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Legal Sidebar

College Athletes Unionize: *Trustees of Dartmouth College* and Other Legal Issues

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On March 5, 2024, the Dartmouth men's basketball team voted to become the first U.S. collegiate athletes to unionize. A regional director of the National Labor Relations Board (NLRB or the Board) previously determined that the players are employees of Dartmouth College (*Trustees of Dartmouth College*) within the meaning of the National Labor Relations Act (NLRA or the Act) and therefore should be afforded statutory protections to unionize and collectively bargain with their employer. Dartmouth filed a request for review of the regional director's decision with the NLRB, asking the Board to reverse the decision.

This Sidebar provides background on the NLRA and the NLRB's recent actions regarding college athletes, discusses the NLRB regional director's decision in *Trustees of Dartmouth College*, and discusses considerations for Congress.

National Labor Relations Act

The Supreme Court has held that Congress's "primary objective" in enacting the NLRA was to "achieve stability of labor relations." To that end, the NLRA provides protection to employees to self-organize; to collectively bargain; and to form, join, or assist labor organizations. The NLRA further recognizes the right of most private sector employees to engage in collective bargaining about wages, hours, and other conditions of employment through representatives of their own choosing. The right to engage in collective bargaining under the NLRA is extended only to individuals considered "employees" under Section 2(3) of the NLRA. Section 2(3) provides in relevant part that the term *employee* "shall include any employee," subject to certain exceptions.

In determining whether a category of workers are statutory employees covered by the NLRA, the Board has stated that its "starting point" is the "broad language" of Section 2(3). The Supreme Court has described the Act's definition of *employee* as "striking" in its breadth. The Court has further held that a "broad, literal interpretation" of the term is consistent with the NLRA's purposes of protecting "the right of employees to organize for mutual aid without employer interference" and "encouraging and protecting the collective-bargaining process." The Board also considers the common law definition of *employee*, which generally requires that an employee is a person who performs services for another subject to their control and in return for payment. However, even in circumstances where the NLRB has the statutory

authority to act, "the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."

For additional background on the NLRA and selected legal topics, please consult this CRS Report.

Background on NLRB Treatment of Collegiate Athletes

In its 2015 *Northwestern University* decision, the NLRB considered the status of Northwestern University's scholarship football players and whether they should be considered "employees" under Section 2(3) of the NLRA. The Board recognized that it had "never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind." A regional director had previously found that the football players at Northwestern who received grant-in-aid scholarships were employees within the meaning of the NLRA.

On appeal, the Board declined to assert jurisdiction in this case, finding that, even assuming that scholarship players are employees within the meaning of Section 2(3), asserting jurisdiction in this matter "would not serve to promote stability in labor relations." The Board acknowledged that the nature of college football resembles a professional sport in a number of relevant ways but that, unlike professional sports, which involve "leaguewide bargaining units," asserting jurisdiction in a single-team case would be "seemingly unprecedented" and problematic. Among its other concerns as to whether it should exercise jurisdiction, the Board noted that of the approximately 125 colleges and universities that participated in the Division I Football Bowl Subdivision (FBS) of the National Collegiate Athletic Association (NCAA), the majority of those schools were state-run institutions, and the Board could not assert jurisdiction over these schools because they are not operated by "employers" as defined in the NLRA. The Board recognized that Northwestern University is not a state-run institution (as well as 17 other colleges and universities that participate in the FBS), but it is the only private school in the 14-member Big Ten athletic conference, and the Board could not assert jurisdiction over any of Northwestern's competitors within the conference. Because the proposed bargaining unit at Northwestern was just one program within a primarily state-run conference and division, the Board found, "In such a situation, asserting jurisdiction in this case would not promote stability in labor relations."

On January 31, 2017, almost two years after the *Northwestern University* decision, NLRB General Counsel Richard F. Griffin Jr. issued memorandum GC 17-01, which concluded that FBS scholarship football players in private colleges and universities fall within Section 2(3)'s broad definition of *employee*. According to the general counsel's memorandum, this conclusion "is supported by the statutory language and policies of the NLRA," as well as the Board's interpretation as outlined in its prior decisions. The memorandum also highlighted that Congress not listing students among the NLRA's enumerated exclusions from the definition of *employee* in the statute "is itself strong evidence of statutory coverage." In addition, the memorandum noted that scholarship football players at Northwestern and other FBS private schools meet the common law test for employment, which generally requires that the employee perform services for the employer, the employer has the right to control the employee's work, and the work be performed in exchange for compensation. The memorandum reasoned that the athletes at Northwestern, for example, provided a service for the college, under the college's control, in the form of a football program that generated $76 million over a ten-year period and that in return the students were compensated with scholarships and a travel/child care stipend. Accordingly, the memorandum found that such scholarship football players satisfied the Section 2(3) definition of *employee* and the common law test. On December 1, 2017, NLRB General Counsel Peter B. Robb issued memorandum GC 18-02, which rescinded a number of prior memoranda, including GC 17-01.

On September 29, 2021, NLRB General Counsel Jennifer Abruzzo issued memorandum GC 21-08, which reinstated GC 17-01 and provided that it is the general counsel's position that "certain Players at Academic Institutions" are employees under the NLRA and are to be afforded all NLRA statutory

protections. Referring to the Board's prior employment decisions in the context of other college and university students—such as student assistants and medical interns, residents, and fellows—Abruzzo's memorandum stated that certain college athletes can satisfy the common law test for employment: "Players at Academic Institutions perform services for their colleges and the NCAA, in return for compensation, and subject to their control" and are therefore employees.

Trustees of Dartmouth College

In *Trustees of Dartmouth College*, the Service Employees International Union (SEIU) sought to represent a bargaining unit of "employees" comprised of the approximately fifteen student athletes on Dartmouth's men's varsity basketball team. Dartmouth is a private, nonprofit university, and its men's basketball team competes in the Ivy League athletic conference within Division I of the NCAA. SEIU has been the exclusive representative of certain employees employed by Dartmouth since 1966. In September 2023, the players, represented by SEIU, submitted a petition with the NLRB alleging that, as "employees," they wished to hold a representation election and requested that the SEIU represent the basketball players in their effort to unionize. Dartmouth, opposing the petition, argued that the student-athletes on its men's basketball team are not employees under Section 2(3) of the NLRA. Primarily, Dartmouth argued that the players on the men's basketball team do not meet the common law test for employment because they do not perform work in exchange for compensation and the college does not exercise sufficient control over them and that allowing the players to unionize would destabilize labor relations in college athletics, as articulated in the Board's *Northwestern* decision. SEIU argued that the players meet the common law test for employment because they receive compensation in return for providing basketball-related services to Dartmouth and are subject to Dartmouth's control, the *Northwestern* decision was not controlling, and labor stability would be enhanced by collective bargaining.

On February 5, 2024, the regional director found that, "because Dartmouth has the right to control the work performed by the men's varsity basketball team, and because the players perform that work in exchange for compensation, the petitioned-for basketball players are employees within the meaning of the Act." Additionally, the regional director found that "asserting jurisdiction would not create instability in labor relations." Therefore, the decision directed that an election be held for the Dartmouth men's basketball team to determine whether they wish to be represented by the SEIU for the purposes of collective bargaining.

In analyzing whether the players meet the common law test for employment—whether the players perform services for Dartmouth in exchange for compensation and are subject to Dartmouth's control—the regional director provided an overview of Dartmouth's structure and business in relation to the men's basketball team. Evaluating whether the players perform work that benefits Dartmouth, the regional director found that the "basketball program clearly generates alumni engagement—and financial donations—as well as publicity which leads to student interest and applications." The regional director distinguished between the basketball team and other programs at the school, highlighting that the major media outlets do not pay for the right to broadcast and distribute video of other extracurricular activities. The regional director dismissed the factual disputes regarding how much actual revenue is generated by the team, reasoning that "the profitability of any given business does not affect the employee status of the individuals who perform work for that business." The regional director also stated that Dartmouth exercises "significant control" over the players' work, highlighting that Dartmouth determines "when the players practice and play" and at times "when and where the players will travel, eat, and sleep."

Analyzing whether the players perform work in exchange for compensation, the regional director examined several potential forms of compensation. Recognizing that the Dartmouth players do not receive athletic scholarships, the decision instead looked to benefits during the admissions process, equipment and apparel (particularly noting basketball shoes valued in excess of $1,000 per player per year), tickets to games, lodging, meals, and access to exclusive school programs providing academic

support and career development, among other things. In response to Dartmouth's argument that "valuable clothing and equipment are provided so that students may play basketball, rather than because they play basketball," the decision observed that the players' compensation is in non-traditional forms because NCAA regulations historically prohibited traditional compensation but that these benefits were compensation nonetheless.

The regional director also rejected the argument that allowing Dartmouth's men's basketball team to unionize would destabilize labor relations in college athletics. The decision distinguished the NLRB's ruling in the *Northwestern* case by focusing on Dartmouth's membership in the Ivy League rather than the Big Ten. The decision reasoned that the "Ivy League, unlike the Big Ten Conference, consists only of private universities. Accordingly, the Board's concerns about potentially conflicting state labor laws do not apply."

Following the regional director's decision, the NLRB issued a notice of election to be held on March 5, 2024. On February 29, 2024, Dartmouth filed an emergency request to stay the scheduled election, and the Board denied the request, finding that Dartmouth had not made a "clear showing" that extraordinary relief was "necessary under the particular circumstances of the case," as required by 29 C.F.R. § 102.67(j)(2). On March 5, the Dartmouth men's basketball team voted 13-2 to join a union, reportedly becoming the first U.S. collegiate team to do so. On the same day, Dartmouth filed a request for review to the NLRB to reverse the decision. The SEIU has since filed a response arguing that the Board should deny Dartmouth's request for review or affirm the regional director's decision.

The Ivy League also submitted an amicus brief in support of Dartmouth and opposing employment status for those who participate in collegiate athletics. The brief emphasized the Ivy League's feeling that the conference is "unique among Division I intercollegiate athletic conferences," as their students who participate in intercollegiate sports are prohibited from receiving athletic scholarships.

Considerations for Congress

In *National Collegiate Athletic Association v. Alston*, the Supreme Court held that the NCAA's rules capping certain compensation for student athletes violated Section 1 of the Sherman Antitrust Act. In a concurrence, Justice Kavanaugh joined the decision in full but also questioned "whether the NCAA and its member colleges can continue to justify not paying student athletes a fair share" of the billions of dollars in revenue that they generate. To that end, the concurrence suggested that one mechanism by which colleges and students could resolve the difficult questions regarding compensation is by "engag[ing] in collective bargaining." However, the Supreme Court has not directly addressed the issue of whether college athletes are employees for purposes of the NLRA. Meanwhile, some Members of Congress have shown interest in addressing whether labor protections should be extended to the athletes. If it does not wish the courts to decide the issue, Congress may amend the NLRA's definitions of *employer* or *employee* in Section 2 to explicitly include or omit the coverage of college athletes.

Concurrent with the Dartmouth case, another case is pending over whether the University of Southern California, acting jointly with the Pac-12 Conference and NCAA, violated the NLRA by misclassifying athletes as non-employees. The NLRB alleged that the university, along with the PAC-12 and the NCAA, misclassified its scholarship and non-scholarship players on the men's football and women's and men's basketball teams to intentionally deprive the players of their rights under the NLRA and to discourage them from engaging in protected concerted activities.

NLRB General Counsel Abruzzo indicated in a footnote in the 2021 memorandum that, if college athletes are considered employees under the NLRA, the NCAA may also be acting as a joint employer with state schools, greatly expanding the number of schools potentially subject to enforcement. The NLRB's 2023 joint-employer rule is being challenged in separate litigation, and a district court judge recently vacated

the rule. While it is unclear if the 2023 rule litigation will impact whether the NCAA is a joint employer, Congress may wish to address what constitutes a "joint employer" for purposes of the NLRA.

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