</sup> Soon after the decision came down, experts began to speculate that this opinion could lead to an expansion of athletes’ rights under federal labor law, and it appears Abruzzo is capitalizing on this momentum by recharacterizing student-athletes as employees.

Abruzzo explicitly states that “Players at Academic Institutions . . . are entitled to be protected from retaliation when exercising their Section 7 rights.”<sup>9</sup> Under Section 7 of the Act, employees have “the right to self-organization, to form, 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.” Section 8(a)(1) of the NLRA prohibits employers from “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7.”<sup>10</sup> By classifying them as employees, Players are better protected to collectively organize and bargain with their Academic Institutions.

In addition, in the past year Players at Academic Institutions have orchestrated demonstrations for racial justice following the death of George Floyd and have organized to share their input on how to compete safely during the Covid-19 pandemic.<sup>11</sup> Abruzzo notes that these actions are directly related to conditions of employment, and that Players engaging in such actions to improve their working conditions should be protected from retaliation.<sup>12</sup>

With the added protection of employee status, Players may be emboldened to become more organized and push harder for the NCAA and their universities to implement further changes.

### Private Universities v. Public Universities

Because of the limits on the NLRB's jurisdictional reach, currently only private universities are covered by this new policy, while public universities remain governed by their respective states' collective bargaining laws.<sup>13</sup> However, Abruzzo notes that the NLRB could assert jurisdiction over athletic conferences, which host a combination of public and private universities.<sup>14</sup>

It is unclear what effect this will have on college sports, since the most profitable teams tend to be at public universities, in conferences made up of exclusively public universities, often in the South,<sup>15</sup> where union membership tends to be low and anti-union sentiments tend to be high.<sup>16</sup> This could lead to variations in bargaining power among Players, could leave some of the most successful Players in vulnerable positions, and could make it more difficult for such schools to recruit and retain the best Players.

### Congressional Action

On May 27, 2021, Senators Chris Murphy (D-Conn.) and Bernie Sanders (I-Vt.) introduced the College Athlete Right to Organize Act.<sup>17</sup> This bill complements Abruzzo's memorandum, and would provide protections for students from private and public universities alike. However, the bill has yet to make significant strides toward being implemented into law.

Abruzzo's memorandum spurred additional calls for federal action to address the concerns of Players and their unequal treatment under state law. On September 29, 2021, NCAA President Mark Emmert urged the House Subcommittee on Consumer Protection and Commerce to pass federal legislation establishing uniform standards for names, images, and likenesses ("NIL") contracts due to the "patchwork" of state laws.<sup>18</sup> Emmert argues that "[a]s new states rush to 'keep up' with the states that have enacted NIL reform, we are likely to see a 'race to the bottom'" when it comes to recruiting top talent.<sup>19</sup> Ramogi Huma, executive director of the National College Players Association, also made a statement encouraging Congress "to decline NCAA sports' request for narrow and unjust NIL legislation" and instead pursue broad-based reform that is critical to college athletes' well-being."<sup>20</sup>

1. Abruzzo uses the term “Players at Academic Institutions” rather than “student-athletes” throughout the memorandum because she believes “student-athlete” is a term “created to deprive those individuals of workplace protections.” *Memorandum GC 21-08*, Office of the General Counsel, National Labor Relations Board (Sept. 29, 2021), n.1 at 1.
2. Tim Ryan, *NLRB General Counsel Says College Athletes Are Employees*, Law360 (Sept. 29, 2021), [https://www.law360.com/sports-and-betting/articles/1426385/nlr-general-counsel-says-college-athletes-are-employees?nl\\_pk=d0073b4f-ed0f-47f2-99aa-c608fbb569d&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=sports-and-betting](https://www.law360.com/sports-and-betting/articles/1426385/nlr-general-counsel-says-college-athletes-are-employees?nl_pk=d0073b4f-ed0f-47f2-99aa-c608fbb569d&utm_source=newsletter&utm_medium=email&utm_campaign=sports-and-betting).
3. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, National Labor Relations Board, <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>.
4. *NCAA v. Alston*, 141 S. Ct. 2141, 2141 (2021).
5. *Memorandum GC 21-08*, Office of the General Counsel, National Labor Relations Board (Sept. 29, 2021), 4.
6. *Id.* at 9.
7. *Investigate Charges*, National Labor Relations Board, <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges>.
8. *NCAA v. Alston*, 141 S. Ct. at 2158 (Kavanaugh, J., concurring).
9. *Memorandum GC 21-08*, Office of the General Counsel, National Labor Relations Board (Sept. 29, 2021), 2.
10. *Interfering with Employee Rights (Section 7 & 8(b)(1))*, National Labor Relations Board, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1>.
11. Dave Jamieson & Travis Waldron, *Biden’s Labor Counsel Says College Athletes Are Workers with Collective Bargaining Rights*, The Huffington Post (Sept. 29, 2021), [https://www.huffpost.com/entry/biden-labor-college-athletes-ncaa\\_n\\_61548f38e4b05025422dc4b1?vi](https://www.huffpost.com/entry/biden-labor-college-athletes-ncaa_n_61548f38e4b05025422dc4b1?vi).
12. *Memorandum GC 21-08*, at 7-8.
13. Tim Ryan, *NLRB General Counsel Says College Athletes Are Employees*, Law360 (Sept. 29, 2021), [https://www.law360.com/sports-and-betting/articles/1426385/nlr-general-counsel-says-college-athletes-are-employees?nl\\_pk=d0073b4f-ed0f-47f2-99aa-c608fbb569d&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=sports-and-betting](https://www.law360.com/sports-and-betting/articles/1426385/nlr-general-counsel-says-college-athletes-are-employees?nl_pk=d0073b4f-ed0f-47f2-99aa-c608fbb569d&utm_source=newsletter&utm_medium=email&utm_campaign=sports-and-betting).
14. *Memorandum GC 21-08*, n. 34 at 9.
15. Tim Ryan, *High Court NCAA Ruling May Be Win for Athlete Labor Rights*, Law360 (June 21, 2021), <https://www.law360.com/articles/1396133/high-court-ncaa-ruling-may-be-win-for-athlete-labor-rights>.
16. Ken Green, *Why Organized Labor Struggles in the American South* (Jan. 28, 2020), <https://www.uniontrack.com/blog/labor-american-south>.
17. *College Athlete Right to Organize Act*, S. 1929, 117<sup>th</sup> Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/1929/text?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=4&s=1>.
18. Rachel Scharf, *NCAA President Decries ‘Patchwork’ of Name, Image Laws*, Law360 (Sept. 29, 2021), [https://www.law360.com/sports-and-betting/articles/1426482/ncaa-president-decries-patchwork-of-name-image-laws?nl\\_pk=d0073b4f-ed0f-47f2-99aa-c608fbb569d&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=sports-and-betting](https://www.law360.com/sports-and-betting/articles/1426482/ncaa-president-decries-patchwork-of-name-image-laws?nl_pk=d0073b4f-ed0f-47f2-99aa-c608fbb569d&utm_source=newsletter&utm_medium=email&utm_campaign=sports-and-betting).
19. *Id.*
20. *Id.*