

STUDENT-ATHLETE EMPLOYEES: *JOHNSON V. NCAA*

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Executive Summary: Student-athlete compensation has significantly changed with the legalization of NIL payments directly to student-athletes by their schools. This has sparked, by extension, further conversation about student athletes' employment status. One recent case, Johnson v. NCAA, brought under the Fair Labor Standards Act (FLSA) by a student-athlete against the NCAA and its member schools has the potential to solidify their status as employees. If student-athletes were considered employees, their employers (the NCAA and its member schools) would be subject to FLSA's regulations on minimum wage, overtime compensation, and other labor protections. This would fundamentally change the structure of college athletics—depending on who you ask—for the better or worse.

BACKGROUND

I. CHANGES IN STUDENT-ATHLETE COMPENSATION

College athletics has undergone a multitude of changes in recent years, largely related to the National Collegiate Athletic Association's (NCAA) new name, image, likeness (NIL) policies. NIL refers to the opportunities available for student-athletes to “receive compensation from third parties using their personal brand,” often called their name, image, and likeness.¹ Historically, student-athletes were not allowed to receive any financial aid beyond that of their cost of attendance because it would be considered a violation of the NCAA's bylaws against “pay-for-play.”² This included a prohibition on NIL; however, these rules were challenged by student-athletes under federal antitrust law.³

In perhaps the most notable case, *House v. NCAA*,⁴ student-athletes challenged the NCAA's prohibition on their receiving anything in exchange for the commercial use of their NIL.⁵ This litigation led to the infamous settlement, approved in June 2025, that resolved three class-actions

¹ *Student-Athletes, NIL (Name, Image, Likeness)*, NCAA, <https://www.ncaa.org/sports/2021/7/9/name-image-likeness.aspx>.

² NCAA, 2025–26 NCAA DIV. I MANUAL § 12.1.2 (2025), <https://ncaapublications.com/a/downloads/-/5aa1033013f945bc/485a6a84bec1a4e1>. This rule is justified by the idea that if an individual is receiving payment for playing their sport (pay-for-play), they lose amateur status and are no longer eligible to play in college. *Id.*

³ See e.g., *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014); *NCAA v. Alston*, 594 U.S. 69 (2021); *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021).

⁴ *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021). Similar cases filed around the same time by other student-athletes were consolidated under *In re College Athlete NIL Litigation*, No. 20-cv-03919, 2023 WL 8372787, at *1 (N.D. Cal. Nov. 3, 2023).

⁵ *In re Coll. Athlete NIL Litig.*, 2023 WL 8372787, at *1.

and included a total of \$2.78 billion to be paid in back damages to student-athletes.⁶ Another feature of the settlement allowed Division I schools “to directly compensate student-athletes for their NIL as part of a revenue-sharing system.”⁷ This system allows schools to “provide up to 22% of the average . . . athletic, media, ticket, and sponsorship revenue to student-athletes” directly.⁸ That alone can amount to upwards of \$20.5 million per school in one academic year, with projections to increase each year.⁹ Lastly, the settlement established “clear and specific rules to regulate third-party [NIL] agreements” and replaced scholarship limits with roster limits.¹⁰

II. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act of 1938 (FLSA) was enacted post-Great Depression, setting a minimum wage,¹¹ maximum hour standards and overtime compensation,¹² and banning child labor in several industries.¹³ While in Congress, proponents of the bill emphasized the need to improve working conditions in America, especially the exploitation of women and children for cheap labor.¹⁴ Notably, the FLSA only applies to an employer and employee relationship which is broadly

⁶ In re Coll. Athlete Nil Litig., No. 20-cv-03919 CW, 2025 WL 1475820, at *21 (N.D. Cal. June 6, 2025).

⁷ *Id.* This revenue sharing system only applies to Division I athletes with primary focus on the Power Five conferences (SEC, Big Ten, ACC, Big 12, and Pac-12). NCSA College Recruiting, *What is NCAA Revenue Sharing?*, NCSA COLLEGE RECRUITING, <https://www.ncsasports.org/blog/what-is-ncaa-revenue-sharing#:~:text=The%20NCAA%20revenue%20sharing%20model%20can%20pay%20athletes%20directly%20from,such%20as%20sponsorships%20or%20endorsements.>

⁸ *Timeline – 2020s*, NCAA, <https://www.ncaa.org/sports/2021/6/14/timeline-2020s.aspx>.

⁹ *Id.*

¹⁰ *Proposed Division I Rule Changes Involving Student-Athlete NIL Activities*, NCAA, <https://www.ncaa.org/sports/2025/4/6/proposed-rule-changes-contingent-on-house-settlement-final-approval.aspx>. A scholarship limit, previously, capped schools on how many full or partial scholarships they could give to athletes. *See New NCAA Scholarship and Roster Limits For 2025-26*, NCSA COLLEGE RECRUITING, <https://www.ncsasports.org/blog/ncaa-scholarship-roster-limits-2024>. A roster limit, however, permits schools to give out scholarships to all athletes, as long as they maintain their roster at the capped number. *Id.*

¹¹ 29 U.S.C. § 206(a)(1) (“Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages [of at least minimum wage].”).

¹² *Id.* § 207.

¹³ *Id.* § 212; Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEPT. OF LABOR (June 1978), <https://www.dol.gov/general/aboutdol/history/flsa1938>.

¹⁴ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEPT. OF LABOR (June 1978), <https://www.dol.gov/general/aboutdol/history/flsa1938>.

defined; the term “employee” means any individual employed by an employer.”¹⁵ Similarly, an “employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee.”¹⁶ This expansive definition was part of Congress’ intent to apply the FLSA’s protections to as many workers as possible.¹⁷

The Supreme Court has limited the Act’s breadth through application—the key for determining employment status being economic reality.¹⁸ A large determinant of whether someone is considered an employee under the FLSA is “whether they work with the expectation of some form of compensation, not limited to wages.”¹⁹ As an enforcement mechanism, the FLSA created the Wage and Hour Division (WHD) within the Department of Labor (DOL).²⁰ WHD has also shared multiple tests to determine employment, the most common test being the “[e]conomic reality test to determine economic dependence.”²¹ Another known test, described in a fact sheet issued by WHD, is the “primary beneficiary test” or *Glatt*²² test which determines whether a worker is an employee or an intern.²³

III. STUDENT-ATHLETES AS EMPLOYEES PRECEDENT

Employees who believe their employer has violated the FLSA can file claims for unpaid wages. Historically, student-athletes have not been considered employees because of the tradition of amateurism in college sports.²⁴ However, student-athletes have recently challenged this by bringing claims against the NCAA under the FLSA.²⁵ In *Berger v. NCAA*²⁶, former student-athletes sued the NCAA and its Division I member schools, alleging they were employees under the FLSA and thus, the defendants were in violation of the FLSA by not paying the athletes minimum wage.²⁷ The Seventh Circuit held that student-athletes were not employees under the FLSA, justified by

¹⁵ 29 U.S.C. § 203(e)(1); see also *Johnson v. NCAA*, 108 F.4th 163, 176 (3rd Cir. 2024) (calling it “a definition that has been described as ‘the broadest . . . that has ever been included in any one act’”) (citing *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)).

¹⁶ 29 U.S.C. § 203(d).

¹⁷ Connor Locke, *First & Goal for Labor: How the Dept. of Labor Can Capitalize on a Recent Win for College Athletes*, 77 ADMIN. L. REV. 437, 453 (2025).

¹⁸ *Id.* (citing *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (“[T]he ‘economic reality’ rather than ‘technical concepts’ is to be the test of employment . . .”).

¹⁹ *Id.*

²⁰ 29 U.S.C. § 204(a).

²¹ 29 C.F.R. § 795.110 (2024).

²² *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016).

²³ *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships>.

²⁴ *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016).

²⁵ See e.g., *id.*; *Dawson v. NCAA*, 932 F.3d 905, 913 (9th Cir. 2019).

²⁶ 843 F.3d 285 (7th Cir. 2016).

²⁷ *Id.* at 289.

sports's status as "extracurricular activities" and DOL's exclusion of college athletes from employment status.²⁸

In *Dawson v. NCAA*²⁹, a former football player sued the NCAA, the University of Southern California, and its conference (PAC-12), alleging that he was denied wages, including overtime pay, in violation of the FLSA.³⁰ The Ninth Circuit considered whether he was an employee of the NCAA and the PAC-12, but ultimately determined he was not because of their inability to hire and fire him and the NCAA was not carrying out a plan to evade the law.³¹ Despite denial of FLSA protections in the federal circuits, student-athletes' survived the NCAA's motion to dismiss in both *Livers v. NCAA*³² and *Johnson v. NCAA*³³ in the Eastern District of Pennsylvania.

JOHNSON V. NCAA AND ITS AFTERMATH

In *Johnson*, student-athletes again alleged the "NCAA's member colleges' failure to pay them a minimum wage" was a violation of the FLSA and sought unpaid wages in their suit.³⁴ Defendants, the NCAA and its member schools, moved to dismiss the case, arguing as a matter of law student-athletes cannot be employees.³⁵ This motion was denied at the district court, prompting appeal by the NCAA which again argued "college athletes play is not work under the FLSA, students' participation in athletics without an expectation of direct monetary compensation forces them from employee status, and the district court erred in the application of the *Glatt* test."³⁶

On interlocutory appeal the Third Circuit affirmed in part the district court's denial of the motion, rejecting the argument that athletes' play is excluded from work and amateurism prohibits finding an employment relationship.³⁷ The court determined student-athletes could be considered employees under certain circumstances and remanded to the district court to apply a different test, replacing the *Glatt* test.³⁸ The new test, made specifically with colleges in mind, states a student-athlete may be an employee under the FLSA when they: "(a) perform services for another party,

²⁸ *Id.* at 292–93.

²⁹ 932 F.3d 905 (9th Cir. 2019).

³⁰ *Id.* at 908.

³¹ *Id.* at 909.

³² No. 17-4271, 2018 LEXIS 124780, at *1 (E.D. Pa. July 25, 2018).

³³ 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

³⁴ *Johnson v. NCAA*, 108 F.4th 163, 174 (3rd Cir. 2024).

³⁵ *Id.* at 175.

³⁶ Locke, *supra* note 17 at 461 (quoting Appellant's Opening Brief at 35, *Johnson v. NCAA*, 108 F.4th 163 (3d Cir. 2024) (No. 19-cv-05230), 2022 WL 1985595) (internal quotation marks omitted).

³⁷ *Johnson*, 108 F.4th at 167, 177, 181.

³⁸ *Id.* at 180. The court found that the intern plaintiffs in *Glatt* and the student-athlete plaintiffs in *Johnson* were not similar enough to warrant *Glatt*'s application to the *Johnson* FLSA claims. *Id.*

(b) necessarily and primarily for the other party’s benefit, (c) under that party’s control or right of control, (d) and in return for express or implied compensation for in-kind benefits.”³⁹

Following the *Johnson* decision, President Trump and representatives in the House have made efforts to solidify student-athletes’ status as non-employees through an Executive Order and proposed legislation.⁴⁰ The Executive Order, titled “Saving College Sports[,]” attempts to “stabilize” college athletics through several legal changes including protecting the NCAA and college athletics from litigation.⁴¹ In regards to employment status of student-athletes, the Executive Order directs the Secretary of Labor and the National Labor Relations Board to “determine and implement the appropriate measures with respect to clarifying the status of collegiate athletes[.]”⁴² Though not directly restricting employment status for college athletes, House Republicans have drafted legislation that could do so.⁴³ The proposed Student Compensation and Opportunity through Rights and Endorsements (SCORE) Act provides that “no individual may be considered an employee of an institution, a conference, or an interstate intercollegiate athletic association based on the participation” in competition as a student-athlete.⁴⁴

IMPLICATIONS OF *JOHNSON*

I. WAGES, BENEFITS, AND LABOR PROTECTIONS

If student-athletes are able to gain employee status they would be eligible to receive minimum wage, overtime pay, worker’s compensation, and the opportunity to bargain collectively.⁴⁵ Proponents of granting employment have highlighted modern college sports function as a full-time

³⁹ *Id.* “If so, the athlete in question may plainly fall within the meaning of employee as defined in 29 U.S.C. § 203(e)(1).” *Id.* Recent NIL changes post-*House* may satisfy the compensation requirement of the test, which has yet to be applied by the district court. See Hugh O’Neil, *College Athlete Employment Status After Johnson and House*, ONLABOR (Oct. 28, 2025), <https://onlabor.org/college-athlete-employment-status-after-johnson-and-house/> (“After *House*, college athletes have a much clearer argument that they are compensated for their services.”).

⁴⁰ Exec. Order No. 14322, 90 Fed. Reg. 35821 (Jul. 24, 2025); Student Compensation and Opportunity Through Rights and Endorsements Act, H.R. 4312, 119th Cong. (2025).

⁴¹ Exec. Order No. 14322, 90 Fed. Reg. 35821 (Jul. 24, 2025) (“The Attorney General and the Chairman of the Federal Trade Commission shall work to stabilize and preserve college athletics through litigation, guidelines, policies, or other actions, as appropriate, by protecting the rights and interests of student-athletes and the long-term availability of collegiate athletic scholarships and opportunities when such elements are unreasonably challenged under antitrust or other legal theories.”).

⁴² *Id.*

⁴³ Student Compensation and Opportunity Through Rights and Endorsements Act, H.R. 4312, 119th Cong. (2025).

⁴⁴ *Id.*

⁴⁵ Hugh O’Neil, *College Athlete Employment Status After Johnson and House*, ONLABOR (Oct. 28, 2025), <https://onlabor.org/college-athlete-employment-status-after-johnson-and-house/>.

job year-round when adding the time spent competing and practicing with workouts and training.⁴⁶ Further, “colleges have an incredible level of control over how an athlete spends their time,” regulating the hours they can spend on athletic participation and their studies.⁴⁷ Some argue college athletics in some sports have risen to the same caliber of professional sports.⁴⁸ However, in comparison, professional athletes are afforded unions to negotiate time demands—student-athletes are not.⁴⁹

Opponents of granting employment have identified problems in implementing a bargaining structure, arguing it would be difficult to have a collective bargaining system involving only a single sports team or a “leaguwide” unit because of the differences in public, private, or religiously affiliated institutions.⁵⁰ Similarly, scholars have tried to distinguish professional from college sports by arguing that student-athletes participate in their sports “wholly unrelated to immediate compensation” and professionals are not under academic standards of a university, unlike students who must obtain a degree.⁵¹

II. RECRUITING, SCHOLARSHIPS, AND FINANCIAL STRUCTURE OF COLLEGIATE SPORTS

The business of college athletics has increased substantially in the last decade—with forty-nine colleges reporting total revenue exceeding \$100 million and five exceeding \$200 million in 2022.⁵² This revenue generated by ticket sales, broadcast deals, and donations cannot be turned into a profit by the school because of their status as public or non-profit entities.⁵³ The “requirement that colleges’ economic output must largely match their input, combined with NCAA rules prohibiting direct payments to athletes, leads schools to spend massively on coaches’ salaries and luxurious athletic facilities rather than paying players directly.”⁵⁴ With changes in employment status and colleges being required to pay a wage, this money would inevitably have to be allocated differently.

Some individuals have questioned “whether the viability of many college athletic programs, including many women’s sports and small-school athletic programs, would suffer if employment

⁴⁶ Rachel Zheliabovskii, *Congress Weighs Pros, Cons, of Collaring Student-Athletes Employees*, SHRM (Apr. 15, 2025), <https://www.shrm.org/topics-tools/employment-law-compliance/congress-weighs-pros-cons-of-calling-student-athletes-employees>.

⁴⁷ *Id.*; Locke, *supra* note 17 at 443.

⁴⁸ Rachel Zheliabovskii, *Congress Weighs Pros, Cons, of Collaring Student-Athletes Employees*, SHRM (Apr. 15, 2025), <https://www.shrm.org/topics-tools/employment-law-compliance/congress-weighs-pros-cons-of-calling-student-athletes-employees>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Locke, *supra* note 17 at 440 (citing NCAA Finances: Revenue and Expenses by School, USA TODAY (Mar. 14, 2024, 2:05 PM), <https://sports.usatoday.com/ncaa/finances>).

⁵³ *Id.* at 440–41 (citing 26 U.S.C. § 501(c)(3) which is part of the Internal Revenue Code).

⁵⁴ *Id.* at 441.

status was adopted.”⁵⁵ This argument is based on the assumption that the costs associated with student-athlete employment may result in schools eliminating other sports.⁵⁶ Another consideration is the possible inequitable impact on smaller colleges, as many of them do not have the resources to support a model that requires them to provide salaries and benefits.⁵⁷ Others, however, have suggested that schools would not need to do anything they cannot afford.⁵⁸ Instead, employment status is a safeguard to protect against abuses within the system as it is.⁵⁹

⁵⁵ Rachel Zheliabovskii, *Congress Weighs Pros, Cons, of Collaring Student-Athletes Employees*, SHRM (Apr. 15, 2025), <https://www.shrm.org/topics-tools/employment-law-compliance/congress-weighs-pros-cons-of-calling-student-athletes-employees>.

⁵⁶ *Id.* Others have also pointed out that classifying student-athletes as employees may take away Title IX protections set in place for college athletics. Hana Ferrero, *College Athletes as Employees: Implications for Title IX and (Un)Equal Pay*, U. CHI. L. REV. ONLINE, <https://lawreview.uchicago.edu/online-archive/college-athletes-employees-implications-title-ix-and-unequal-pay>. It has been argued that “if college athletes are classified as employees, Title IX, as applied to employees, not athletes, will likely control wage payments,” leading to female athletes being paid less than their male counterparts. *Id.*

⁵⁷ Rachel Zheliabovskii, *Congress Weighs Pros, Cons, of Collaring Student-Athletes Employees*, SHRM (Apr. 15, 2025), <https://www.shrm.org/topics-tools/employment-law-compliance/congress-weighs-pros-cons-of-calling-student-athletes-employees>.

⁵⁸ *Id.*

⁵⁹ *Id.*