Lowndes

Insights

Can Student-Athletes Be Considered Employees?

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The debate over fair compensation for NCAA athletes has intensified, shifting from *if* athletes should be paid to *how* they should be compensated. The rise of Name, Image, and Likeness (NIL) payments has added momentum to this shift. One development that continues to unfold is the *Johnson v. NCAA* case, where the Third Circuit ruled that some college athletes might be considered employees under the Fair Labor Standards Act (FLSA). The court introduced a new test to determine employee status, one that may conflict with Title IX and could threaten the existing college athletics model.

The *Johnson v. NCAA* Case

The *Johnson* case originated from a 2019 lawsuit by six former college athletes who alleged violations of the FLSA and state employment laws. They claimed they were employees of the NCAA and their universities, arguing their athletic participation constituted work performed under institutional control and for the benefit of the schools.

The District Court denied the NCAA's motion to dismiss, rejecting the "amateur" status defense and applying an "economic realities" test to assess whether the athletes plausibly qualified as employees. However, the Third Circuit vacated that decision and established a new, "sui generis" balancing test for college athletes. The test considers whether athletes perform services primarily for the university's benefit, are under the university's control, and receive compensation or in-kind benefits in return.

Concerns Over Clarity and Equity

In a concurring opinion, Judge Porter expressed concerns about the vagueness of the majority's test. He argued that it failed to adequately distinguish between "play" and "work," raising questions about how the test would apply across different levels of competition. Specifically, he pointed out the framework may not adequately differentiate between Division I and Division III athletes, and that it lacks meaningful guidance for non-revenue-generating sports. Judge Porter also raised a critical issue: the potential conflict with Title IX. If only certain athletes, primarily male

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participants in revenue-generating sports, are classified as employees, it could lead to disparities in compensation and opportunity that challenge Title IX's mandate for sex-based equality in athletics.

Under the *Johnson* test, only athletes in high-revenue sports such as Division I football and men's basketball are likely to qualify as employees. This could lead to a situation where male athletes in these sports are paid, while female athletes and those in other sports are not, potentially clashing with Title IX's requirement for proportional scholarship distribution and equitable opportunities.

While some argue that revenue generation could justify pay disparities under Title IX, others contend that such a metric is tainted by historical inequities in investment and opportunities for female athletes. Relying on revenue alone may potentially violate the spirit of Title IX, which aims to ensure equal opportunities for all genders.

What Comes Next?

The complex interplay between compensation, employment status, and Title IX may necessitate intervention from Congress or the NCAA to set forth clear and uniform standards that students and athletic programs are able to navigate. As these legal developments continue to evolve, consulting with an experienced attorney can help ensure compliance and minimize risk.