

TURNING STUDENT DISCIPLINE INTO HR VIOLATIONS?:
THE IMPLICATIONS OF CALLING STUDENT-ATHLETES
“EMPLOYEES” UNDER THE FAIR LABOR STANDARDS ACT
IN LIGHT OF *JOHNSON V. NCAA**

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INTRODUCTION

The world of college athletics is changing. Throughout much of the history of college sports, run by the National Collegiate Athletics Association (NCAA), collegiate student-athletes were unable to receive financial compensation relating to their athletic performance despite generating extraordinary amounts of revenue. Revenue includes money from ticket sales, merchandise depicting student-athletes, camps run by the school and staffed by the student-athletes, and other sources. The NCAA justified the arrangement by claiming the importance of maintaining “amateur status” for student-athletes. But present and former student-athletes have begun challenging the NCAA under the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA).¹ Alleging student-athletes should be considered “employees” under the FLSA, two cases, *Berger v. NCAA* from the Seventh Circuit and *Dawson v. NCAA* from the Ninth Circuit, have been decided in favor of the NCAA. However, a July 2024 decision from the Third Circuit in *Johnson v. NCAA* affirming the district court’s denial of the NCAA’s motion to dismiss may result in a circuit split. If the *Johnson* case is ultimately decided against the NCAA, there could be major implications, across a variety of legal areas. While classifying student-athletes as employees

* This Note was prepared prior to the approval of the *House* settlement. Accordingly, the analysis may be impacted depending on the application of the *House* settlement and pending congressional action.

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1 While the NLRA is one avenue towards employee status for student-athletes, this Note will focus on the developments under the FLSA.

could have benefits for student-athletes, those benefits must be considered alongside the potential challenges and related changes.

This Note will consider the application of the economic realities test from the Third Circuit in *Johnson*, as well as the implications of classifying student-athletes as employees. To understand the current landscape, Part I of this Note provides background on the NCAA and its recent changes, the definition of “employee,” the Fair Labor Standards Act, and the initial discussion on student-athletes as “employees.” Part II examines the tradition and development of “amateurism” in student-athletics as well as an analysis of the related cases, while Part III discusses the application of the *Johnson* economic realities test. Finally, Part IV discusses implications of considering student-athletes “employees” under the FLSA and argues why, in light of the implications of a finding that student-athletes would qualify as employees under the economic realities test, Congress should step in.

I. BACKGROUND ON COLLEGE ATHLETICS AND THE FAIR LABOR STANDARDS ACT

A. *College Athletics and the NCAA*

College athletics first started with the creation of a Yale boat club in 1843.² The first intercollegiate competition was in 1852, when the boat teams from Yale and Harvard raced on Lake Winnepesaukee in New Hampshire; intercollegiate athletics took off from there.³ In response to public outcry over football-related deaths and injuries, the Intercollegiate Athletic Association of the United States (IAAUS) was founded in 1906 to “regulate the rules of college sport and protect young athletes.”⁴ Sixty-two colleges and universities became members of the IAAUS before it was renamed the National Collegiate Athletic Association (NCAA) in 1910.⁵ However, college athletics remained largely unregulated before the NCAA passed the “Sanity Code” in 1948.⁶ The Sanity Code only allowed students to receive need-based financial

2 See Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970).

3 *Id.* at 224, 229 (“By 1876 . . . collegians had created associations for conducting intercollegiate competition in crew, baseball, track and field and football, organized sport was well established at most of the leading institutions in the East.” *Id.* at 229.).

4 *History*, NCAA, <https://www.ncaa.org/about-us/history/> [<https://perma.cc/VX2G-ZLCU>] (last visited Apr. 9, 2026).

5 *Id.*

6 See Ken Pendleton, *The Sanity Code*, SPORTS CONFLICT INST., <https://sportsconflict.org/the-sanity-code/> [<https://perma.cc/SX2V-N323>] (last visited Jan. 27, 2026).

aid and was “intended to ensure amateurism in college sports.”⁷ The Sanity Code was repealed in 1951, and the NCAA began allowing athletic scholarships without considering financial need or academic merits.⁸ Scholarships were limited to tuition, books, and board in 1975.⁹ In 2014, the NCAA permitted member colleges and universities to raise scholarships to cover the full cost of attendance, and, in a 79-1 vote in 2015, the member institutions officially increased the scholarship cap.¹⁰

Currently, there are over 500,000 college student-athletes from more than 1,100 member colleges and universities participating in ninety-two championships in twenty-four different sports.¹¹ The member colleges and universities are divided into Divisions I, II, and III.¹² Division I (DI) is the highest level of competition and has the most scholarships between the three divisions.¹³ DI has two subdivisions for football: the Football Bowl Subdivision and the Football Championship Subdivision.¹⁴ Across 350 DI member institutions, there are more than 170,000 student-athletes, and the NCAA advertises support for DI student-athletes including “full scholarships, cost-of-attendance stipends, degree completion programs and academic revenue distribution.”¹⁵ Division II (DII) is about “flexibility” where there is still opportunity for high competition and partial scholarships combined

7 Victoria Larned, *The Ultimate College and High School NIL Timeline*, ECCKER SPORTS (Mar. 29, 2022), <https://ecckersports.com/industry-insights/the-ultimate-college-and-high-school-nil-timeline/> [<https://perma.cc/S8E3-QMR7>]; *History*, *supra* note 4.

8 Larned, *supra* note 7; David Broughton, *Timeline: The Road to Name, Image, Likeness*, SPORTS BUS. J. (Nov. 27, 2023), <https://www.sportsbusinessjournal.com/Articles/2023/11/27/college-sports-timeline> [<https://perma.cc/QRA2-FBBM>]; *see also* Ben Strauss, *Colleges' Shift on Four-Year Scholarships Reflects Players' Growing Power*, N.Y. TIMES (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/sports/colleges-shift-on-four-year-scholarships-reflects-players-growing-power.html> [<https://perma.cc/3VWF-L557>].

9 Larned, *supra* note 7; Gordon S. White Jr., *N.C.A.A. Cuts Athletes' Aid*, N.Y. TIMES (Aug. 15, 1975), <https://www.nytimes.com/1975/08/15/archives/ncaa-cuts-athletes-aid-ncaa-cuts-athlete-aid.html> [<https://perma.cc/7UNN-Y7GP>].

10 Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills*, N.Y. TIMES (Jan. 17, 2015), https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html?eafs_enabled=false [<https://perma.cc/9ZJT-Q79L>].

11 Overview, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/L59Q-4SJF>] (last visited Apr. 9, 2026); *see, e.g., About NCAA Division II*, NCAA, <https://www.ncaa.org/sports/2025/9/19/about-ncaa-division-ii.aspx> [<https://perma.cc/U8Y2-HDHA>] (last visited Apr. 6, 2026).

12 *History*, *supra* note 4.

13 *See Overview*, *supra* note 11; *The Differences Between the College Divisions* (NCAA, NAIA, NJCAA), NCSA COLL. RECRUITING, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions> [<https://perma.cc/DK9S-YSD6>] (last visited Jan. 31, 2026).

14 *Our Division I Story*, NCAA, <https://www.ncaa.org/sports/2021/2/16/our-division-i-story.aspx> [<https://perma.cc/9F34-NJH7>] (last visited Jan. 31, 2026); *History*, *supra* note 4.

15 *Our Division I Story*, *supra* note 14.

with academic or need-based aid.¹⁶ Around 300 member colleges and universities are classified as DII programs.¹⁷ Division III (DIII) is the largest division, made up of over 430 member institutions and 200,000 student-athletes.¹⁸ There are no athletic scholarships for DIII athletes.¹⁹ In 2022, the NCAA member institutions voted to ratify an updated NCAA constitution, so “[n]ow each of the association’s three divisions will be empowered to govern itself.”²⁰

The NCAA advertises “three guiding principles: academic success, student-athlete well-being and fairness.”²¹ The NCAA awards almost \$4 billion in athletic scholarships every year as well as over \$10 million in grants and scholarship for graduate student-athletes.²² The NCAA distributes more than \$600 million to DI schools and conferences annually.²³ In addition to funding, the NCAA has established “core guarantees” that require DI schools to offer degree completion funds, academic services, career counseling, and life skills training and education, and the schools are not permitted to change a student’s athletic scholarship for athletic-performance reasons.²⁴ Schools are required to comply with health and safety guidelines, and the NCAA provides access to insurance.²⁵

In 2022, DI member schools reported almost \$17.5 billion in total revenue.²⁶ Revenue came from institution and government support,

16 See *About NCAA Division II*, *supra* note 11.

17 *Id.*

18 *Our Division III Story*, NCAA, <https://www.ncaa.org/sports/2021/2/16/our-division-iii-story.aspx> [<https://perma.cc/U9KR-XBSB>] (last visited Apr. 9, 2026).

19 *Id.*

20 Associated Press, *NCAA Ratifies New Constitution, Paving Way to Restructuring*, U.S. NEWS (Jan. 20, 2022), <https://www.usnews.com/news/sports/articles/2022-01-20/ncaa-ratifies-new-constitution-paving-way-to-restructuring> [<https://perma.cc/XV9C-AVRW>].

21 *History*, *supra* note 4.

22 See *Scholarships*, NCAA, <https://www.ncaa.org/sports/2014/10/6/scholarships.aspx> [<https://perma.cc/XBX8-HZEM>] (last visited Apr. 9, 2026); *NCAA Scholarships and Grants*, NCAA, <https://www.ncaa.org/sports/2015/9/14/ncaa-scholarships-and-grants.aspx> [<https://perma.cc/YB3Q-QP7D>] (last visited Apr. 9, 2026).

23 *Division I Finances*, NCAA, <https://www.ncaa.org/what-we-do/finances/> [<https://perma.cc/Y9NS-7EDC>] (last visited Apr. 9, 2026).

24 *Student-Athlete Core Guarantees*, NCAA, <https://www.ncaa.org/student-athletes/student-athlete-experience/core-guarantees/> [<https://perma.cc/3LAW-EY7K>] (last visited Apr. 10, 2026).

25 See *id.*

26 *Division I Athletics Finances 10-Year Trends from 2013 to 2022*, NCAA RSCH. (Dec. 2023), https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf [<https://perma.cc/ZF88-52T6>] (“\$11.2 billion of total DI revenue was generated by the athletics departments, and \$6.3 billion was allocated revenue from institution/government support and student fees.”); see also *NCAA Membership Financial Database*, NCAA RSCH. (Dec. 2025), <https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx> [<https://perma.cc/GBL3-78QS>].

donor contributions and endowments, media rights, NCAA and conference distributions, championship revenues, student fees, ticket sales, royalties, licenses, and other sources.²⁷ In the same year, DI schools reported over \$17 billion in spending on athletics.²⁸ Coach compensation accounted for the highest percentage of spending (20%), followed by student-athlete aid (18%); they reported over \$3 billion in spending on student-athlete financial aid.²⁹ Other expenses included administrative compensation, games and travel, facilities, recruiting, and medical funding.³⁰ The NCAA reported nearly \$1.3 billion in revenue for the 2022–2023 fiscal year.³¹

B. One Avenue to Employee Status: The Fair Labor Standards Act

The Fair Labor Standards Act of 1938 was introduced to “provide for the establishment of fair labor standards in employment[]”³² in order to “protect workers and stimulate the economy.”³³ As part of its effect, the FLSA established minimum wage and overtime pay for employees as well as recordkeeping requirements.³⁴ The FLSA establishes specific, nonwaivable rights for “a fair day’s pay for a fair day’s work.”³⁵ The Fifth Circuit has ruled that “[i]ndustrial custom does not warrant the continuation of abuses that the [FLSA] was created to rectify.”³⁶

27 *Division I Athletics Finances 10-Year Trends from 2013 to 2022*, *supra* note 26.

28 *Id.*; see also *NCAA Finances: Revenue and Expenses by School*, USA TODAY (Mar. 14, 2024, 14:05 UTC), <https://sportsdata.usatoday.com/ncaa/finances> [<https://perma.cc/28ET-QUCS>] (listing revenue and expenses by school with Ohio State at the top of the list reporting \$251,615,345 total revenue and \$225,733,418 total expenses).

29 *Division I Athletics Finances 10-Year Trends from 2013 to 2022*, *supra* note 26.

30 *Id.*

31 Associated Press, *NCAA Generates Nearly \$1.3 Billion in Revenue for 2022-23. Division I Payouts Reach \$669 Million*, U.S. NEWS (Feb. 1, 2024), <https://www.usnews.com/news/sports/articles/2024-02-02/ncaa-generates-nearly-1-3-billion-in-revenue-for-2022-23-division-i-payouts-reach-669-million> [<https://perma.cc/6CMZ-U25M>].

32 Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 1, 52 Stat. 1060, 1060.

33 SARAH A. DONOVAN, CONG. RSCH. SERV., R42713, *THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 1* (2023).

34 See 29 U.S.C. §§ 201–219 (2018); see also *Handy Reference Guide to the Fair Labor Standards Act*, WAGE & HOUR DIV., U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa> [<https://perma.cc/S6H4-BGV9>] (last visited Feb. 24, 2026); *McMaster v. Minnesota*, 819 F. Supp. 1429, 1438 (D. Minn. 1993) (“The FLSA was intended both to provide a minimum standard of living to American workers and to eliminate unfair competition resulting from the use of underpaid labor.”).

35 SPORTSWISE: A PODCAST ABOUT SPORTS AND THE LAW: *Episode 65: Are College Athletes Employees? The Latest Legal Blow to the NCAA*, with Labor Lawyer Josh Nadreau, at 01:36 (Spotify, July 13, 2024).

36 *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 135 F.2d 320, 322 (5th Cir. 1943).

When considering which individuals receive “employee” status, the FLSA’s definition of “employee” is remarkably broad.³⁷ “Employee” is defined as “any individual employed by an employer.”³⁸ The FLSA’s definition of “employ” includes “to suffer or permit to work,”³⁹ and an “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁴⁰ Courts have reported that the FLSA’s broad definitions “should be strictly construed in favor of the employee,”⁴¹ but the Wage and Hour Division of the U.S. Department of Labor, the department in charge of enforcement of the FLSA, released explanations of a few key terms that informed interpretations of the terms.⁴²

Under the FLSA, employers are required to pay employees for all the hours they work in a workweek.⁴³ The Wage and Hour Division explained that an employee “may not be employed for more than 40 hours in a week without receiving at least one and one-half times their regular rates of pay for the overtime hours.”⁴⁴ The Wage and Hour Division described a “workweek” as including “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed work place.”⁴⁵ The Wage and Hour Division elaborated on the FLSA’s definition of “employ” by describing that an employee may still be compensated for voluntary work after a shift.⁴⁶ Employees may also be compensated for waiting or on-call time,⁴⁷ and travel time may also be compensable under the FLSA.⁴⁸

37 The Supreme Court has acknowledged that the FLSA’s definition of an employee is “the broadest definition that has ever been included in any one act.” *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 CONG. REC. 7657 (1937)).

38 29 U.S.C. § 203(e)(1) (2018).

39 *Id.* § 203(g).

40 *Id.* § 203(d).

41 *See, e.g.,* *Edwards v. Riverside Prods. Co.*, 85 F. Supp. 290, 293 (N.D. W. Va. 1949).

42 *See Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV., U.S. DEP’T OF LABOR (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked> [<https://perma.cc/VE8E-M9E4>].

43 *Handy Reference Guide to the Fair Labor Standards Act*, *supra* note 34, at 11.

44 *Fact Sheet #22*, *supra* note 42; *Handy Reference Guide to the Fair Labor Standards Act*, *supra* note 34, at 11.

45 *Id.*

46 *Id.* (providing an example that “an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors,” and that the reason the employee continued to work is “immaterial”).

47 Whether waiting or on-call time is considered work time is fact-dependent. Work time generally includes when an employee is “engaged to wait” but does not include when the employee is “waiting to be engaged.” *Id.* Constraints of freedom could impact whether an employee “on-call” must be compensated. *See id.*

48 *See id.*

The FLSA provides for exemptions to both the minimum wage and overtime pay provisions, and the FLSA has specified individuals who are not covered.⁴⁹ Despite the broad definitions in the FLSA and the provided-for exemptions, there have been numerous circumstances where an individual's or group's status as "employees" was uncertain.⁵⁰ In light of that uncertainty, courts have developed numerous multifactor tests to determine whether individuals are employees. For example, these multifactor tests have been used to determine whether an individual is an employee or independent contractor⁵¹ and whether a student intern would be classified as an employee.⁵² Ultimately, evaluations of "employee status" are fact intensive and involve analyzing the "economic reality" of the relationship between parties as a whole.⁵³

II. THE DEATH OF THE TRADITION OF "AMATEURISM"⁵⁴

The exact meaning of "amateurism" in college athletics is unclear,⁵⁵ although the NCAA has previously defined a professional athlete as "one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association."⁵⁶ Despite lacking an explicit definition in the NCAA's eligibility requirements, "amateurism" is traditionally understood as "the proposition that college athletes must not receive compensation in exchange for their participation in intercollegiate athletics."⁵⁷ The

49 See 29 U.S.C. § 213; DONOVAN, *supra* note 33, at 2–3.

50 There has previously been uncertainty in the status of volunteers, independent contractors, trainees, prison labors, possible differences within industries like Uber and Lyft, etc. See KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *Knight Commission Public Session I—September 18, 2024*, at 40:50 (YouTube, Sept. 19, 2024), <https://www.youtube.com/watch?v=serykHYB5mk> [<https://perma.cc/6RWZ-TLCW>].

51 See *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382–83 (3d Cir. 1985).

52 See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016).

53 See *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) ("Because status as an 'employee' for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the 'economic reality' of the working relationship' between the alleged employee and the alleged employer..." (quoting *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992))); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

54 The NCAA's conception of amateurism has undergone significant changes post-*House*; this Part discusses the development of the NCAA's historical approach to "amateurism" prior to *House*.

55 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2152 (2021).

56 NCAA, DIVISION I 2024–25 MANUAL art. 12, § 12.02.11 (2024).

57 Nicholas C. Daly, Note, *Amateur Hour Is Over: Time for College Athletes to Clock in Under the FLSA*, 37 GA. ST. U. L. REV. 471, 475 (2021); see also *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015) ("Not paying student-athletes is *precisely* what makes them amateurs.").

desire for “amateurism” in college athletics has been around since the beginning of intercollegiate athletic competitions. In the 1870s and 1880s, some colleges would invite and pay non-students to participate in intercollegiate athletic competitions.⁵⁸ Schools began to recognize that stronger performances in athletics was beneficial for the school’s reputation.⁵⁹ Therefore, the schools sought to ensure that competition was solely between students enrolled in the schools.⁶⁰

As competition evolved and college athletics continued to develop, the NCAA became the regulating organization.⁶¹ Despite the main concern being overseeing and instituting safety regulations, the NCAA established rules to preserve amateurism by “prohibit[ing] financial remuneration to student-athletes and preclud[ing] student-athletes with professional experience.”⁶² One of the motivations for the NCAA’s advancement of amateurism was an effort to encourage fair recruiting and a competitive balance.⁶³ Thus, the NCAA’s “Principle of Amateurism” was that collegiate student-athletes “shall be amateurs in an intercollegiate sport” and participation “should be motivated primarily by education and by the physical, mental and social benefits to be derived.”⁶⁴

In order to maintain their eligibility, student-athletes throughout NCAA history had been prohibited from receiving any “pay” for their athletic ability: They could lose amateur status if they contracted with a professional team, entered a draft, hired an agent, etc.⁶⁵ The NCAA’s bylaws allowed student-athletes to receive aid based on athletic ability, but that aid was capped at the value of their cost of attendance.⁶⁶ Previously, the NCAA claimed the principle of amateurism helped protect student-athletes from being exploited by “professional and commercial enterprises.”⁶⁷

58 Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809, 812 (2016).

59 See *id.* (noting how strong athletic performances coincided with increases in prospective-student applications).

60 *Id.* at 813.

61 Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL’Y REV. 181, 189–90 (2017).

62 *Id.* at 190.

63 See *id.*

64 *Id.* at 191 (quoting NCAA, DIVISION I 2016–17 MANUAL art. 2, § 2.9 (2016)).

65 See NCAA, DIVISION I 2024–25 MANUAL art. 12, § 12.1.2 (2024). Student-athletes are now able to receive compensation from the commercial use of the name, image, and likeness, although the state and NCAA regulation of that area is still developing. See NCAA, DIVISION I 2024–25 MANUAL art. 22, § 22.01.1 (2024); see also *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2166 (2021).

66 See NCAA, DIVISION I 2024–25 MANUAL art. 15, § 15.1 (2024).

67 See NCAA, DIVISION I 2010–2011 MANUAL art. 2, § 2.9 (2010).

Undeterred by the NCAA's claim about the need for amateurism, scholars question the true motivations of amateurism in college athletics.⁶⁸ The more cynical view of the NCAA's advancement of amateurism is that it is exploitative and driven by the NCAA and its member institutions' desire to preserve the profits they gain from monetizing college athletics while not having to bear the expense of compensating the student-athletes.⁶⁹ Considering the massive amounts of revenue generated by collegiate athletics,⁷⁰ critics argue that amateurism is simply a way to protect a university's "bottom line" because "[u]niversities could avoid minimum payments to student-athletes as employees, overtime restrictions, increases to benefits, and other mandates of applicable labor laws."⁷¹

The "tradition of amateurism" has been confronted in a number of cases throughout the history of the NCAA. In 1984, the Supreme Court complementarily discussed the NCAA's tradition of amateurism in an antitrust challenge against the NCAA's plan to televise football games in *NCAA v. Board of Regents*.⁷² Despite finding that the television plan violated antitrust laws, the Supreme Court noted in dicta that the NCAA "plays a critical role in the maintenance of a *revered* tradition of amateurism in college sports."⁷³ The Court went on to say that "[t]here can be no question . . . that [the NCAA] needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics."⁷⁴

The NCAA relied on the Supreme Court's dicta from *Board of Regents* in many of its later legal challenges, although the reverence surrounding "amateurism" started to wither. In *O'Bannon v. NCAA*, another antitrust suit relating to student-athlete name, image, and likeness (NIL), the Ninth Circuit discussed how the dicta in *Board of Regents*, although "impressive-sounding," did not mean "every NCAA

68 See, e.g., Daly, *supra* note 57; Edelman, *supra* note 58, at 818; Crabb, *supra* note 61; Sara Levien, *There's a Crack in the NCAA's Amateurism Shield: Johnson v. NCAA May Shatter It Completely. What Then?*, 57 SUFFOLK U. L. REV. 175, 176 (2024) (referring to the NCAA's principle of amateurism as "fictitious"); Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496 (2008) (discussing the "myth of amateurism"); Keely Grey Fresh, Note, *Blood, Sweat, Tears: A Re-Examination of the Exploitation of College Athletes*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 163, 169–70 (2021).

69 Lynda Wray Black, *The Day the Fight Song Died: The Alston Concurrence that Became the Playbook*, 53 U. MEM. L. REV. 1009, 1011–12, 1011 n.7 (2023).

70 See *supra* notes 26–31 and accompanying text.

71 Crabb, *supra* note 61, at 192 (referring to amateurism as "a spoonful of sugar" to help the public "swallow" the exploitative nature of intercollegiate athletics).

72 Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 88 (1984).

73 *Id.* at 120 (emphasis added).

74 *Id.*

rule that somehow relates to amateurism is automatically valid.”⁷⁵ While the Ninth Circuit found the NCAA’s amateurism rules were procompetitive,⁷⁶ the court sided with the student-athlete plaintiffs.⁷⁷ As a result, the NCAA increased the limit on scholarship aid to include the full cost of attendance.⁷⁸ Concurring in part and dissenting in part, Chief Judge Thomas acknowledged the ongoing controversy surrounding amateurism when he concluded that “[t]he national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it.”⁷⁹ Thus, the debate continued when student-athletes began challenging their status as “employees.”

A. *Berger v. NCAA*, *Dawson v. NCAA*, and *NCAA v. Alston*

The NCAA and member colleges and universities have faced multiple lawsuits from current and former collegiate student-athletes claiming to be employees under the FLSA. In *Berger v. NCAA* and in *Dawson v. NCAA*, the judgments were in favor of the NCAA and the member institutions.⁸⁰

In *Berger*, former student-athletes filed suit against the NCAA and over 120 DI institutions to no avail.⁸¹ The plaintiffs were former track and field student-athletes at the University of Pennsylvania arguing the NCAA and member institutions were required to pay student-athletes a minimum wage under the FLSA.⁸² The district court had found, and the Seventh Circuit affirmed, that the student-athletes lacked standing since “[t]heir connection to the other schools [apart from the University of Pennsylvania] and the NCAA is far too tenuous to be considered an employment relationship.”⁸³ Then, evaluating the claims against only the University of Pennsylvania, the Seventh Circuit, citing *Board of Regents*, said that the “long-standing tradition [of amateurism] defines the economic reality of the relationship between student athletes and their schools.”⁸⁴

The appellate court also discussed § 10b24(a) of the Department of Labor’s Field Operations Handbook, which states: “University or college

75 O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1055, 1063 (9th Cir. 2015).

76 *Id.* at 1064.

77 *Id.* at 1079.

78 *See id.* at 1053–55. The Ninth Circuit reversed the district court’s additional remedy of allowing student-athletes to receive up to \$5,000 in cash per year. *Id.* at 1053.

79 *Id.* at 1083 (Thomas, C.J., concurring in part and dissenting in part).

80 *See Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 288–89 (7th Cir. 2016); *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 907 (9th Cir. 2019).

81 *Berger*, 843 F.3d at 288–89.

82 *Id.* at 289.

83 *Id.*

84 *Id.* at 291.

students who participate in activities generally recognized as *extracurricular* are generally not considered to be employees within the meaning of the [FLSA].”⁸⁵ The plaintiff student-athletes had argued athletic participation was similar to “work-study” programs discussed in § 10b24(b)⁸⁶ and that § 10b24(a) only applied to student-run club sports.⁸⁷ Although the appellate court agreed with the student-athletes that NCAA-regulated and club sports were different, the court still categorized NCAA-regulated sports as “extracurricular” for the purposes of the FLSA exception in § 10b24(a).⁸⁸ Thus, the Seventh Circuit concluded student-athletes were *not* employees under the FLSA “as a matter of law.”⁸⁹ However, despite the majority’s positive reflection on amateurism, Judge Hamilton’s concurrence described the tradition of amateurism in college athletics as “sometimes frayed.”⁹⁰

The Ninth Circuit came to a similar conclusion in *Dawson v. NCAA*; however, the court did not address amateurism in its opinion.⁹¹ The plaintiffs in *Dawson* were football players arguing they were employees of the NCAA and the PAC-12 Conference under the FLSA.⁹² The named plaintiff did not allege he was an employee of his former college, USC.⁹³ Looking at the economic reality and considering “the circumstances of the whole activity,” the Ninth Circuit considered “(1) expectation of compensation; (2) the power to hire and fire; (3) and evidence that an arrangement was ‘conceived or carried out’ to evade the law.”⁹⁴ The Ninth Circuit found *Dawson* was not an employee of the NCAA nor the PAC-12 Conference because they did not provide any scholarship to *Dawson*, the complaint did not demonstrate they had the power to hire or fire him, and there was no evidence the NCAA’s rules were intended to evade the law.⁹⁵ Meaningfully, the Ninth Circuit noted that “precedent demonstrates that revenue does not automatically engender or foreclose the existence of an employment relationship under the

85 *Id.* at 292 (quoting DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 10b24(a) (2016)).

86 Section 10b24(b) discusses possible employment circumstances for students, including work-study. See DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 10b24(b) (2016).

87 *Berger*, 843 F.3d at 293.

88 *Id.*

89 *Id.* at 294.

90 *Id.* (Hamilton, J., concurring).

91 *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905 (9th Cir. 2019).

92 *Id.* at 907.

93 *Id.*

94 *Id.* at 909 (internal citations omitted) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947)).

95 *Id.* at 909–10.

FLSA.”⁹⁶ Thus, the Ninth Circuit held that the student-athletes in *Dawson* were not employees of the NCAA nor the PAC-12 under the FLSA.⁹⁷

While the decisions in *Berger* and *Dawson* made it seem as if student-athlete employee status under the FLSA was unlikely, and the *Berger* decision indicated amateurism may be an influential tool for the NCAA and its member institutions, the “tradition of amateurism” took a major hit in June 2021 in *NCAA v. Alston*.⁹⁸ Although the issue in the case was not focused on student-athletes as employees, the majority decision in *Alston* was the key to changing the NCAA’s NIL policies.⁹⁹ The majority cited the Ninth Circuit’s stance that the debate about amateurism was not meant to be decided by the appellate judges.¹⁰⁰ However, Justice Kavanaugh’s concurrence dealt a significant blow to the amateurism defense as a whole. Justice Kavanaugh wrote that “[t]he NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA’s business model would be flatly illegal in almost any other industry in America.”¹⁰¹ Summarizing his perception of college athletics, Justice Kavanaugh focused on how the billions of dollars in revenue generated by college athletics “flow to seemingly everyone except the student athletes.”¹⁰² He characterized the NCAA’s tradition of amateurism as “circular and unpersuasive.”¹⁰³ And while he acknowledged that the NCAA and its member institutions have helped establish great traditions, he clarified that “those traditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated.”¹⁰⁴

Ultimately, the decision in *Alston* and Justice Kavanaugh’s concurrence may have triggered the end for amateurism as a defense against classifying student-athletes as employees under the FLSA.¹⁰⁵ The *Johnson v. NCAA* case may be the final nail in the coffin.

96 *Id.* at 910.

97 *Id.* at 911.

98 Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021).

99 *See generally id.*; *see also* Black, *supra* note 69, at 1041.

100 *Alston*, 141 S. Ct. at 2166.

101 *Id.* at 2167 (Kavanaugh, J., concurring).

102 *Id.* at 2168.

103 *Id.* at 2167, 2167–69 (“[I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.” *Id.* at 2168.).

104 *Id.* at 2169.

105 *See* Callan G. Stein, Andrew Henson, Christopher M. Brolley & Blake Brettschneider, *U.S. Senate Committee Hears Testimony About the Need for Uniform NIL Regulation That Would Exempt Student-Athletes From Federal and State Employment Laws*, TROUTMAN PEPPER (Oct. 24, 2023), <https://www.troutman.com/insights/us-senate-committee-hears-testimony-about-the-need-for-uniform-nil-regulation-that-would-exempt-student-athletes-from->

B. Johnson v. NCAA

Despite Justice Kavanaugh's concurrence in *Alston*, the NCAA's bylaws still required amateurism to be eligible to compete in intercollegiate athletics in the immediate aftermath of the case.¹⁰⁶ But in *Johnson v. NCAA*, the first case after Kavanaugh's condemnation of the NCAA's tradition of amateurism, the District Court for the Eastern District of Pennsylvania rejected the amateurism defense.¹⁰⁷ The plaintiffs in *Johnson* included a former Villanova University football player, a member of the Fordham University swimming and diving team, a former member of the Fordham baseball team, a former member of the Sacred Heart University tennis team, a former soccer player for Cornell University, and a member of the Lafayette College tennis team.¹⁰⁸ The plaintiffs alleged that student-athletes should be compensated for their time engaging in their interscholastic athletic activities as employees.¹⁰⁹ Their complaint named the NCAA and the colleges and universities they attended as well as twenty additional DI universities as defendants and a putative class of 125 DI institutions.¹¹⁰ The complaint alleged that the NCAA reported a total revenue of \$1,064,403,240 in 2018, yet student-athletes had no opportunities to receive wages for their contribution.¹¹¹ In their motion to dismiss, the NCAA and member institutions argued the student-athletes were not employees because they were amateurs, because the Department of Labor had established that student-athletes were not employees under the FLSA, and because the student-athletes failed to satisfy a multi-factor test to determine employee-status.¹¹² Despite each argument, the district court denied the motion to dismiss and held the student-athletes had "plausibly allege[d] that [student-athletes were] employees . . . under the *Glatt* test."¹¹³

federal-and-state-employment-laws/ [https://perma.cc/C48M-CTRW] ("Many have pointed to the *Alton* [sic] decision—and Justice Kavanaugh's blistering concurrence, in particular—as a path toward an eventual Supreme Court decision finding student-athletes are employees under the FLSA.").

106 See, e.g., NCAA, DIVISION I 2024–25 MANUAL art. 12, § 12.01.1 (2024) ("Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.").

107 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 501 (E.D. Pa. 2021), *aff'd in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024).

108 *Id.* at 495–96.

109 *Id.* at 495.

110 *Id.*

111 *Id.* at 496–97. The complaint alleged that there was an exception where student-athletes participating in NCAA sports could receive compensation for winning Olympic medals through the U.S. Olympic Committee's Operation Gold program. See *id.* at 496.

112 *Id.* at 500.

113 *Id.* at 512.

In regards to the amateurism defense, the NCAA and member institutions had once again relied on the language from *Board of Regents* and the *Berger* court's acknowledgment of the tradition of amateurism.¹¹⁴ However, the district court in *Johnson* found that the *Alston* majority's commentary relegated the *Board of Regents* language to dicta and Kavanaugh's concurrence to be dispositive.¹¹⁵

In their argument based on the Department of Labor, the NCAA and member institutions cited to sections 10b24 and 10b03(e) of the Wage and Hour Division's Field Operations Handbook.¹¹⁶ As they had in *Berger*, they argued the exception in section 10b24 excluding "students who participate in activities generally recognized as extracurricular" from employee-status under the FLSA,¹¹⁷ in combination with section 10b03(e), provided a complete defense.¹¹⁸ However, the district court rejected the argument, finding that any relief from liability required a showing of good faith reliance on sections 10b24 and 10b03(e), which the district court stated was absent from the record.¹¹⁹

Still considering the argument for the section 10b24 exception, the district court went on to find that the student-athletes had "plausibly allege[d] that NCAA D1 interscholastic athletics are not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend."¹²⁰ In support of this finding, the district court pointed to alleged facts that student-athletes are forced to schedule their classes around their athletic participation, in some cases preventing them from taking prerequisite classes for certain degree programs, and claims that student-athletes are required to participate in thirty to forty hours of recorded and non-recorded activities per week.¹²¹ The district court also considered the revenue the

114 *Id.* at 501.

115 *Id.* (rejecting the "argument that [student-athletes] are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics").

116 *Id.* at 502.

117 *Id.* (quoting DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 10b24(a) (2016)).

118 *Id.* Section 10b03(e) states that colleges and universities may allow "students to engage in ... interscholastic athletics and other similar endeavors," and those activities "conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students ... do not result in an employer-employee relationship between the student and the school or institution." DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 10b03(e) (2016).

119 *Johnson*, 556 F. Supp. 3d at 502–03 (citing 29 U.S.C. § 259(a)).

120 *Id.* at 506.

121 *Id.* at 505. The NCAA requires member institutions to record "Countable Athletically Related Activities" on timesheets. See NCAA, DIVISION I 2024-25 MANUAL art. 17, § 17.02.1 (2024).

NCAA and member institutions received in addition to the “significant control” the organizations held over the student-athletes.¹²²

Finally, the district court considered the NCAA and member institutions’ final argument: the economic reality of the relationship under the *Glatt* test.¹²³ The NCAA and member institutions argued that the seven-factor test from *Glatt*, where the Second Circuit considered whether an unpaid intern was an employee under the FLSA, supported a finding that the student-athletes were not employees.¹²⁴ According to the Second Circuit, the test is a “primary beneficiary test” where each factor is weighed while none are dispositive.¹²⁵ Ultimately, the district court found that the first and seventh factors supported a finding that student-athletes were *not* employees while the second and fifth were neutral, and the third, fourth, and sixth factors supported a finding that student-athletes *are* employees under the FLSA.¹²⁶ Thus, the district court found that the allegations were sufficient to survive the motion to dismiss.¹²⁷

Upon review, the Third Circuit held that the denial of the NCAA and member institutions’ motion to dismiss was appropriate and that amateurism was not a sufficient defense.¹²⁸ However, the Third Circuit found that the use of the *Glatt* test was improper.¹²⁹ The Third Circuit agreed with an “economic realities” approach but noted that collegiate athletics are unique.¹³⁰ Therefore, the Third Circuit pointed to a need for a test that accounted for the line between play and work in athletics.¹³¹

122 *Johnson*, 556 F. Supp. 3d at 497, 497–98.

123 *Id.* at 506–12.

124 *Id.* at 509–11. The seven factors look at the extent to which: (1) the intern and employer “clearly understand that there is no expectation of compensation,” (2) “the internship provides training that would be similar to that which would be given in an educational environment,” (3) “the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit,” (4) “the internship accommodates the intern’s academic commitments,” (5) “the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning,” (6) “the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern,” and (7) “the intern and the employer understand that the internship is conducted without entitlement to a paid job” at its conclusion. *See id.* at 509–10 (quoting *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016)).

125 *Id.* (citing *Glatt*, 811 F.3d at 536–37).

126 *Id.* at 512.

127 *Id.*

128 *Johnson v. Nat’l Collegiate Athletic Ass’n*, 108 F.4th 163, 167, 181–82 (3d Cir. 2024).

129 *Id.* at 167.

130 *Id.* at 177 (“Merely playing sports, even at the college level, cannot always be considered commercial work integral to the employer’s business in the same way that the activities performed by independent contractors or interns are assumed to be in previously mentioned multifactor tests.”).

131 *Id.* at 177–78.

Accordingly, the Third Circuit created a four-factor test and held that student-athletes “may be employees under the FLSA when they (a) perform services for another party, (b) ‘necessarily and primarily for the [other party’s] benefit,’ (c) under that party’s control or right of control, and (d) in return for ‘express’ or ‘implied’ compensation or ‘in-kind benefits.’”¹³² While providing the four-factor test, the majority emphasized that “the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee-employer.”¹³³ Ultimately, the case was remanded for evaluation under the Third Circuit’s four-factor test,¹³⁴ although the concurrence described some doubts about its applicability.¹³⁵

III. APPLICATION OF THE *JOHNSON* ECONOMIC REALITIES TEST

Since the Third Circuit remanded the *Johnson* case for analysis under the new four-factor test, the question of student-athletes as employees under the FLSA remains unanswered. The decision does not mean that collegiate student-athletes *are* employees under the FLSA, but it does mean that they *could* be. Ultimately, individuals on both sides of the debate are waiting to see what happens next.¹³⁶

The responses to the Third Circuit’s decision have regarded it as a “win” for student-athletes, but there is some disagreement as to how significant of a win it was. A significant “win” for student-athletes is that amateurism, as a matter of law, is not a defense.¹³⁷ However, both the majority and the concurrence acknowledged that collegiate athletics are unique and should be evaluated as such.¹³⁸ That acknowledgement could weigh in favor of the NCAA and its member institutions, especially if, as the concurring opinion pointed out, the district court gives greater deference to the precedent from “over 65 years, [where] courts across

132 *Id.* at 180 (internal citations omitted) (first quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944); and then quoting *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 301 (1985)).

133 *Id.*

134 *Id.* at 182.

135 *Id.* at 189–93 (Porter, J., concurring).

136 There has not been movement towards settlement, and some institutions have successfully made motions to dismiss for failure to prosecute. See *Explore Ongoing Cases in College Sports Litigation*, COLL. SPORTS LITIG. TRACKER, <https://www.collegesportslitigationtracker.com/tracker> [<https://perma.cc/H2AE-A6EY>] (last updated Apr. 8, 2026, 20:00 ET); Amanda Christovich, *NCAA Refuses Settlement Talks in Athlete Employment Lawsuit*, FRONT OFFICE SPORTS (Feb. 11, 2026), <https://frontofficesports.com/ncaa-refuses-settlement-talks-in-athlete-employment-lawsuit/> [<https://perma.cc/79H5-TGGD>].

137 SPORTSWISE: *Episode 65*, *supra* note 35, at 08:23.

138 *Johnson*, 108 F.4th at 177 (majority opinion), 189 n.9 (Porter, J., concurring).

the country have determined that student-athletes do not qualify as employees of their universities.”¹³⁹

The four factors have been interpreted as a “totality of the circumstances” test,¹⁴⁰ and, as acknowledged in Judge Porter’s concurrence, “almost no question is as fact-intensive as determining employee status under the FLSA.”¹⁴¹ While pointing out the fact-intensive inquiry, the concurrence also addressed how to approach applying the four factors from the majority’s test, as the majority did not provide much guidance.¹⁴² The remainder of this Part explores the potential outcome of analysis under the Third Circuit’s four-factor economic realities test: whether student-athletes (a) perform services for another party, (b) necessarily and primarily for the other party’s benefit, (c) under that party’s control or right of control, and (d) in return for express or implied compensation or in-kind benefits.

A. *Perform Services for Another Party*

As the concurrence pointed out, the majority opinion did not define “services” for the sake of the first factor in its economic realities test.¹⁴³ The concurrence noted that the test does not elaborate on “the critical distinction between ‘service,’ ‘labor,’ or ‘work,’ as distinguished from play or sport.”¹⁴⁴

Discussing the first factor, Paul McDonald, the lead plaintiff’s lawyer for the *Johnson* case, claimed this prong was “the easiest” because almost anything can be considered a service.¹⁴⁵ When addressing the concurrence’s concern about distinguishing between work and play, McDonald said participation in club sports, considering there was no investment by the university, was play and that the student-athlete situation was more accurately comparable to work-

139 *Id.* at 192–93 (Porter, J., concurring).

140 *See* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 42:18.

141 *Johnson*, 108 F.4th at 183–84.

142 *Id.* at 189–92.

143 *Id.* at 189.

144 *Id.* The concurrence relied on various definitions of “servant” and “services.” *See id.*; RESTATEMENT (THIRD) OF AGENCY § 220 (A.L.I. 2006) (defining a “servant” as “a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other’s control or right to control”); *Service*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1950) (defining “service” as “[p]erformance of labor for the benefit of another or at another’s command”); *Service*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “service” as “[l]abor performed in the interest or under the direction of others”).

145 SPORTSWISE: A PODCAST ABOUT SPORTS AND THE LAW: *Episode 66: The Lead Plaintiff’s Lawyer in Johnson v. NCAA Joins to Discuss Johnson v. NCAA!*, at 32:40–32:50 (Spotify, July 16, 2024).

study rather than club or recreational teams.¹⁴⁶ Additionally, when discussing the first factor, McDonald pointed to how professional leagues exemplify how sport can be compensable as work.¹⁴⁷

On the other hand, Jill Bodensteiner, the Vice President and Athletic Director for Saint Joseph's University, argued that the line between work and play in collegiate athletics is not so simply drawn.¹⁴⁸ Bodensteiner, trying to find the distinction between work and play, raised questions about "the factors that differentiate your varsity athletes from your club, your [intramural], [and] your fitness gurus on your campus."¹⁴⁹

Accordingly, it is possible that this first factor, depending on the facts presented, could weigh in favor of the NCAA and its member institutions by classifying the student-athletes' participation as play. After all, as the concurrence pointed out, "student-athletes [generally] serve the teams for which they play[, which] is true of anyone who has ever played on a team But one's contribution in the service of teamwork does not necessarily create an employment relationship."¹⁵⁰ However, while the concurrence said play was not work, which aligns with Bodensteiner's point, the majority, stating a similar idea as McDonald, said the economic realities test should "identify athletes whose play is *also* work."¹⁵¹ Additionally, the district court briefly discussed work and play in its original denial of the NCAA and member institutions' motion to dismiss, noting that athletic "play" can be "work," as exemplified by professional athletics.¹⁵² Thus, based on the majority's point and the district court's previous commentary, it is likely that student-athletes on varsity teams across all three NCAA divisions could be characterized as performing services, weighing in favor of employee-status under the FLSA.

B. Necessarily and Primarily for the Other Party's Benefit

The second factor asks who the primary beneficiary of the student-athlete's performance is. As the *Johnson* concurrence pointed out, "there is a sense in which student-athletes obviously play for the benefit of their university's team."¹⁵³ However, considering the same could be said

146 *Id.* at 33:27–33:48.

147 *Id.* at 34:16–34:29.

148 *See* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 43:02–43:11.

149 *Id.* at 43:45–43:53.

150 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 108 F.4th 163, 189 (3d Cir. 2024) (Porter, J., concurring).

151 *Id.* at 178 (majority opinion).

152 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 501–02 n.7 (E.D. Pa. 2021), *aff'd in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024).

153 *Johnson*, 108 F.4th at 189 (Porter, J., concurring).

for high school student-athletes, the concurrence noted that “something more is required to convert the majority’s university-as-beneficiary factor into a useful indicia of employment.”¹⁵⁴

This factor will likely turn on how the district court defines “benefit” on remand. The *Johnson* concurrence instructs the factfinder to determine whether a collegiate sports team is part of a “profit-seeking business[]” or “an extra-curricular activity creating at best indirect and attenuated economic benefit for the university.”¹⁵⁵ When the majority in *Johnson* was considering whether the *Glatt* test was appropriate, it determined that student-athletes may not receive comparable benefits to those an intern receives in an internship because collegiate athletes are “not part of any academic curriculum.”¹⁵⁶ Thus, it is possible that academic credit could be significant to the outcome of the second factor. However, schools may incorporate athletic participation into academic curriculum in different ways. For example, some schools encourage or allow student-athletes to have their participation reflected directly in their academic records.¹⁵⁷ Therefore, this factor, should academic credit make a difference in the “primary benefit” factor, may have a variety of different results based on the policies of an institution.

In order to address the conversation about academic credit under the second factor, McDonald pointed to employment through work-study programs where academic credit is not available.¹⁵⁸ The difference between student-athletes and work-study participants, according to McDonald, is that student-athletes do not receive scheduling accommodations and must arrange their academic schedules around their athletic participation whereas work-study participants schedule their work-study participation around their academics.¹⁵⁹ Furthermore, work-study is limited to twenty hours a

154 *Id.* at 190.

155 *Id.*

156 *Id.* at 180 (majority opinion).

157 *See, e.g.,* Mark Schlabach, *Varsity Athletes Get Class Credit*, WASH. POST (Aug. 25, 2004), <https://www.washingtonpost.com/archive/politics/2004/08/26/varsity-athletes-get-class-credit/2b459d91-faa9-48c0-8e1b-ded29439c4e6/> [<https://perma.cc/79QJ-DVEB>] (“A Washington Post survey of physical education courses taught at the 117 schools that field Division I-A football teams found that nearly three dozen universities award academic credit for participation on intercollegiate sports teams.”); *NCAA Student-Athlete Academic Eligibility Requirements*, UNIV. OF MARY, <https://goumary.com/sports/2023/3/7/ncaa-student-athlete-academic-eligibility-requirements.aspx> [<https://perma.cc/83YF-9YB5>] (last visited Apr. 9, 2026) (A DII university granted academic credit for competing as well as introducing “Virtue in Sport” courses.); *Physical Education*, SWARTHMORE COLL. ATHLETICS, https://swarthmoreathletics.com/sports/2013/6/14/PE_0614131554.aspx [<https://perma.cc/YY23-ZKFY>] (last visited Mar. 1, 2026) (For participation in intercollegiate athletics, a DIII college grants academic credits towards the institution’s physical education requirement.).

158 SPORTSWISE: *Episode 66*, *supra* note 145, at 36:12–36:20.

159 *Id.* at 36:20–36:58.

week whereas student-athletes may dedicate well over thirty hours to their sport.¹⁶⁰ Advocates for employment status for student-athletes point to the lack of academic scheduling accommodations as a way of demonstrating that the student-athletes are not the primary beneficiaries of their participation in collegiate sports.¹⁶¹

Also subject to debate in the “primary benefit” factor is the question of whether profitability should play a significant factor in the analysis. Some commentators argued revenue should not be a part of the analysis considering the profitability of a business does not determine whether or not the business’s employees are actually employees.¹⁶² That being said, both the majority in *Johnson* at the Third Circuit as well as the district court noted the immense revenue generated by collegiate athletics.¹⁶³ Thus, revenue could implicate who receives the primary benefit, and advocates for student-athlete employee-status rely heavily on the money being generated.¹⁶⁴

But the discussion of revenue leads to another variable impacting whether the student-athlete or the NCAA and member institutions are the primary beneficiary: scholarship and financial aid. 57% of DI student-athletes and 63% of DII student-athletes are receiving some form of scholarship.¹⁶⁵ While that is a significant percentage, only 1% of student-athletes receive a full-ride, and they are heavily dependent on the sport.¹⁶⁶ Ultimately, a student-athlete’s scholarship could impact whether a court would consider them the primary beneficiary of their athletic performance.¹⁶⁷

160 *Id.* at 37:26–38:10.

161 *See, e.g., id.* at 39:40–40:05; Tyler J. Murry, Note, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 790–92 (2022); Fresh, *supra* note 68, at 173.

162 SPORTSWISE: *Episode 65*, *supra* note 35, at 18:10–18:18 (discussing how profitability is not used to determine employment status in other industries).

163 *See Johnson v. Nat’l Collegiate Athletic Ass’n*, 108 F.4th 163, 169–71 (3d Cir. 2024) (“Some estimate that college athletes generate roughly \$3 billion in annual revenue for their schools, conferences, and the NCAA.” *Id.* at 169); *Johnson v. Nat’l Collegiate Athletic Ass’n*, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021), *aff’d in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024).

164 *See supra* notes 26–31 and accompanying text.

165 Jesse Marsh, *5 Misconceptions About College Athletic Scholarships*, SPORTSEPRENEUR (Jan. 2026), <https://sportsepreneur.com/misconceptions-about-college-athletic-scholarships/> [https://perma.cc/8E2U-A23G]; *see also supra* notes 12–16, 22–25, and accompanying text.

166 *Athletic Scholarships: Everything You Need to Know*, NCSA COLL. RECRUITING, <https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts> [https://perma.cc/RQ4D-N75M] (last visited Mar. 1, 2026).

167 The IRS considers scholarships to be a benefit meant to aid the student-athlete in pursuing their education, which is why athletic scholarships have not been excluded from tax exemptions for being considered a “payment for services.” *See infra* notes 202–03 and accompanying text.

Another potential complication based on the discussion of revenue to determine who is the primary beneficiary of student-athlete performance is the status for student-athletes in non-revenue-generating sports. While there are twenty-four sports across the three divisions in the NCAA,¹⁶⁸ most only consider football and men's basketball to be revenue-generating.¹⁶⁹ Even in the district court's opinion, the difference in the alleged revenues for colleges and universities with NCAA DI football teams compared to schools without football teams was substantial.¹⁷⁰ Therefore, if the revenue generated by the sport is key to determine whether the student-athlete or the NCAA and member institutions are the primary beneficiary, this factor may have opposite results for revenue-generating compared to non-revenue-generating sports.¹⁷¹ If so, the NCAA and member institutions may argue that they are not benefitting at all for non-revenue-generating sports.¹⁷² To counter, McDonald argued that every sport generates revenue, albeit at different levels.¹⁷³ To McDonald's point, the majority from the Third Circuit in *Johnson* discussed how success in athletics can "contribute to a positive feedback loop producing more revenue, greater selectivity in admissions, improved alumni engagement, greater fundraising, and better faculty recruiting, all of which can catapult regional universities into national prominence in a way that would otherwise be impossible."¹⁷⁴ On the contrary, the concurrence argued "for most student-athletes, the economic reality is that their athletic service, and their team's existence, is revenue-negative."¹⁷⁵

Another potential consideration at this step could be the educational and personal value a student-athlete may derive from their participation in collegiate athletics. In their motion to dismiss in front of the district court, the NCAA and member institutions in *Johnson* claimed

168 Overview, *supra* note 11.

169 See, e.g., Nick Tremps, Note, *The Memorandum Heard Around the College Athletics World: Why Student-Athletes in Non-Revenue-Generating Sports Should Not Enjoy the Status of "Employee" Under the NLRA*, 14 WAKE FOREST L. REV. ONLINE 47, 58–59 (2024).

170 See *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 505 (E.D. Pa. 2021), *aff'd in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024).

171 See Tremps, *supra* note 169, at 60–61.

172 SPORTSWISE: Episode 65, *supra* note 35, at 28:24–28:32.

173 SPORTSWISE: Episode 66, *supra* note 145, at 23:42–24:03 (discussing how revenue generation doesn't determine employee-status by analogizing to how a dishwasher is an employee despite not directly generating revenue).

174 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 108 F.4th 163, 169 (3d Cir. 2024).

175 *Id.* at 191 (Porter, J., concurring). The concurrence also pointed to how the majority opinion did not provide guidance to distinguish between "the 'economic reality' of a nonrevenue student-athlete's relationship with his university [and] that of a musician whose performing arts scholarship is conditioned on her time-consuming participation in a band or orchestra." *Id.* at 192.

student-athletes received “intangible educational benefits” that include “discipline, work ethic, strategic thinking, time management, leadership, goal-setting, and teamwork.”¹⁷⁶ While certainly valuable lessons, a lower court looking to the majority from the Third Circuit in *Johnson* for guidance could find that “[b]y far the most obvious beneficiaries of college sports are a select few administrators, athletic directors, and coaches.”¹⁷⁷ Thus, it is likely this factor would support a finding that at least some DI student-athletes are the primary beneficiaries of their participation in sports.

C. Under That Party's Control or Right of Control

The third factor from the Third Circuit discusses control and the right of control, and the concurrence, once again, pointed to the lack of guidance provided for evaluating control under the factor.¹⁷⁸ McDonald, in applying this factor, considered it a rather straight-forward factor in favor of the student-athletes in light of NCAA bylaws applying to each student-athlete as well as additional guidelines and requirements from individual schools.¹⁷⁹ Any bylaws and institutional guidelines would likely apply equally to both revenue-generating and non-revenue-generating sports, so the potential varying outcomes based on revenue generation from the previous factors may not be present in this factor. However, there would likely be different outcomes based on the different rules and regulations the colleges and universities enforce.

Supporters of holding that student-athletes are not employees have pointed out that control is still a factor in non-employment relationships and that “games require rules.”¹⁸⁰ That being said, the level of control exercised by individual member institutions may reintroduce the potential for divergent findings. When considering control exercised by individual institutions, the National Association of Collegiate Directors of Athletics (NACDA) and the Division I Athletics Directors Association (DI-AAA) have been developing what is currently being referred to as the “Division I Next Generation Educational and Student-Athlete Centric Model.”¹⁸¹ The Model is meant to “give student-athletes a greater voice

176 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 505–06 (E.D. Pa. 2021), *aff'd in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024) (quoting Complaint at 39, *Johnson*, 556 F. Supp. 491 (No. 19-5230)).

177 *Johnson*, 108 F.4th at 170. The district court opinion in *Johnson* did not mention scholarships in its analysis of the motion to dismiss.

178 *Id.* at 190 (Porter, J., concurring).

179 SPORTSWISE: *Episode 66*, *supra* note 145, at 46:20–47:40.

180 See KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 46:28–46:33.

181 See NAT'L ASS'N OF COLLEGIATE DIRS. ATHLETICS, DIV. I NEXT GENERATION EDUC. & STUDENT-ATHLETE CENTRIC MODEL 1 (2024), <https://nacda.com/documents/2024/6/18/FullReportforweb.pdf> [<https://perma.cc/73FC-KBL5>].

and control over their experience,”¹⁸² and provides a means to evaluate the control individual institutions exercise over their student-athletes.¹⁸³ The Model looked at four categories of control: academic requirements, directions for performing tasks, mandatory time commitments, and off the playing field activities.¹⁸⁴ While emphasizing its intent to reduce any “unnecessary control,” the Model proposes that universities and colleges should exercise the control necessary “to preserve the education, health, safety, and well-being of student-athletes and to maintain the integrity of the academic and athletics mission.”¹⁸⁵ The Model conceived control as a sort of spectrum, which further indicates that the outcome for this factor will likely vary depending on the institution’s restrictions.

Ultimately, as it currently stands, the concurrence claimed the “control or right-of-control factor does not go very far to distinguish Division I athletes from Division II athletes, Division III athletes, or other organized team-sport participants,”¹⁸⁶ so this would be, like the previous two, a very fact-intensive analysis.

D. In Return for Express or Implied Compensation or In-kind Benefits

The final factor discusses services in return for express or implied compensation or in-kind benefits, which likely has an overlapping analysis with the first and second factors. As for “in-kind benefits,” the Supreme Court called such benefits “wages in another form.”¹⁸⁷ In terms of in-kind benefits, student-athletes receiving scholarships or financial aid would meet this factor.¹⁸⁸ Other alternative forms of “in-kind” benefits that would meet this factor could include training centers, travel, accommodations, academic advising, extra tickets to games and competitions, and meal plans.¹⁸⁹ A study by the Knight Commission compared median academic spending per student compared to median athletic spending per student-athlete, and found that, between 2005–2008, the median academic spending was increasing by 20.5% whereas

182 *Id.* at 10.

183 *Id.* at 11.

184 *Id.*

185 *Id.* at 10.

186 *Johnson v. Nat’l Collegiate Athletic Ass’n*, 108 F.4th 163, 190 (3d Cir. 2024) (Porter, J., concurring).

187 *Tony & Susan Alamo Found. v. Sec’y of Lab.*, 471 U.S. 290, 301 (1985).

188 *See Johnson*, 108 F.4th at 191; *see also supra* note 22 and accompanying text.

189 *See SPORTSWISE: Episode 66, supra* note 145, at 18:03–18:21; KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 51:58–52:13; Katie Davis, *A New Playbook: Benefits and Tax Implications of Athlete Employment*, JAMES MOORE & CO. (Feb. 21, 2024), <https://www.jmco.com/articles/collegiate-athletics/benefits-tax-athlete-employment/> [<https://perma.cc/3DUS-AZR7>].

the median athletic spending was increasing by 37.9%.¹⁹⁰ In 2008, the study found that median athletic spending per athlete was \$84,446 compared to \$13,349 median academic spending.¹⁹¹ Accordingly, such spending and benefits could be considered in-kind benefits that would weigh in favor of student-athlete employee status for this factor.

An additional wrinkle to this factor was introduced by the concurrence. The concurrence claimed the difference between an employee and a non-employee may be blurred by a “person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit.”¹⁹² Thus, the distinction between work and play could once again influence a factor’s outcome, as “[t]he FLSA was ‘obviously not intended’ to classify all such persons as employees, ‘[o]therwise, all students would be employees of the school or college they attended.’”¹⁹³

IV. IMPLICATIONS OF FINDING THAT STUDENT-ATHLETES ARE EMPLOYEES UNDER THE FSLA AND THE NEED FOR A CONGRESSIONAL “CARVE-OUT”

A finding that student-athletes are employees under the FLSA would have massive implications for not only the NCAA and its member institutions, but the student-athletes as well. For the NCAA and its member institutions, the potential monetary damages could be massive, especially when considering the possibility for “copycat litigation” that would likely follow.¹⁹⁴ Wage and labor laws can have retroactive effects,¹⁹⁵ and there is the potential of practically unlimited liability considering there are very limited records of the total hours the student-athletes have “worked,”¹⁹⁶ especially since, as the Third Circuit noted, the FLSA has not defined “work.”¹⁹⁷

One of the main goals of the FLSA is to protect “the rights of those who toil, of those who sacrifice a full measure of their freedom and

190 KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS 4 (2010).

191 *Id.* (“Median athletics spending per athlete at institutions in each major athletics conference ranges from 4 to nearly 11 times more than the median spending on education-related activities per student.”).

192 *Johnson*, 108 F.4th at 191 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)).

193 *Id.* (quoting *Walling*, 330 U.S. at 152).

194 SPORTSWISE: *Episode 65*, *supra* note 35, at 23:07–24:00.

195 *Id.* at 24:36–24:41 (discussing how, if an individual is classified as an employee today, they were an employee yesterday).

196 *Id.* at 25:04–25:45 (stating that the employer has the obligation to establish and maintain time records, and if they failed to do so accurately, the employee testimony is the “next best evidence”).

197 *Johnson*, 108 F.4th at 178.

talents to the use and profit of others.”¹⁹⁸ And while a finding that student-athletes are employees may provide student-athletes with compensation, it would also open the door for some significant complexities. Among the potential changes that could impact student athletes stemming from employee-status are tax complexities, the possibility of restrictive covenants, visa obstacles, worker’s compensation impacts, and Title IX complications. Additionally, there could be nonlegal implications such as changes to handling student conduct violations and the logistical challenges for institutions having hundreds of new employees on campus.

A. Tax Complexities

One of the potential complications that would arise from classifying student-athletes as employees would be taxes. Section 61(a)(1) of the federal tax code explicitly says that gross income includes any “[c]ompensation for services, including fees, commissions, fringe benefits, and similar items.”¹⁹⁹ As it currently stands, an athletic scholarship that relates to tuition and tuition-related expenses such as enrollment fees, books, and required course equipment is tax-free under § 117 of the federal tax code.²⁰⁰ Any scholarship received that relates to “incidental expenses” like room and board, travel, and optional equipment would be considered taxable and part of a student-athlete’s gross income.²⁰¹

An important caveat is that, for a scholarship to be tax-free, it cannot be in return for services.²⁰² The IRS has long included athletic scholarships to be within § 117 based on Revenue Ruling 77-263, which commented that an athletic scholarship “awarded to students by a university that expects but does not require the students to participate in a particular sport, requires no particular activity in lieu of participation, and does not cancel the scholarship if the student cannot participate” is excludable from the student-athlete’s gross income and is therefore not taxable income.²⁰³ Accordingly, the IRS’s stance has been that “the athletic scholarship awarded by the university is primarily to aid the recipients in pursuing their studies and, therefore,

198 *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 597 (1944).

199 26 U.S.C. § 61(a)(1) (2018).

200 *See* 26 U.S.C. § 117 (2018); *Topic No. 421, Scholarships, Fellowship Grants, and Other Grants*, IRS: TAX TOPICS (Jan. 20, 2026), <https://www.irs.gov/taxtopics/tc421> [<https://perma.cc/D2D2-P73L>].

201 *Topic No. 421, supra* note 200.

202 *See* 26 U.S.C. § 117(c)(1) (2018).

203 Rev. Rul. 77-263, 1977-2 C.B. 47.

is excludable under section 117.”²⁰⁴ If the four factor test from *Johnson* determines that scholarships are in return for services, that may prompt the IRS to begin taxing athletic scholarships that have previously been tax-free.

Another possibility could be the cancellation of athletic scholarships in general. If colleges and universities begin paying student-athletes salaries under the FLSA, they may decide not to offer scholarships, as well.²⁰⁵ While some institutions may still offer scholarships to aid in recruiting, others would consider transitioning the current athletic financial aid to pay student-athlete wages; it is an “either/or,” not an “and.”²⁰⁶

An additional tax implication for calling student-athletes employees is taxation for fringe benefits under § 132 of the federal tax code.²⁰⁷ A fringe benefit is any kind of payment in exchange for services—usually not in cash (e.g., free coffee or personal printing at work).²⁰⁸ Section 61(a)(1) explicitly says fringe benefits in exchange for services are included in income unless as otherwise provided in § 132.²⁰⁹ This could introduce taxes on fringe benefits like ticket discounts, team trips, memberships, athletics facilities, mental health resources, and physical therapy.²¹⁰ This introduces complications of how to actually track the benefits and calls into question how the student-athletes’ education would be categorized. Would their education be considered a fringe benefit that would now need to be taxed?²¹¹

204 Letter from John A. Koskinen, Comm’r, IRS, to Hon. Richard Burr, Sen., U.S. Senate (Apr. 9, 2014).

205 See Michael McCann, *College Athletes as Employees: Answering 25 Key Questions*, SPORTICO (Dec. 19, 2023, 10:00 ET), <https://www.sportico.com/feature/college-athletes-employees-complete-primer-1234758491/> [<https://perma.cc/DM8K-7SLL>].

206 *Name, Image, and Likeness, and the Future of College Sports: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 14–15 (2023) (statement of Jill Bodensteiner, Vice President and Dir. of Athletics, Saint Joseph’s Univ.).

207 26 U.S.C. § 132 (2018).

208 See *Employee Benefits*, IRS (July 24, 2025), <https://www.irs.gov/businesses/small-businesses-self-employed/employee-benefits> [<https://perma.cc/YJD6-LK8K>].

209 See 26 U.S.C. § 61(a)(1) (2018).

210 See Davis, *supra* note 189; KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 51:55–52:21.

211 See Diego Areas Munhoz & Samantha Handler, *College Athlete Unions Raise Specter of Scholarship Tax Hit*, BLOOMBERG L. (Apr. 8, 2024, 4:45 ET), <https://news.bloomberglaw.com/daily-labor-report/college-athlete-unions-raise-specter-of-scholarship-tax-hit> [<https://perma.cc/GBY2-TZZ4>] (“Legal and tax observers noted that large profitable athletic departments may be able to manage increased costs, but smaller schools and low-revenue sports would likely bear the brunt of the change, putting those programs in jeopardy.”).

B. Possibility of Introducing Restrictive Covenants

Restrictive covenants, in the employment context, are contracts that employers introduce into employment relationships in order to protect business interests, such as goodwill, trade secrets and confidential information, and investments.²¹² Restrictive covenants include non-compete agreements, which prohibit employees from leaving and working with a competitor, non-solicitation agreements, which prevent employees from soliciting a former employer's customers or employees, and non-disclosure agreements, which prevent employees from using or disclosing a former employer's confidential information.²¹³ While the FTC has tried to introduce a national ban on non-compete agreements, the ban was stymied in litigation.²¹⁴ Accordingly, restrictive covenants remain governed by state law.²¹⁵ California, Minnesota, Oklahoma, and North Dakota have complete bans on non-competes, but the level of limitations on restrictive covenants varies significantly by state.²¹⁶

As student-athletes are not currently considered employees, they are not subject to restrictive covenants.²¹⁷ That protection against restrictive covenants could be lost with granting student-athletes employee status.²¹⁸

Currently, the NCAA allows student-athletes to transfer to a different school while maintaining immediate eligibility to participate in

212 See *Restrictive Covenants in the USA*, L&E GLOB. (Oct. 22, 2024), <https://leglobal.law/countries/usa/employment-law/employment-law-overview-usa/08-restrictive-covenants/> [https://perma.cc/VJC8-5W9G]; Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

213 See *Restrictive Covenants*, *supra* note 212.

214 See David E. Schwartz, Parker Rider-Longmaid & Joseph M. Rancour, *FTC Noncompete Rule Is Set Aside, But Appeal Is Expected and States May Act*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Sept. 5, 2024), <https://corpgov.law.harvard.edu/2024/09/05/ftc-noncompete-rule-is-set-aside-but-appeal-is-expected-and-states-may-act/> [https://perma.cc/QN2G-PEH7].

215 See *State Noncompete Law Tracker*, ECON. INNOVATION GRP. (Jan. 13, 2026), <https://eig.org/state-noncompete-map/> [https://perma.cc/JL8V-FAED].

216 *Id.* (discussing how limitations on restrictive covenants may be industry-specific or basing enforceability on “reasonableness” of terms).

217 See Kenneth N. Winkler, *FTC Proposed Ban on Non-Competes Could Have Huge Impact on College Football*, BERMAN FINK VAN HORN (Feb. 6, 2023), <https://www.bfvlaw.com/ftc-proposed-ban-on-non-competes-could-have-huge-impact-on-college-football/> [https://perma.cc/53PV-8CK6].

218 *Id.*; see also Holt Hackney, *To Compete or Not to Compete: The Impact of Prohibiting National Non-Compete Agreements in Sports*, SPORTS L. EXPERT (Nov. 29, 2023), <https://sportslawexpert.com/2023/11/29/to-compete-or-not-to-compete-the-impact-of-prohibiting-national-non-compete-agreements-in-sports/> [https://perma.cc/SL3H-WFRJ] (discussing how some college football coaches are subject to non-compete agreements).

their sport at their new school.²¹⁹ If student-athletes are considered employees, there is a question of whether restrictive covenants would impact transfer policies.²²⁰ For example, in 2025, the University of Georgia filed a lawsuit seeking \$390,000 in damages from a former football player that transferred after his sophomore season.²²¹ This raised a number of questions: If a student-athlete is subject to a non-compete agreement, would transferring be prohibited? If they were subject to a non-solicitation agreement, would they face liability for talking to their former teammates about transferring? If subject to a non-disclosure agreement, would they be vulnerable to liability for talking about their former team's strategies or team playbooks?

An additional consideration related to restrictive covenants is the introduction of arbitration.²²² Provisions requiring any employment disagreements to be addressed through arbitration are permitted under the FLSA.²²³ Arbitration provisions could make it more difficult for an employee to take their complaints to court and could lower their likelihood of recovery.²²⁴

C. *Visa Obstacles*

The NCAA estimates that around 25,000 student-athletes are international students,²²⁵ and, although there are several options, the

219 See Meghan Durham Wright, *Division I Council Approves Changes to Transfer Rules*, NCAA (Apr. 17, 2024, 18:35 ET), <https://www.ncaa.org/news/2024/4/17/media-center-division-i-council-approves-changes-to-transfer-rules.aspx> [<https://perma.cc/FHE2-CCTX>]; Heather Dinich, *NCAA Approves New Transfer Rule Allowing Immediate Eligibility*, ESPN (Apr. 17, 2024, 15:28 ET), https://www.espn.com/college-football/story/_/id/39963389/ncaa-approves-new-transfer-rule-allowing-immediate-eligibility [<https://perma.cc/UCF2-2ZM2>].

220 See Winkler, *supra* note 217.

221 Dan Murphy, *Georgia Seeks \$390K from DE Damon Wilson for Transfer Damages*, ESPN (Dec. 5, 2025, 13:53 ET), https://www.espn.com/college-football/story/_/id/47212583/georgia-seeks-390k-de-damon-wilson-transfer-damages [<https://perma.cc/6XCY-AVKG>].

222 The University of Georgia is seeking to force its lawsuit against Damon Wilson into arbitration. *See id.*

223 See, e.g., *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir. 2014); *Adkins v. Lab. Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002).

224 See Dan Ocampo, *FAQ on Mandatory Arbitration in Employment*, NAT'L EMP. L. PROJECT (Oct. 30, 2024), <https://www.nelp.org/insights-research/faq-on-mandatory-arbitration-in-employment/> [<https://perma.cc/KF8Y-3CUH>] ("Workers are twice as likely to prevail, and take home an average of fifteen times more, when they proceed in court than when they are forced into arbitration.").

225 *Become an International Student-Athlete*, NCAA, <https://www.ncaa.org/eligibility-center/initial-eligibility-requirements/international-student-athletes/> [<https://perma.cc/8LX2-XH3N>] (last visited Apr. 10, 2026).

majority of them come to the United States on an F-1 Visa.²²⁶ Students utilizing F-1 Visas have strict limitations on employment, including on-campus employment capped at twenty hours a week, subject to approval by a Designated School Official.²²⁷ This introduces extraordinary obstacles depending on how compensable time is calculated.

According to the facts alleged during the *Johnson* district court's review of the motion to dismiss, "[s]tudent athletes have reported spending more than 30 hours per week on athletically related activities . . . [with some] report[ing] spending more than 40 hours per week."²²⁸ Assuming these estimates are accurate, this would foreclose international student-athletes on F-1 Visas from participating in a significant portion of their sport each week. This could also vary depending on the school and how far the teams need to travel for competitions. For the 2024 March Madness tournament, multiple teams traveled over 2,000 miles,²²⁹ and, assuming travel time would be considered hours worked under the FLSA,²³⁰ a student-athlete may reach the twenty-hour maximum extremely quickly. Additionally, waiting for a competition to start, especially an off-campus competition,²³¹ could be considered hours worked, which would also limit the time an international student may have to participate. Visa limitations could also result in student-athletes being prevented from voluntarily working on their sport, independent of their scheduled times.²³²

226 See *What Type of Visa Is Required for an International Student in US?*, U.S. SPORTS SCHOLARSHIPS, <https://www.ussportsscholarships.com/student-visa/> [<https://perma.cc/DP86-7RYK>] (last visited Feb. 7, 2026).

227 See *Chapter 6—Employment*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-2-part-f-chapter-6> [<https://perma.cc/8VH8-N7PK>] (last visited Feb. 8, 2026).

228 *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021), *aff'd in part, vacated in part*, 108 F.4th 163 (3d Cir. 2024).

229 See Christopher Boan, *March Madness 2024: Who Is Traveling the Furthest?*, BET CAROLINA (Mar. 19, 2024, 10:19 ET), <https://www.betcarolina.com/college-basketball/march-madness-odds/who-is-traveling-the-furthest> [<https://perma.cc/QT4D-GNU6>].

230 See *Fact Sheet #22*, *supra* note 42 ("Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.").

231 *Id.* ("Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time).").

232 *Id.* ("Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer. . . . The reason is immaterial. The hours are work time and are compensable.")

Additionally, international students on an F-1 are permitted to work at off-campus locations “that are educationally affiliated with the school and the employment must be an integral part of the student’s educational program.”²³³ An international student-athlete would need to be able to demonstrate an off-campus competition was part of their educational program, otherwise they may be unable to participate in an away competition.

D. Workers’ Compensation Impacts

Student-athletes are often injured as a result of participating in their sport.²³⁴ As it currently stands, the NCAA requires its DI member institutions “to cover medical costs for an athletically related injury for at least two years after either graduation or separation from the school, or until the student-athlete qualifies for coverage under the NCAA Catastrophic Injury Insurance Program.”²³⁵ Costs also include out-of-pocket medical expenses and medical expenses not reimbursed by insurance.²³⁶ The NCAA Catastrophic Injury Insurance Program is additional insurance for an injury resulting in medical expenses over \$90,000.²³⁷ The NCAA requires DI schools to be compliant with Cardiac Care Best Practices, Mental Health Best Practices, and a Concussion Safety Protocol.²³⁸ Additionally, the NCAA has a Post-Eligibility Insurance Program for student-athletes in DI, DII, and DIII.²³⁹ The Post-Eligibility Insurance Program provides student-athletes two-year coverage on a policy with a “\$90,000 excess limit per [athletically related] injury [suffered through participation in their sport], with no deductible,” and part of that amount is able to go towards mental health.²⁴⁰ The NCAA’s member institutions, while required to provide medical care to current student-athletes, are not required to provide

233 *Chapter 6—Employment, supra* note 227.

234 See Zachary Y. Kerr, Stephen W. Marshall, Thomas P. Dompier, Jill Corlette, David A. Klossner & Julie Gilchrist, *College Sports–Related Injuries — United States, 2009–10 Through 2013–14 Academic Years*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6448a2.htm> [<https://perma.cc/7AUC-5FL2>] (“The 1,053,370 injuries estimated during the 5 academic years studied represented an average of 210,674 total injuries per year.”).

235 *Student-Athlete Core Guarantees, supra* note 24.

236 *Id.*

237 See *NCAA Catastrophic Injury Insurance Program*, NCAA, <https://www.ncaa.org/student-athletes/insurance-and-medical-coverage/catastrophic-injury-insurance-program/> [<https://perma.cc/UTC5-TXYS>] (last visited Apr. 10, 2026).

238 See *Student-Athlete Core Guarantees, supra* note 24.

239 *Id.*

240 *Post-Eligibility Insurance Program*, NCAA, <https://www.ncaa.org/sports/2023/8/17/ncaa-post-eligibility-insurance-program.aspx> [<https://perma.cc/7NKM-D45P>] (last visited Apr. 10, 2026).

insurance for the additional two years covered by the Post-Eligibility Insurance Program.²⁴¹ Should the *Johnson* four-factor test result in a finding that student-athletes are employees, the NCAA's approach may change. One potential development could be turning towards workers' compensation,²⁴² a possibility that had supporters prior to the *Johnson* case.²⁴³

Workers' compensation can vary by state²⁴⁴ and provides compensation benefits for employees injured while on the job.²⁴⁵ If a student-athlete was injured while practicing or competing, they would potentially need to seek workers' compensation.²⁴⁶ The workers' compensation system can be unpredictable and unfamiliar,²⁴⁷ but the workers' compensation benefits can be significant: the programs include compensation for medical expenses and payment for lost wages.²⁴⁸ Payments are often limited based on "average weekly wage,"²⁴⁹ and the cost for workers' compensation insurance would fall on the colleges and universities.²⁵⁰ That being said, colleges and

241 *Id.*

242 See Michael McCann, *College Athlete Pay Could Trigger Workers' Compensation Coverage*, SPORTICO (June 17, 2024, 05:55 ET), <https://www.sportico.com/law/analysis/2024/college-athlete-pay-workers-compensation-1234784341/> [<https://perma.cc/39W2-RKK4>].

243 See, e.g., Shaun Loughlin, Note, *Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics*, 48 CONN. L. REV. 1737, 1762–63 (2016); Alexis C. Hivner, Note, *Clock-Out or Time-Out: Alston's Game-Changing Impact on Student-Athletes' Employment Status*, 54 U. MEM. L. REV. 691, 721–24 (2024).

244 See Carl Niedbala, *Workers' Compensation: State by State Guide*, FOUNDER SHIELD (Aug. 24, 2024), <https://foundershield.com/blog/workers-compensation-state-by-state/> [<https://perma.cc/VG7N-L45E>] (discussing how forty-nine out of fifty states require companies to carry workers' compensation insurance); *Program Operations Manual System (POMS): Chart of States' Maximum Workers' Compensation (WC) Benefits*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0452150045> [<https://perma.cc/Y6S8-PP36>] (last visited Feb. 8, 2026).

245 See Christopher R. Deubert, *Practical Implications for Student-Athletes if They Professionalize*, CONSTANGY (Apr. 30, 2024), <https://www.constangy.com/employment-labor-insider/practical-implications-for-student-athletes-if-they-professionalize> [<https://perma.cc/565A-Q24D>].

246 *Id.*

247 See Loughlin, *supra* note 243, at 1765–66.

248 See *Workers' Compensation*, USA.GOV (Mar. 21, 2025), <https://www.usa.gov/workers-compensation> [<https://perma.cc/Z2AE-K9X3>].

249 See Cori Smith, *Workers' Compensation Recovery for Injured University Student Athletes: The Impact of Recent Legal Developments*, 29 CONN. INS. L.J. 116, 133 (2022); *The Pros and Cons of Workers' Compensation*, BAILEY & GALEYEN ATT'YS AT L. (Apr. 20, 2023), <https://www.thetexasattorney.com/blogs/the-pros-and-cons-of-workers-compensation/> [<https://perma.cc/K4N3-FYPN>] (“[W]orkers' compensation won't cover pain and suffering [or] loss of enjoyment of life.”).

250 See McCann, *supra* note 242.

universities receive a significant portion of their funding from tuition,²⁵¹ so could an increase in costs for workers' compensation insurance result in that cost being passed along to the student body through higher cost of attendance?

Additionally, depending on how many student-athletes a college or university has that would qualify as employees under the *Johnson* four-factor test, the institutions may be required to offer health insurance for student-athletes aside from the requirements from the NCAA.²⁵² This could result in some student-athletes receiving better health insurance coverage, although they would likely have to pay some of the insurance premiums or copays.²⁵³ While these changes may provide new benefits for student-athletes, colleges and universities would likely need to provide guidance for navigating the new developments.

E. Title IX Complications

Signed in June 1972, Title IX is a federal law intended to protect equal participation in educational opportunities and careers.²⁵⁴ It provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."²⁵⁵ Accordingly, Title IX established "equal opportunity in athletics based on sex."²⁵⁶

In a conversation about developing NIL guidelines, Catherine Lhamon, the then-Assistant Secretary of Education for Civil Rights, said there must be equal opportunities in schools "including with respect to benefits, opportunities, publicity, and recruitment, and [schools] must not discriminate in the provision of financial aid."²⁵⁷ When considering compensation for student-athletes, then-U.S. Secretary of Education Miguel Cardona has previously expressed concern that male student-athletes would be paid more than the female student-athletes.²⁵⁸

251 See Smith, *supra* note 249, at 134.

252 See Deubert, *supra* note 245.

253 *Id.*

254 See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2018).

255 *Id.* § 1681(a).

256 Hana Ferrero, Note, *College Athletes as Employees: Implications for Title IX and (Un)Equal Pay*, U. CHI. L. REV. ONLINE, June 11, 2025, at *1, *4.

257 Paula Lavinge & Dan Murphy, *Title IX Will Apply to College Athlete Revenue Share, Feds Say*, ESPN (July 16, 2024, 10:58 ET), https://www.espn.com/college-sports/story/_/id/40567726/title-ix-college-athlete-revenue-share-nil [<https://perma.cc/7ZZ4-NVZ2>].

258 Paula Lavinge, *Education Secretary Miguel Cardona on Title IX Compliance: 'It Shouldn't Be That the Federal Government Has to Watch—It's Everyone's Job'*, ESPN (June 15, 2022, 06:45 ET), https://www.espn.com/college-sports/story/_/id/34084273/education-secretary-miguel-cardona-title-ix-compliance-the-federal-government-watch-everyone-job [<https://perma.cc/8EMJ-4G3U>].

However, there is some confusion about how Title IX would apply in a student-athlete employment context.²⁵⁹ Ultimately, “Title IX obligations may extend to ensuring equal wages and opportunities for female athletes, potentially leading to changes in funding and resources allocation within athletic departments,”²⁶⁰ and additional guidance from the Department of Education would be essential to navigate any potential changes.²⁶¹

F. Logistical and Practical Challenges

In addition to legal changes, there are logistical and practical complications that may result from finding student-athletes to be employees. One such practical challenge would be the logistics of managing hundreds of new employees and identifying and tracking compensable time. While the size of a college or university’s Human Resource department varies, generally, the size of the department should grow according to the numbers of employees.²⁶² The NCAA and its member institutions would need to better establish and define what would count as compensable time and would need to build an informational infrastructure to aid student-athletes navigating the changes to their student-athlete experience. Additionally, the institutions would need to determine whether they would need to create job postings for positions on teams and develop a process for onboarding and terminations.

While the logistical challenges of managing new employees may not negatively impact the student-athletes so much as place additional burdens on the NCAA and its member institutions, there are other practical changes that could. For example, if a student-athlete violates a team standard, would that violation be addressed by the coaching staff or would it become a matter for the institution’s Human Resource department? What would the possible consequences be? Could a student-athlete be fired for poor performance? If a student-athlete is at risk of being “fired,” how would that impact their status as a student? Would employee status give the NCAA and member institutions a

259 See KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 26:59–27:31.

260 Robert Gilmore, Maribeth Meluch, Alan Rauss & Emily Vaisa, *College Athletes as Employees: Landmark Case Could Reshape Collegiate Athletics*, JD SUPRA (Feb. 9, 2026), <https://www.jdsupra.com/legalnews/college-athletes-as-employees-landmark-2349972/> [https://perma.cc/EF4K-UCDF].

261 Additionally, the categorization of student-athletes as employees would bring them under Title VII, so there would need to be additional guidance on how Title IX and Title VII should overlap in this context. See *id.*

262 See *Does Your Company Need an HR Department?*, CSP GLOB. (July 9, 2020), <https://online.csp.edu/resources/article/does-your-company-need-an-hr-dept/> [https://perma.cc/5GSN-3A2K].

greater right to control student-athletes? Additionally, there is a concern that treating student-athletes as employees could cause institutions to lose sight of their status as students and foster differing treatment of the student-athletes compared to the rest of the student body.²⁶³

G. A Congressional “Carve-Out” Is Necessary to Address These Complications

In addition to the potential impacts outlined above, individuals in favor of finding student-athletes as employees often argue that it may be simpler,²⁶⁴ but that may not be the case. Ultimately, as discussed above, the four-factor test would likely have different results depending on the student-athlete, the sport, and the institution.²⁶⁵ Thus, there would be no clear-cut, simple determination where every student-athlete would be classified the same way.²⁶⁶ In fact, the concurrence in *Johnson* even acknowledged that “the economic-reality question probably shakes out differently for FBS football players and March Madness-level men’s basketball players than it does for other student-athletes.”²⁶⁷ Furthermore, neither the majority nor the concurrence from *Johnson* said *every* student-athlete should be considered an employee, so, even after the four-factor test, there is still ambiguity as to where the line between employee and non-employee should be drawn.²⁶⁸ If that is one of the main motivations for advocates for the classification of student-athletes as employees, the Third Circuit’s test may lead to unsatisfying results.

In order to provide simplicity and account for the possible cascading impacts of finding student-athletes as employees, Congress

263 See, e.g., *Name, Image, and Likeness, and the Future of College Sports: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 150 (2023) (statement of Jack Swarbrick, Vice President and former James E. Rohr Dir. of Athletics, Univ. of Notre Dame) (“[S]tudent-athletes are first and foremost students. . . . [A]nytime a rule is made or a policy developed that draws a distinction between a student-athlete and his or her fellow students, the rationale for doing so must be compelling.”).

264 See KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 50, at 1:09:01–1:09:14.

265 See *supra* Part III.

266 See *Johnson v. Nat’l Collegiate Athletic Ass’n*, 108 F.4th 163, 184, 192 (3rd Cir. 2024) (Porter, J., concurring) (discussing how the “answers [to the economic realities test] will likely differ among individuals, teams, sports, and schools,” *id.* at 192).

267 *Id.* at 192.

268 See *id.* at 177 (majority opinion); see also SPORTSWISE: *Episode 65*, *supra* note 35, at 11:19–11:23.

would likely need to get involved.²⁶⁹ Some senators have argued for Congress to bar student-athletes from employee status under any federal statute, which would include the FLSA and NLRA, while others have proposed empowering student-athletes while addressing tax and financial aid implications.²⁷⁰ Another possibility that has been proposed involves amending the FLSA definition of “employee” to address the status of student-athletes.²⁷¹

At the time this Note was authored, two conflicting bills were introduced in Congress to address questions relating to collegiate student-athletics. The Student Compensation and Opportunity through Rights and Endorsements Act (SCORE Act) was reported to the House in July 2025 by Rep. Gus Bilirakis.²⁷² It is introduced as a bill “[t]o protect the name, image, and likeness rights of student athletes and to promote fair competition with respect to intercollegiate athletics, and for other purposes.”²⁷³ As currently proposed, the SCORE Act explicitly prohibits their classification as employees.²⁷⁴

On the other hand, the Student Athlete Fairness and Enforcement Act (the SAFE Act) was sponsored by Senator Maria Cantwell and introduced to the Senate in September 2025.²⁷⁵ The SAFE Act, currently silent on the matter of student-athlete employment, claims to be a bill “[t]o protect the name, image, and likeness rights of, and provide protections for, student athletes, and for other purposes.”²⁷⁶

In light of the conflicting bills, collegiate athletics’ continuing evolution²⁷⁷ has made predicting legislative movement difficult.

269 See Munhoz & Handler, *supra* note 211 (“Many of the issues arising from student-athletes being classified as employees could be solved by Congress, legal and tax observers said.”).

270 See *id.*

271 JIMMY BALSER, CONG. RSCH. SERV., LSB11223, *JOHNSON V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: THIRD CIRCUIT ALLOWS COLLEGE ATHLETES’ CLAIM FOR WAGES TO MOVE FORWARD* 3 (2024).

272 Student Compensation and Opportunity through Rights and Endorsements Act, H.R. 4312, 119th Cong. (2025).

273 *Id.*

274 *Id.* § 8 (“[N]o individual may be considered an employee of an institution, a conference, or an interstate intercollegiate athletic association based on the participation of such individual on a varsity sports team or in an intercollegiate athletic competition as a student athlete . . .”).

275 Student Athlete Fairness and Enforcement Act, S. 2932, 119th Cong. (2025).

276 *Id.*

277 An ongoing development includes a \$2.78 billion antitrust settlement that would allow schools to start paying student-athletes through revenue sharing. See Justin Williams, *House v. NCAA Settlement Granted Preliminary Approval, Bringing New Financial Model Closer*, ATHLETIC (Apr. 11, 2026), <https://www.nytimes.com/athletic/5826004/2024/10/07/house-ncaa-settlement-approval-claudia-wilken/> [<https://perma.cc/FW94-WRF5>].

Regardless of the complexities of legislation, it likely still remains the most impactful and efficient solution.²⁷⁸

CONCLUSION

The landscape of college athletics is changing, and the developments are not stopping any time soon. After Justice Kavanaugh's concurrence in *Alston*, it is likely that there will be more courts like the Third Circuit and Eastern District Court in *Johnson v. NCAA* that no longer consider amateurism a bar for classifying student-athletes as employees. And applying the four factors in the economic realities test from the Third Circuit in *Johnson* likely supports a finding that at least some DI collegiate student-athletes are employees under the FLSA.²⁷⁹ However, that finding, while it would provide student-athletes the benefit of minimum wage and overtime compensation, leaves many unanswered questions relating to complications with taxes, restrictive covenants, visa challenges, worker's compensation, and Title IX, in addition to practical and logistical complications. Taking those complexities into consideration, the most direct solution would be for Congress to address student-athletes' employee status while providing guidance for navigating the resulting implications.

278 *Name, Image, and Likeness*, *supra* note 263, at 153 (discussing the possibility of "craft[ing] legislation articulating the rights of student-athletes, including the right to negotiate with the conferences in which they compete over the terms and conditions of their athletic participation. Such an approach would protect the rights of student-athletes while also preserving their essential status as students").

279 It appears more likely for student-athletes in a revenue-generating sport to be classified as an employee. *See supra* notes 168–73 and accompanying text.