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Labor & Employment Alert
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Play Ball! National Labor Relations Board Declines Jurisdiction in Northwestern University Football Players Case

Today, August 17, 2015, the National Labor Relations Board ("Board") unanimously decided that it would not exercise jurisdiction over Northwestern University scholarship football players, and thus those players do not have a federal right to organize and bargain collectively (at least today).

Background:

In March, 2014, in a widely-publicized case, the Board's Regional Director in Chicago ruled that Northwestern University scholarship football players are "employees" under the National Labor Relations Act ("Act") and therefore have the right to organize and bargain collectively with their employer.

According to testimony and documentary evidence, The scholarships that players receive are anywhere between $61,000 – 76,000 a year, and they "work" at football 40-50 hours a week (somewhat less during the offseason), with approximately 20 hours a week spent on academic classes and schoolwork. Coaches have almost dictatorial authority over players, from where they can live to what they can eat to their personal travel plans to detailed training and practice schedules.

Under the Act, the 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." The Regional Director found that the players perform a service for the University, under a "contract of hire" – their scholarship agreement. According to the Regional Director, this actually was a pretty simple case.

A particular point of emphasis was the value of those services to the University. For the 2012-2013 academic year, the football program brought in about $30 million, against expenses of approximately $22 million. The remainder goes to fund other student athletic programs and enables the University to meet its Title IX obligations to provide proportional numbers of men's and women's varsity sports.

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The Board's Decision:

It is important to understand what the Board did and did not decide in this case. It did NOT decide that scholarship football players of private schools were or were not "employees" under the Act. It did NOT decide that it did not have jurisdiction over intercollegiate sports teams, conferences or the NCAA. In fact, the Board reiterated that it does have jurisdiction over private colleges (and at least some conferences) and their employees.

What the Board did do was make a discretionary decision based on public policy – NOT a legal decision. It elected not to assume jurisdiction over Northwestern University scholarship football players because:

> even if the scholarship players were statutory employees (which, again, is an issue we do not decide), it would not effectuate the policies of the Act to assert jurisdiction. Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS [Football Bowl Series] football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case. . . .
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> Just as the nature of league sports and the NCAA's oversight renders individual team bargaining problematic, the way that FBS football itself is structured and the nature of the colleges and universities involved strongly suggest that asserting jurisdiction in this case would not promote stability in labor relations. Despite the similarities between FBS football and professional sports leagues, FBS is also a markedly different type of enterprise. In particular, of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions. As a result, the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by "employers" within the meaning of Section 2(2) of the Act.

Thus the Board was careful to keep its options open: "Further, we are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board's approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities)."

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Takeaway:

While unsuccessful in this particular case, this case does illustrate the creativity of unions in developing potentially new roles for themselves, and in persuading the Board to go along. Between the "Fight for $15" crusade, corporate campaigns, Justice for Janitors, going after franchisors on "joint employer" theories, worker centers, micro-units and "quickie" election rules, private sector employers are under more pressure than ever from both unions and the Board.

This client alert was written by Attorney Geoff Wermuth. If you have any questions, please contact Geoff Wermuth or the attorney responsible for your account, or call (617) 479-5000.

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