

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-08

September 29, 2021

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Statutory Rights of Players at Academic Institutions (Student-Athletes)¹ Under
the National Labor Relations Act

On January 31, 2017, the Office of the General Counsel issued GC 17-01, which addressed various issues regarding the statutory rights of university faculty and/or students under the National Labor Relations Act ("the Act" or "NLRA"). That memo summarized pertinent representation case decisions and was intended to serve as a guide for employers, labor unions, and employees regarding how the Office of the General Counsel intended to apply those cases in the unfair labor practice arena. GC 17-01 was later rescinded by GC 18-02. This memo reinstates GC 17-01, to the extent it is consistent with this memo, and, additionally, provides updated guidance regarding my prosecutorial position that certain Players at Academic Institutions are employees under the Act. Further, it explains that, where appropriate, I will allege that misclassifying such employees as mere "student-athletes", and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act.

¹ While Players at Academic Institutions are commonly referred to as "student-athletes," I have chosen not to use that term in this memorandum because the term was created to deprive those individuals of workplace protections. Molly Harry, *A Reckoning for the Term "Student-Athlete,"* *Diverse* (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete> (explaining that NCAA's president and lawyers coined term "student-athlete" in 1950s to avoid paying workers' compensation claims to injured athletes and NCAA continues to utilize it in litigation involving rights of college athletes); *Level Playing Field: Misclassified* (HBO documentary broadcast Sept. 21, 2021) (describing ongoing use of moniker "student-athlete" to deprive those employees of their workplace rights); Jay D. Lonick, *Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 Va. Sports & Ent. L.J. 135, 139-42 (2015) (arguing that "student-athlete" is "used to deny athletes legal protection and to preserve the myth that today's student-athletes are amateurs pursuing sports as a mere hobby or avocation").

GC 17-01 addressed *Northwestern University*, in which the Board declined to exercise jurisdiction over a representation petition filed by a union seeking to represent Northwestern University's scholarship football players and expressly declined to resolve whether Players at Academic Institutions are employees under the NLRA.² This memo briefly summarizes my position, set forth in detail in GC 17-01, that certain Players at Academic Institutions are employees under the Act and are entitled to be protected from retaliation when exercising their Section 7 rights. It also discusses developments in the case law and National Collegiate Athletic Association ("NCAA") rules related to Players at Academic Institutions, and contemporaneous societal shifts, including a dramatic increase in collective action among Players at Academic Institutions, all of which reinforce my position that they are protected by the Act.

As explained in GC 17-01, although the Board in *Northwestern University* declined to exercise jurisdiction over scholarship football players at that university, nothing in that decision precludes the finding that scholarship football players at private colleges and universities, or other similarly situated Players at Academic Institutions, are employees under the Act.³ And more importantly, the conclusion that such Players at Academic Institutions are employees is supported by the statutory language and policies of the NLRA, as well as the Board's interpretation of the same in *Boston Medical Center Corp.*,⁴ and *Columbia University*.⁵ The definition of "employee" in Section 2(3) of the NLRA is broadly defined to include "any employee," subject to only a few, enumerated exceptions. Those exceptions do not include university employees, football players,

² 362 NLRB 1350, 1356 (2015). More specifically, *Northwestern University* involved the University's Division I FBS (Football Bowl Subdivision) football players who receive grant-in-aid scholarships. 362 NLRB at 1350-51.

GC 17-01 also discussed *Pacific Lutheran University*, 361 NLRB 1401 (2014), in which the Board announced a new standard for determining when it would exercise jurisdiction over faculty members at self-identified religious colleges and universities and announced a new standard for determining when faculty members are managerial and, thus, excluded from protection under the Act, and *Columbia University*, 364 NLRB No. 90 (August 23, 2016), in which the Board reaffirmed its position that student assistants in colleges and universities are employees under the Act. *Columbia University* remains Board law, and I will continue to maintain the prosecutorial position that student assistants, as well as medical interns and non-academic student employees, are protected by the Act. With respect to *Pacific Lutheran*, the Board, in *Bethany College*, 370 NLRB No. 91, slip op. at 5 (February 19, 2021), overruled the religious-jurisdiction test set forth in that case and announced that the Board "does not have jurisdiction over teachers or faculty at *bona fide* religious educational institutions." In GC 21-04, I requested that all cases involving the applicability of *Bethany College* be submitted to Advice. In addition, in *Elon University*, 370 NLRB No. 91 (February 12, 2021), the Board revised the *Pacific Lutheran* test for determining when faculty are managerial. Specifically, it refined the portion of the managerial test to be applied when determining whether a faculty committee's decision-making authority will be attributed to members of that committee. *Elon University*, 370 NLRB No. 91, slip op. at 8-9.

³ As *Columbia University* clearly explained, although *Northwestern University* denied protections of the Act to certain Players at Academic Institutions, it did so "without ruling on their employee status." 364 NLRB No. 90, slip op. at 7, n.56.

⁴ 330 NLRB 152, 160 (1999).

⁵ 364 NLRB No. 90, slip op. at 4-5.

or students.⁶ Moreover, *Boston Medical* and *Columbia University* correctly recognize that the Supreme Court has endorsed the Board's expansive interpretation of "employee".⁷

The Board has also applied common-law agency rules governing the employer-employee relationship when applying the Act's expansive language and purpose to determine employee status.⁸ Under common law, an employee includes a person "who perform[s] services for another and [is] subject to the other's control or right of control."⁹ In addition, "[c]onsideration, *i.e.*, payment, is strongly indicative of employee status."¹⁰ That law fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA. Indeed, Players at Academic Institutions perform services for their colleges and the NCAA, in return for compensation, and subject to their control. Most notably, as GC 17-01 described, the following evidence presented in *Northwestern University* supported that finding:

- the athletes play football (perform a service) for the university and the NCAA, thereby generating tens of millions of dollars in profit and providing an immeasurable positive impact on the university's reputation, which in turn boosts student applications and alumni financial donations;
- the football players received significant compensation, including up to \$76,000 per year, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare;
- the NCAA controls the players' terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept, and ensures compliance with those rules through its "Compliance Assistance Program";

⁶ See *Columbia University*, 364 NLRB No. 90, slip op. at 4; *Boston Medical Center*, 330 NLRB at 160.

⁷ See *Columbia University*, 364 NLRB No. 90, slip op. at 5; *Boston Medical Center*, 330 NLRB at 160.

⁸ See *Columbia University*, 364 NLRB No. 90, slip op. at 4-5 (applying common law to find student assistants to be employees under the NLRA).

⁹ See *Boston Medical Center*, 330 NLRB at 160.

¹⁰ *Id.*

- the university controls the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules; for example, the university maintains detailed itineraries regarding the players' daily activities and football training, enforces the NCAA's minimum GPA requirement, and penalizes players for any college or NCAA infractions, which could result in removal from the team and loss of their scholarship.

In short, GC 17-01 concludes, and this memo reiterates, that the scholarship football players at issue in *Northwestern University* clearly satisfy the broad Section 2(3) definition of employee and the common-law test. Therefore, those football players, and other similarly situated Players at Academic Institutions, should be protected by Section 7 when they act concertedly to speak out about their terms and conditions of employment, or to self-organize, regardless of whether the Board ultimately certifies a bargaining unit.¹¹

In addition, because those Players at Academic Institutions are employees under the Act, misclassifying them as "student-athletes", and leading them to believe that they are not entitled to the Act's protection, has a chilling effect on Section 7 activity.¹² Therefore, in appropriate cases, I will pursue an independent violation of Section 8(a)(1) of the Act where an employer misclassifies Players at Academic Institutions as student-athletes. Accordingly, cases involving the misclassification of Players at Academic Institutions should be submitted to Advice. That approach is consistent with GC 21-04, in which I requested that all cases involving the applicability of *Velox Express, Inc.*,¹³ in which the Board refused to find a violation based on the employer having misclassified drivers as independent contractors, be submitted to Advice.¹⁴

¹¹ It is important to note, as the Board explained in *Northwestern University*, that its decision not to assert jurisdiction in that one case does not preclude reconsideration of the issue in a future case. 362 NLRB at 1355 & n.28.

¹² See *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 13, 16, 19-21 (August 29, 2019) (Member McFerran, dissenting in part, concurring in part) (describing chilling effect of misclassification because employees reasonably would believe that exercising their rights would be futile or would lead to adverse employer action); *Level Playing Field: Misclassified* (HBO documentary broadcast Sept. 21, 2021) (explaining that NCAA intentionally misclassifies college scholarship athletes as "student-athletes" to avoid providing protections and benefits under employment laws, including wage and hour, workers compensation, health and safety, and unemployment benefits, as well as under labor laws, just as gig employers misclassify employees as "independent contractors," and describing how doing so institutionalizes racial segregation of workplace protections).

¹³ Cases involving the misclassification of student assistants, medical interns, and non-academic student employees, who are led to believe that they are not entitled to the Act's protection, similarly should be submitted to Advice.

¹⁴ Molly Harry, *A Reckoning for the Term "Student-Athlete,"* *Diverse* (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete> (describing NCAA's ongoing strategy of using term "student-athlete" in litigation, including in *Northwestern University* litigation, in its continuing effort to deprive athletes of workplace rights and financial benefits).

Moreover, since the issuance of GC 17-01, there have been significant developments in the law, NCAA regulations, and the societal landscape, that demonstrate that traditional notions that all Players at Academic Institutions are amateurs have changed. These developments further support the conclusion that certain Players at Academic Institutions are employees under the Act.

First, in *NCAA v. Alston*,¹⁵ the Supreme Court, in a unanimous decision, recognized that college sports is a profit-making enterprise and rejected the NCAA's antitrust defense based in the notion of amateurism in college athletics. There, the Court addressed antitrust issues related to the compensation paid to athletes in men's Division I FBS football and men's and women's Division I basketball. The Court held that NCAA rules limiting certain education-related compensation that schools may offer athletes, such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid post-eligibility internships, violate antitrust law.¹⁶ Although the Court did not disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance, it recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are "forevermore" lawful.¹⁷ The decision is likely a precursor to more changes to come in college athletics. Specifically, commentators argue that, as courts "continue to chip away at NCAA restrictions on benefits to student-athletes, more compensation that is untethered to academics brings student-athletes more fully within 'employee status' under the law."¹⁸

Justice Kavanaugh, in his concurring opinion in *Alston*, went further. He strongly suggested that the NCAA's remaining compensation rules also violate antitrust laws and questioned "whether the NCAA and its member colleges can continue to justify not paying student athletes a fair share" of the billions of dollars in revenue that they generate.¹⁹ Moreover, he suggested that one mechanism by which colleges and students could resolve the difficult questions regarding compensation is by "*engag[ing] in collective bargaining*."²⁰

¹⁵ 141 S. Ct. 2141 (2021).

¹⁶ *Id.* at 2152, 2158.

¹⁷ *Id.* at 2158.

¹⁸ Alex Blutman, *The Strike Zone – NCAA v. Alston*, onlabor (June 22, 2021) <https://onlabor.org/the-strike-zone-ncaa-v-alston/>. See Sarah Eberspacher & Martin D. Edel, *Supreme Court Sides with Student-Athletes in Alston v. NCAA, Expands Permissible Types of Compensation*, The National Law Review (June 21, 2021), <https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston>.

¹⁹ *Alston*, 141 S. Ct. at 2168 (2021) (Kavanaugh, J., concurring).

²⁰ *Id.* (emphasis added). Relatedly, on May 27, 2021, the College Athlete Right to Organize Act was introduced in the Senate. That law would amend the NLRA's definition of "employee" to expressly include certain college athletes, including those attending public institutions, and to give them collective bargaining rights. College Right To Organize Act, S. 1929, 117th Cong. (2021) <https://www.congress.gov/bills/117th-congress/senate-bill/1929/text?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=4&s=1>.

Shortly after the Supreme Court's decision, the NCAA announced the suspension of name, image, and likeness ("NIL") rules for Players at Academic Institutions.²¹ The NCAA did so in the face of mounting pressure, as state laws throughout the country granting NIL rights were set to take effect.²² Players at Academic Institutions now may collect payment for use of their name, image, and likeness, thereby opening the door for them to profit from endorsements, autograph sales, and public appearances, among other ventures.²³ In addition, Players at Academic Institutions are permitted to use professional service providers to assist them in engaging in NIL activities.²⁴ The freedom to engage in far-reaching and lucrative business enterprises makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income.²⁵

²¹ Press Release, NCAA, NCAA adopts interim name, image and likeness policy (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

²² Alan Blinder, *College Athletes Cash In as Generations of Rules Fade Under Pressure*, N.Y. Times, July 1, 2021 (updated Sept. 17, 2021) <https://www.nytimes.com/2021/07/01/sports/ncaafotball/ncaa-college-athletes-endorsements.html>.

²³ Alex Kirshner, *College Athletes Are Wasting No Time Getting Paid*, Slate (July 1, 2021, 5:56 PM), <https://slate.com/culture/2021/07/ncaa-name-image-likeness-college-athletes-endorsements-ads-pay.html>.

²⁴ Press Release, NCAA, NCAA adopts interim name, image and likeness policy (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

²⁵ See generally Dan Murphy, *Let's make a deal: NCAA athletes cashing in on name, image and likeness*, ESPN (July 1, 2021), https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness. Further changes to NCAA restrictions are possible. The NCAA, under increasing pressure to remake the "multibillion dollar college sports industry," Alan Blinder, *N.C.A.A. Chief, Under Pressure, Says College Sports May Need Reorganization*, N.Y. Times, July 15, 2021 <https://www.nytimes.com/2021/07/15/sports/mark-emmert-ncaa-reorganize-supreme-court.html>, will hold a constitutional convention later this year at which possible modifications to the structure of college sports will be addressed. Alan Blinder, *N.C.A.A. Looks to Rewrite the Constitution and Stave Off Critics*, N.Y. Times, July 30, 2021, <https://www.nytimes.com/2021/07/30/sports/ncaa-constitution-mark-emmert.html>.

Finally, those changes have taken place at a time when Players at Academic Institutions have been engaging in collective action at unprecedented levels. In 2020, activism among Players at Academic Institutions sky-rocketed along with the national attention to social justice issues following the murder of George Floyd and concerns regarding health and safety in the face of the Covid-19 pandemic.²⁶ For example, Players at Academic Institutions across the country banded together to speak out about racism at their colleges and to demand change, and some threatened to withhold their services in response to their coach's actions after George Floyd's murder.²⁷ Activism concerning such racial justice issues, including openly supporting the Black Lives Matter movement, directly concerns terms and conditions of employment, and is protected concerted activity.²⁸

College football players also joined together using the monikers #weareunited and #wewanttoplay to express their desire to play the 2020 season despite the ongoing pandemic, while demanding adequate safety protocols and an opt-out option for players who chose not to play.²⁹ Those groups further sought open communication between players and university and NCAA leadership, and, ultimately, a "college football players' association" to represent them.³⁰ Moreover, Players at Academic Institutions have gained more power as they better understand their value in generating billions of dollars in revenue for their colleges and universities, athletic

²⁶ See Michael T. Nietzel, *Black Athletes Are Leading The New College Protest Movement*, Forbes (June 28, 2020, 6:00 AM), <https://www.forbes.com/sites/michaelt Nietzel/2020/06/28/black-athletes-lead-the-new-college-protest-movement/?sh=f6ed01762fad>; Alex Kirshner, *The End of College Football (as We Know It)*, Slate (Sept. 1, 2021, 5:55 AM), <https://slate.com/culture/2021/09/college-football-future-nil-pay-playoff-conferences-tv.html>.

²⁷ Alan Blinder & Billy Witz, *College Athletes, Phone in Hand, Force Shift in Protest Movement*, N.Y. Times, June 12, 2020, <https://www.nytimes.com/2020/06/12/sports/ncaafootball/george-floyd-protests-college-sports.html>; Sean Gregory, *College Athletes Are Realizing Their Power Amid the George Floyd Protests and COVID-19*, Time (June 18, 2020 10:08 AM), <https://time.com/5855471/college-athletes-covid-19-protests-racial-equality/>.

²⁸ See *SunBridge Healthcare LLC, d/b/a Milford Center, Case 01-CA-156820, Advice Memorandum dated January 20, 2016 at 9-12*, <https://apps.nlr.gov/link/document.aspx/09031d45835690dd> (setting forth position of NLRB Division of Advice that employee conversations about workplace racial discrimination is inherently concerted); Press Release, NLRB, Region 18 complaint alleges Home Depot fired employee who refused remove Black Lives Matter slogan from apron (Aug. 16, 2021), <https://www.nlr.gov/news-outreach/region-18-complaint-alleges-home-depot-fired-employee-who-refused-to-remove-black>.

²⁹ Alan Blinder & Billy Witz, *In Push to Play, College Football Players Show Sudden Unity*, N.Y. Times, Aug. 10, 2020 (updated Apr. 29, 2021), <https://www.nytimes.com/2020/08/10/sports/ncaafootball/coronavirus-college-football-players.html>.

³⁰ *Id.*

conferences, and the NCAA,³¹ and this increased activism and demand for fair treatment has been met with greater support from some coaches, fans, and school administrators.³² Players at Academic Institutions who engage in concerted activities to improve their working conditions have the right to be protected from retaliation.³³

³¹ Alex Kirshner, *The Impact and Evolution of College Football Player Protest*, The Ringer (June 30, 2020, 9:45 AM), <https://www.theringer.com/2020/6/30/21307518/college-football-player-protests-black-lives-matter-movement>; Alan Blinder & Billy Witz, *College Athletes, Phone in Hand, Force Shift in Protect Movement*, N.Y. Times, June 12, 2020, <https://www.nytimes.com/2020/06/12/sports/ncaaf/college-football/george-floyd-protests-college-sports.html>. Prior to the NCAA suspending NIL restrictions, Division I basketball players spoke out using the hashtag #NotNCAAProperty to protest those restrictions. Laurel Wamsley, *Before March Madness, College Athletes Declare They Are #NotNCAAProperty*, NPR (March 18, 2021, 4:42 PM), <https://www.npr.org/2021/03/18/978829815/before-march-madness-college-athletes-declare-they-are-notncaaproperty>.

³² Alan Blinder & Billy Witz, *In Push to Play, College Football Players Show Sudden Unity*, N.Y. Times, Aug. 10, 2020 (updated Apr. 29, 2021), <https://www.nytimes.com/2020/08/10/sports/ncaaf/college-football/coronavirus-college-football-players.html>.

³³ Although some coaches, colleges, and universities are more supportive of activism by Players at Academic Institutions than in the past, the concern for retaliation is very real. For example, a scholarship football player filed a lawsuit on August 20, 2021, alleging that his coach cut him from the team when the coach learned of his support for the #weareunited movement. Associated Press, *Former player sues Washington State, football coach over dismissal*, ESPN (Sept. 2, 2021), https://www.espn.com/college-football/story/_/id/32134637/former-player-sues-washington-state-football-coach-dismissal. See Alex Kirshner, *The Impact and Evolutions of College Football Player Protector*, The Ringer (June 30, 2020, 9:45 AM), <https://www.theringer.com/2020/6/30/21307518/college-football-player-protests-black-lives-matter-movement> (recognizing increased support for student-athlete activism, while acknowledging that institutional structures in college football can be slow to change). Because that player attended a state university, he would not be protected by the Act, which expressly excludes state and local governments from the Board's jurisdiction. Nevertheless, it demonstrates the importance of protecting Players at Academic Institutions.

In sum, it is my position that the scholarship football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, are employees under the Act. I fully expect that this memo will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that I will be taking that legal position in future investigations and litigation under the Act.³⁴ In addition, it notifies them that I will also consider pursuing a misclassification violation.

/s/

J.A.A.

³⁴ Because Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability. Indeed, as one commentator has explained, the NCAA exercises strict control over certain Players at Academic Institutions, beginning with establishing eligibility standards and terms pursuant to which they may enter the workforce (athletic team), including unilateral contract terms in the "Student-Athlete Agreement" and detailed recruitment rules, and through extensive compliance requirements, which can result in termination if violated. See Jay D. Lonick, *Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 Va. Sports & Ent. L.J. 135, 161-67 (2015). Similarly, it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions. As explained in *Northwestern University*, where an athletic conference is an "independent, private entity, created by the member schools," exerting jurisdiction over the conference is appropriate even where some member institutions are public. 362 NLRB at 1354 n.17, citing *Big East Conference*, 282 NLRB 335, 340-42 (1986) (asserting jurisdiction over athletic conference where two of nine member institutions were state institutions, because those two institutions "cannot control the operations" of conference). Therefore, I will consider pursuing charges against an athletic conference or association even if some member schools are state institutions.