

THE NCAA, NORTHWESTERN UNIVERSITY AND THE FIRST STUDENT-ATHLETE UNION

By: Phil McNicholas & Anthony Barbieri

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The NCAA has been the leading college-sports regulatory authority since the early 1900's. Without any competition, it promulgated rules and regulations on its member schools and student-athletes however it pleased. Recently, a variety of legal challenges has started to tilt the balance of power away from the NCAA.

Current and former student-athletes have at least ten lawsuits against the NCAA for injuries suffered in collegiate competition. Additionally, former UCLA basketball star Ed O'Bannon and several co-plaintiffs sued the NCAA for using their images and likeness without compensation. Former Arizona State quarterback Sam Keller and others filed a similar lawsuit, which the NCAA settled for a rumored \$20 million. Numerous other current and former student-athletes sued the NCAA, challenging its restriction that a student-athlete can receive compensation, alleging that the NCAA and its member universities have conspired to limit their benefits to only tuition, room and board, and related costs.

These suits have all garnered a lot of media attention but, currently, the most significant legal situation involving the NCAA is the Northwestern University football team's efforts to form a labor union - the College Athletes Players Association ("CAPA"). After Northwestern initially rejected the effort, students filed a complaint with the NLRB. The NLRB's Regional Director in Chicago ruled that Northwestern's football players are university "employees" and eligible to form a union and negotiate with their "employer," i.e., their school.

In ruling that football players are "employees", the Regional Director ignored the "primarily economic" versus "primarily educational" test that had been used by the NLRB in the past to determine whether graduate assistants were university employees. The Regional Director also gave no weight to other arguments, such as the fact that scholarship and non-scholarship athletes play together on the same team and are subject to the same rules; and he was not persuaded by the argument that *all* college athletes enjoy the benefits of college sports – such as enhanced job prospects after college. Instead, the Regional Director noted that football players are controlled by different rules than typical Northwestern students, and focused on the extensive hours players spend on football-related activities throughout the year. The Regional Director concluded that players receive full scholarships in exchange for football-related services, and therefore are "employees" and eligible to unionize.

Displeased with the Regional Director's ruling, Northwestern, with the NCAA's backing, filed an appeal to the NLRB's National Office. At the time this article was written, the appeal has not been decided. Assuming the NLRB's ruling is upheld, and the football team votes in favor of a union, the first student-athlete union will be created. According to the Northwestern players, unionizing will allow them to collaborate with university administrators on practice hours, game scheduling, medical/disability benefits and other "student-athlete" issues. They will also likely demand additional compensation above and beyond their scholarships. CAPA will obtain the same rights held by all other unions, including the right to strike and to collectively bargain.

One can only assume that student-athletes at other private universities will follow this precedent and form their own unions. Student-athletes at public universities may also pursue unionization, but the NLRB does not govern unions of public employees, so different standards would apply.

The *Northwestern* decision could have a long-term impact on college sports and colleges in general. In addition to student-athletes, any private-college student on scholarship could argue that they are an employee. This opens the door to a whole slew of state and federal employment-law issues: including taxes (income taxes, unemployment, social security); the Fair Labor Standards Act, wage and hour laws; immigration (foreign students); ERISA; employer mandate of the ACA; occupational safety and health; coverage under the various anti-discrimination laws; workers' compensation; and vicarious liability for "employee" torts. Other issues could include intellectual-property rights (which may be cleared up with the outcome of the pending lawsuits against the NCAA).

The end result could lead to higher costs to certain universities. Some people believe that universities might eliminate athletic or "performance-based" scholarships. This would likely harm the athletes and their families, and the school's revenues might suffer, which could result in diminished academic programs – not to mention changing the landscape of college sports for the fans. However, others contend that unions will protect athletes' health and safety during and after college, and that ending the NCAA's monopoly on college-sports regulation will only make it better.

Things are changing rapidly with the NCAA, and the *Northwestern* appeal will play a major role in re-shaping the NCAA in the future.