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Flag on the Play! Labor Board Deems that Student-Athletes are a University's Employees

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On March 26, 2014, the Regional Director of Region 13 (Chicago, Illinois) of the National Labor Relations Board (the "Board") ruled that college student-athletes, specifically football players, receiving scholarships from Northwestern University are employees under Section 2(3) of the National Labor Relations Act (the "NLRA"), and are eligible to vote on whether they wish to be represented by a labor union, in this case the College Athletes Players Association ("CAPA"). This decision is the latest example of the efforts of the current Board to extend the reach of the NLRA.

By way of background, the NLRA provides that the "term 'employee' shall include any employee . . ." In interpreting the meaning of this language, the Supreme Court previously held that when applying the NLRA's broad definition of employee, it is necessary to consider the common law definition of employee. The common law definition of employee is a "person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."

In his interpretation of the NLRA in *Northwestern University and CAPA*, the Board's Chicago regional director determined that student-athletes are employees. Specifically, he found that the scholarships that the student-athletes receive for tuition, fees, room, board and books are a substantial economic benefit, which constitutes compensation. Citing the amount of revenue that the University's football program generated, the director reasoned that the student-athletes performed a valuable service for the University. The decision also placed a significant emphasis on the amount of control that the University exercised over the student-athletes receiving scholarships. The decision painstakingly explained the rules, regulations, and practice requirements placed on the student-athletes and only casually mentioned that student-athletes have to meet academic standards, such as class attendance and minimum grade point averages. Ultimately, the ruling stated that, "it cannot be said that [the University's] scholarship players are 'primarily students'." This statement is in direct conflict with the core purpose of the NCAA, which is to "integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount." The decision was limited solely to student-athletes receiving a scholarships; it does not apply to student-athletes who do not receive scholarships.

Northwestern has until April 9, 2014 to request that the full Board review the decision of this regional director. While predicting what the full Board will do is a challenge, the current Board has taken an expansive view of the law in a clear effort to aid unions. The University issued a statement shortly after the ruling stating that it intended to appeal the decision, citing its belief that "student-athletes are not employees, but students." For now, the drive to unionize student-athletes will be limited to private universities because the Board does not have jurisdiction over public universities.

Because an appeal of this decision seems imminent, we will continue to update our current and prospective clients of further developments on this issue. Please contact John K. Baker (610.782.4913, bakerj@whiteandwilliams.com) or

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