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Cover Page Footnote
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The Employment Status of the Twenty-First Century NCAA Collegiate Athlete: An Evaluation of the Fair Labor Standards Act and the National Labor Relations Act

By:

Danielle L. Kennebrew, J.D., LL.M.*

Introduction

Throughout the course of the twenty-first century there have been many monumental, historical, “trending” topics, and events that have sparked dialogue and intellectual debate. One topic that has arguably cemented its place within the century is the highly debated issue regarding the employment status of the National College Athletic Association (NCAA) collegiate athlete. Many commentators and scholars alike have expressed differing views on the topic. Some individuals hold the belief that collegiate athletes should not be granted employee status under federal laws, due to the underlying traditions of amateurism; while others believe that an employment relationship has formed between the collegiate athlete and his or her respective educational institution and the NCAA.

This article will explore both viewpoints by examining the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) in an attempt to determine whether the NCAA collegiate athlete falls within the classification of an employee within the meaning of both federal laws. Part I will provide a historical overview of the NCAA’s, FLSA’s, and the NLRA’s prohibitions against classifying collegiate athletes as employees. Part II will address the precedent set by Berger v. NCAA1. Part III takes a deeper dive into the economic realities test and its applicability to collegiate sports. Part IV provides an in-depth analysis of the relationship between the NLRA and the NCAA scholarship athlete. Lastly, this composition will offer recommendations for the future.

I. Historical Overview: The NCAA’s, FLSA’s, and the NLRA’s Prohibitions Against Classifying Collegiate Athletes as Employees

A. National Collegiate Athletic Association (“NCAA”)

Throughout history, it can be said that intercollegiate athletics has held a very distinct and unique place within our society, nationally and internationally. The extensive history of intercollegiate athletics dates back to the nineteenth century with competitions between Cambridge University and Oxford University.2 At its inception, college athletics began as student organized “extracurricular” contests with the purpose of providing students with an outlet from the monotony

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1 843 F.3d 285 (2016).
and rigors of their scholarly pursuits. The ideology of fusing athletics and academia, however, was not widely accepted by the administrative bodies of many United States universities and colleges prior to the Civil War. Nevertheless, collegiate athletics garnered popularity amongst students, alumni, and the public to which universities took note and began to gradually support and exercised moderate control over the contest. Intercollegiate athletics soon developed in the United States during the mid-nineteenth century. With the notoriety of college sports like regatta, football soon thereafter began to flourish to the top ranks.

However, the birthing of intercollegiate football caused concern amongst many due to its physical nature (i.e., physicality). Therefore, in an attempt to reform intercollegiate athletics, the Intercollegiate Athletic Association (IAA) emerged on December 28, 1905, and changed the structural components of collegiate organized sports. President Theodore Roosevelt led the charge in the creation of the IAA by staging a “call to action” meeting amongst Ivy League Universities to discuss the grueling effects that college football had on the players. The IAA was introduced out of necessity resulting from the high numbers of injuries and deaths amongst collegiate athletes participating in football games. As a result of the meeting, a promulgation of policies governing the standard of conduct of its members, conferences, and the creation of a rules committee commenced. The birthing of the “amateurism model” within intercollegiate sports first took shape after the development of the association. President Roosevelt stated, “… No student who has ever been compensated in any way for their athletic ability is allowed to participate in intercollegiate athletics.”

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3 Id. at 15-20, 23.
4 Id. at 10.
6 Smith, supra note 2 at 3, 28.
9 Id. at 217.
By 1910, the IAA was renamed as the National Collegiate Athletic Association (NCAA)\(^{11}\) to reflect the organization’s broad scope nationally.\(^{12}\) The NCAA is recognized as a member-led organization that regulates the intercollegiate activities of its member institutions and athletes throughout the United States. The core values of the organization are centered on the well-being and lifelong success of college athletes.\(^{13}\) From its inception, the NCAA focused on preserving the “integrity” of collegiate sports by curtailing institutional dishonesty and implementing bylaws to enforce the notion of “amateurism.”\(^{14}\) However, many schools abandoned the “amateurism” philosophy. For instance, “in 1939 just before the football season, the University of Pittsburg freshman student-athletes went on strike, protesting the reduction of pay they received in comparison to the upperclassmen football players. The “student-athletes” utilized sit-down strikes\(^{15}\) as a tactic to gain an increase in pay. Ultimately, the strikers were successful, and the University of Pittsburg restored the “student-athletes” pay as it was prior to the reduction.”\(^{16}\) The “pay-for-play” operation began to take shape within intercollegiate athletics in an attempt to gain a competitive advantage amongst different colleges.

In an effort to enforce its goals, the NCAA in 1948 promulgated policies referred to as the “Purity Code” (i.e., later renamed the “Sanity Code”).\(^{17}\) These codes reinforced that education was

\(^{11}\) The National Collegiate Athletic Association (NCAA) is a member led organization that is dedicated to the well-being and lifelong success of college athletes. There are 1,098 colleges and universities and 102 athletics conference that make up the NCAA. The NCAA is further divided into three (3) divisions (Division I, Division II, Division III) based on the student bodies, the athletics budgets, and scholarships awarded. [NCAA Division I: About Us](http://www.ncaa.org/about?division=d1), (visited Dec. 31, 2020).

Division I collegiate institutions traditionally have the largest student bodies, funding, offers the most generous scholarships (such as a full scholarship and / or multiyear scholarships), and are also subdivided based on football sponsorship. “Schools that participate in bowl games belong to the Football Bowl Subdivision.” Those that participate in the NCAA-run football championship belong to the Football Championship Subdivision. [NCAA Division II: About Us](http://www.ncaa.org/about?division=d2), (visited Dec. 31, 2020).

Division II institutions are just as competitive and are committed to academic excellence as Division I universities. However, the major difference between Division I and Division II universities is the financial resources that are devoted to the athletic programs. Lastly, “Division III collegiate athletes compete not for financial reward, but quite simply, for the love of the game. Put simply, Division III athletes are not awarded athletic scholarships like Division I and II collegiate athletes. [NCAA Division III: About Us](http://www.ncaa.org/about?division=d3), (visited Dec. 31, 2020).

\(^{12}\) Riess, supra note 7


\(^{14}\) By 1916, the NCAA adopted the definition of amateur to mean, “… One who engages in sport solely for the pleasure and physical, mental, or social benefits he derives therefrom, and to whom sport is nothing more than an avocation.” Eric Snyder, Amateurism and Intercollegiate Athletics, (last visited Apr. 1, 2020) [https://www.higheredjobs.com/Articles/articleDisplay.cfm?ID=560](https://www.higheredjobs.com/Articles/articleDisplay.cfm?ID=560).

\(^{15}\) A sit-down strike can be defined as “a strike during which workers occupy their place of employment and refuse to work or allow others to work until the strike is settled.” Collins English Dictionary – Complete & Unabridged (2012 Digital Ed.)


\(^{16}\) John Sayle Watterson, College Football: History, Spectacle, Controversy 189 (2000).

superior to athleticism & banned off-campus recruiting, prohibited subsidies, inducements to athletes, and insisted that athletes meet a school’s normal academic requirement to be admitted.\textsuperscript{18} The policies also barred athletic scholarships and authorized investigations of those colleges that allegedly violated the Purity Codes.\textsuperscript{19} Many critics deemed these policies too harsh and without the necessary enforcement by the NCAA, the Purity Codes were repealed within a few years.\textsuperscript{20} As a compromise, the NCAA during the 1950s set forth a policy permitting the award of financial-aid, based on a student’s athletic ability. The emergence of this rule sparked a “spending spree” amongst universities to “buy a winning team.”\textsuperscript{21} The creation of “pay-for-play” was revitalized; however, the “compensation” was in the form of athletic scholarships. It can be said that the NCAA entered a new era in collegiate athletics during the 1950s.\textsuperscript{22} Admittedly, the NCAA was expanding and the notion that NCAA athletes could be identified as employees of their respective universities threatened the amateurism component of the NCAA.\textsuperscript{23}

1. \textit{The Creation of the Term “Student-Athlete”}:  

The terminology “student-athlete” has origins traceable to the 1950s. The term was birthed as a response to the widespread development of the grant-in-aid system amongst colleges.\textsuperscript{24} Supporters of the repealed Sanity Codes labeled the grant-in-aid system as “pay-for-play.”\textsuperscript{25} As previously mentioned, the NCAA was confronted with an external threat of collegiate athletes being identified as employees of their respective universities within the meaning of workers compensation. The two prominent cases that gave life to their fears during the 1950s were \textit{University of Denver v. Nemeth},\textsuperscript{26} State Compensation Insurance Fund, and \textit{Fort Lewis A & M College v. Industrial Commission of Colorado and Billie Dwade Dennison}.\textsuperscript{27} The ideology of college athletes being likened to professionals was also a looming narrative. Therefore, many universities rallied together to assert that college sports were only for amateurs.\textsuperscript{28} The debate over employee status of the NCAA athlete began with the Colorado Supreme Court in \textit{Nemeth}. The Colorado Supreme Court held that Nemeth, a student and a football player for the University of Denver (University), was an employee of the university; thereby, entitling him to workers compensation.\textsuperscript{29} The court reasoned that the University entered into a contract for hire with the athlete (Nemeth) that was solely dependent on Nemeth’s performance on the football

\textsuperscript{18} It should be noted that Kenneth “Tug” Wilson, an assistant to the commissioner of the Big Ten who also acted as the secretary of the NCAA exclaimed, “We must set up a policy whereby a boy will choose a school for its educational value rather than the school choosing a boy for his athletic ability.” \textit{Id.}  


\textsuperscript{20} Walter Byers et al., Unsportsmanlike Conduct Exploiting College Athletics, 67 (1995).  


\textsuperscript{22} Rodney Sith, A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics, 11 Marq. Sports L. Rev. 9, 15 (2000).  

\textsuperscript{23} Walter Byers et al., Unsportsmanlike Conduct Exploiting College Athletics, 69 (1995).  

\textsuperscript{24} \textit{Id.} at 68-69.  

\textsuperscript{25} \textit{Id.}  

\textsuperscript{26} 127 Colo. 385 (1953).  

\textsuperscript{27} 135 Colo. 570 (1957).  

\textsuperscript{28} Byer, supra note 23, at 68-69.  

\textsuperscript{29} Nemeth, \textit{supra} note 26, 392.
field. The University agreed to provide Nemeth with free meals and a job to maintain the tennis courts. However, the meals and the job ceased when the student was ‘cut from the football squad.’ The University contended that Nemeth was not employed to play football, but to keep the tennis courts free from gravel and litter solely. More specifically, the university argued that the opportunities (e.g., free meals and a job) ‘were extended to Nemeth exclusively by reason of his being a student at the University’ and had no connection with his football activities. The court did not agree with the University and explained that:

Nemeth was informed by those having authority at the University, that ‘it would be decided on the football field who received the meals and the jobs.’ He participated in football practice, and after a couple of weeks a list of names was read, which included Nemeth’s name… he was then given free meals and a job. One witness said: ‘If you worked hard (in football) you got a meal ticket.’ Another testified that, ‘the man who produced in football would get the meals and a job.’

The court determined that, “the evidence was sufficient to sustain a finding of an employment relationship between Nemeth and the University as defined by Section 287(b), chapter 97, ’35 C.S.A. and amended Section 288(b) appearing in S.L. ’47, chapter 232, p. 633.”

One benefit that results from being classified as an employee is the right to Workman’s Compensation. In order to prevail in a Workman’s Compensation claim, the injury sustained must “arise out of the employment, meaning it must arise out of the nature, conditions, obligations, or incidents of the employment.” The Court simplifies the inquiry and asserts that “under all the circumstances the injury arose from something which was an incident to the employment.” The Court relies on Justice Campbell’s interpretation of the phrase “incident to the employment.” Justice Campbell says:

Where an employee is doing something which, though not strictly in the line of his obligatory duty, is still doing something incidental to his work, and while doing the same is injured, the accident causing the injury may properly be held to arise out of and in the course of employment, and he will be entitled to compensation.

The Court reasoned that participating in football was an incident to Nemeth’s employment because if he stopped playing football, he would endanger his position and lose his job. Essentially, the contract for hire was solely reliant on Nemeth’s engagement in football. Additionally, the University furnished medical and nursing treatment, to Nemeth and other players on the team. Moreover, the court reasoned that Nemeth was upon the employer’s (i.e., Universities’) premises participating in football practice when the injury occurred; therefore, the

30 Id. at 398-399.
31 Id. at 390-391.
32 Id. at 387.
33 Id. at 390.
34 Id.
35 Id. at 391.
36 Id.
37 Id.
38 Id. at 393.
39 Id. at 394.
injury arose during the course and within the scope of Nemeth’s employment as a football player of the University.\footnote{Id. at 397.}

The \textbf{Nemeth} case marked an unprecedented point in intercollegiate athletics because the Colorado Supreme Court recognized that a collegiate athlete could hold employee status. However, the Colorado Supreme Court case of \textbf{Dennison}, disrupted the findings of the Nemeth court. The \textbf{Dennison} decision is distinguished from \textbf{Nemeth} because the court concluded that there was no contractual relationship for hire established between the athlete and the university that was solely dependent on the athlete playing football. The \textbf{Nemeth} case emphasized that a football player’s performance determined whether the athlete would receive compensation in the form of a job and meals provided by the university, thereby, establishing a link to a contractual obligation and an employment relationship between the two parties.

Similarly, \textbf{Dennison}, a college football player and student at Fort Lewis A & M College, received grant-in-aid from the university which covered his tuition, expenses, and received a job prior to his fatal head injury during intercollegiate play.\footnote{Dennison, supra note 27, 571.} However, the court reasoned that “none of the benefits he (Dennison) received could … be claimed as a consideration to play football.”\footnote{Id. at 572.} In interpreting the court’s findings, Dennison was not found to be an employee because there was nothing to show that the contract of hire by the college was dependent upon his athletic performance in football.\footnote{Id.} The court determined that, “Fort Lewis A & M did not generate a direct benefit from the activities, since the college was not in the football business and received no benefit from this field of recreation.”\footnote{Id. at 573.} Subsequently, the establishment of an employment relationship between the college and the athlete was nonexistent and Dennison’s widow could not claim workers compensation on behalf of her husband.

In response to the \textbf{Nemeth} and \textbf{Dennison} cases Walter Byer (Byer), the NCAA executive director from the 1940s to his retirement in 1987,\footnote{Byers, supra note 23, 5.} implemented an extensive usage of the term “student-athlete.” Byer explained that “We crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for words such as players and athletes. We told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros.”\footnote{Id. at 69.} Byer was advised to “make certain that no employment relationship was created between the institution and the student-athlete involving a duty to participate in athletics.”\footnote{Id. at 75.} The restructured NCAA regulations read, “This award is made in accordance with the provisions of the Constitution of the [NCAA] pertaining to the principles of amateurism [emphasis added], sound academic standards, and financial aid to student athletes …. Your acceptance of the award means that you agree with these principles and are bound by them.”\footnote{Id.}

It has been more than sixty years since Byer drafted the bylaws in the 1950s and not much has changed regarding the employment status of the collegiate athlete. From my observation, since the \textbf{Dennison} decision in 1957 there have been limited number of cases where collegiate athletes have filed suit under workers compensation law seeking employee status. The courts have frequently rejected the notion of an employment relationship between the athlete and the

\begin{footnotes}
\footnote{Id. at 397.}
\footnote{Dennison, supra note 27, 571.}
\footnote{Id. at 572.}
\footnote{Id.}
\footnote{Id. at 573.}
\footnote{Byers, supra note 23, 5.}
\footnote{Id. at 69.}
\footnote{Id. at 75.}
\footnote{Id.}
\end{footnotes}
institution. However, the court in Van Horn v. Industrial Accident Commission reasoned differently.

In the years to follow, however, the District Court of Appeal (Cali.) in Van Horn emphasized that “one who participates for compensation as a member of an athletic team may be an employee within the statutory scheme of the Worker’s Compensation Act.” Here, Van Horn was both a college football player and a student at California State Polytechnic College. Van Horn was involved in a fatal plane crash after a scheduled football game with the institution. His widow filed a worker’s compensation claim on his behalf asserting that he was employed by the university to play football. Van Horn received $50 at the beginning of each school quarter and $75 for rent (which came from a special account) during the football playing season. The payments were denoted as an athletic scholarship. However, the court asserted that “the form of remuneration is immaterial. A court will look through form to determine whether consideration has been paid for services.” The court reiterated that “… one may have the dual capacity of student and employee in respect to an activity.” The court draws a comparison to “student-teachers and student-nurses” and found that awarding employee status upon athletes would not violate public policy in regards to workers compensation. The court rendered that consideration was proffered which resulted in an employment relationship.

Many scholars believe the term student-athlete “obscures the legal reality that some of the athletes, in fact, are also employees.” However, several jurisdictions have held that student-athletes are not recognized as employees. For instance, the United States Court of Appeals for the Seventh and Ninth Circuits have ruled in favor of the NCAA by rejecting the concept of an employment relationship between college athletes and the NCAA.

Currently, the vitality of the amateurism model reigns supreme within NCAA collegiate athletics. However, one could forecast that reform is on the horizon. A number of collegiate athletes have brought suit against the NCAA for violating federal minimum wage laws and labor laws pursuant to the Fair Labor Standards Act and the National Labor Relations Act. The primary issue that must be resolved asks: What legal rights are afforded to the collegiate athlete, so commonly referred to as the “student-athlete” as it relates to employment status? If collegiate athletes were recognized as employees of their institutions the athlete would be afforded specific rights under federal law. More specifically, the athlete would acquire benefits under the Fair Labor Standards Act (e.g., minimum wage and overtime), the National Labor Relations Act (e.g., unionization rights), and state workman’s compensation laws (i.e., which addresses compensation for on the job injuries).

50 Id. at 465.
51 Id. at 460-462.
52 Id. at 466.
53 Id. at 465.
54 Id. at 465-466.
56 Although litigation over the issue has continued, the courts have been consistent in finding that student-athletes are not recognized as employees under any legal standard, whether bringing claims under workers’ compensation laws, the NLRA or FLSA. See Berger, supra note 1, 291-292; Epstein, Adam and Anderson, Paul, The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective, 26 Marq. Sports L. Rev. 287, 297 (2016).
It can be reasoned from an evaluation of case history involving assertions of employee status of the college athlete, that a shift has occurred. The shift is apparent in the causes of actions asserted by the plaintiff(s). Currently, plaintiffs have steered away from asserting workman’s compensations claims and have begun to assert minimum wage claims pursuant to the FLSA. It is evident that the fight for reform is an ongoing battle.

B. The Fair Labor Standards Act: Employee Compensation

As a general matter, one of the most commonly litigated issues in defining the employment relationship between parties is the classification of the worker as an employee or independent contractor. For purposes of collegiate athletics the dogma of independent contractor is not relevant for this discussion. However, the determination of employee status is ripe for review.

It is debatable that all workers aspire to obtain employee status; however, in this case it is to the benefit of the collegiate athlete to obtain such a recognition. A collegiate athlete would desire to be classified as an employee because of the protections that flow from such a classification. If found to be an employee of his or her respective university, that institution would be liable under federal law for any violations that takes place, such as failure to provide workman’s compensation, overtime payments, and minimum wage.

As previously mentioned, collegiate athletes have been in a continuous battle with the NCAA in attempts to become recognized employees. Many athletes contend that their participation in NCAA regulated sports should afford them employee status similar to work-study students and interns. One avenue that collegiate athletes utilize in their fight to obtain compensation is to pursue employee status under the FLSA.

The Fair Labor Standards Act is a federal law that was enacted in 1938 with the purpose of preventing employer abuses of labor, establishing minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. In order to receive the protections afforded under the FLSA, a worker must be classified as a covered employee, amongst other things. Pursuant to 29 U.S.C.A. § 203(e)(1), the FLSA defines an employee in overly broad terms by stating “an employee means any individual employed by an employer.” In accordance to the federal law, “employ” is defined as “to suffer or permit to work.” However, the term “work” is not defined under the FLSA. Therefore, jurisprudence becomes the guide to understanding the interpretation of “employee” as a term of art, within the context of this article.

Historically, administrative agencies and courts have repeatedly denied NCAA collegiate athletes employee status. The inquiry is -- Why? The United States Court of Appeals (Seventh Circuit) decision in Berger was a case of first impression regarding this issue. In order to assess

62 Id.
the athletes’ employment status, the court utilized the Economic Realities Test to draw its conclusion and reasoned that no employment relationship existed.63

The economic realities test focuses on the “financial reality accompanying the work” and on “whether the individual is economically dependent on the business to which he renders service.”64 Put somewhat differently, “the economic realities test seeks to determine whether, as a matter of economic reality, the worker is reliant on the hiring party, or is in business for him or herself.”65

The employer-employee relationship is no longer measured by the common law standards relating to master and servant, but is tested by the measurement of “economic reality” rather than “technical concepts.”66 There is no single rule or test to determine the employment relationship of the worker but rather the courts consider the “total activity or situation which controls.”67

Moreover, the Seventh Circuit asserted the following: in order “to qualify as an employee under the FLSA, one must perform work for an employer.”68 The Seventh Circuit referenced the Department of Labor’s (DOL) definition of “work” and concluded that intramural and interscholastic athletics did not constitute work.69 The court correlated NCAA intercollegiate competition as interscholastic athletics and determined that NCAA athletes’ “play” does not amount to “work” because the athlete “voluntarily” engages in intercollegiate athletics.70 Additionally, the Seventh Circuit hinges its decision on the philosophy of “amateurism” as a long-standing history within the NCAA which it does not want to disrupt.71

Two years post Berger the United States District Court (E.D. Pennsylvania) in Livers v. NCAA,72 ruled in a similar fashion as the Berger court. The court in Livers held that NCAA

63 Berger, supra note 1, 290-291.

“On September 25, 2020, the U.S. Dept. of Labor announced a proposed rule addressing how to determine whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor. The Dept. of Labor proposes to adopt an “economic reality” test to determine a worker’s status. The test considers the following: whether a worker is in business for themselves (independent contractor) or is economically dependent on a putative employer for work (employee); the nature and degree of the worker’s control over the work; and the worker’s opportunity for profit or loss based on initiative and/or investment. These factors help determine if a worker is economically dependent on someone else’s business or is in business for themselves. Moreover, three other factors that may serve as additional guideposts in the analysis including: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production.” U.S. Department of Labor, Proposed Rule: Independent Contractor Status under the FLSA, 29 CFR Parts, 780, 788, and 795, (last visited January 1, 2021) <https://www.dol.gov/agencies/whd/flsa/2020-independent-contractor-nprm> (2020).
67 Rosenthal, supra note 64, 141-142.
68 Berger, supra 1, 290.
69 Id. at 292-294.
70 Id. at 293.
71 Id.
athletes were not considered employees of their respective universities pursuant to the FLSA.\(^{73}\) The court reasoned that when the economic realities test is applied there is no employment relationship established between the parties; however, one must question this logical application.

As of December 2021, the courts have not interpreted the term “employee” to encompass the NCAA collegiate athlete within the meaning of the FLSA.

C. *The National Labor Relations Act: Labor Relations Rights*

Employees have many rights that are protected in accordance with state and federal laws. Collegiate athletes for years have fought to obtain employee status in order to obtain statutory protected rights relating to their participating in NCAA regulated sports. Another avenue college athletes utilized in attempts to obtain employee status was through federal laws of the National Labor Relations Act (NLRA).

The NLRA was enacted by “Congress in 1935 as an administrative agency, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, business and the U.S. economy.”\(^{74}\) The ideology of classifying NCAA athletes as employees under the NLRA was also a case of first impression for the National Labor Relations Board. The purpose of introducing the NLRA into this discussion is to focus on the initial ruling in 2014 offered by the National Labor Relations Board’s (NLRB) regional director, Peter Ohr (“Ohr”), on the issue of employee status regarding NCAA athletes.

In 2014, Ohr presided in the case of *Northwestern v. NCAA*\(^{75}\) and ruled that the football players of Northwestern fell within the NLRA’s broad definition of ‘employee’ when one considers the common law definition of employee.\(^{76}\) Following the ruling, the Northwestern football players were given the opportunity to hold union elections.\(^{77}\) However, the University of Northwestern appealed the ruling to the NLRB’s five-member board. Soon thereafter, the NLRB “declined to assert jurisdiction in the case, stating that it did not want to create instability in labor relations.”\(^{78}\)

**Summary:**
Throughout the evolution of collegiate sports, there has been an emergence of college athletes seeking employee status. The collegiate athlete has sought recognition as an employee pursuant to state compensation laws, the FLSA, and the NLRA; however, as it stands the classification has not been extended definitively to the athlete by the courts.

This article will explore the ideology of awarding collegiate athletes employee status. More specifically, Part II will discuss the paramount case of *Berger v. NCAA* and will answer the following questions: Why did the court rule in favor of the NCAA? What influenced the court’s

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\(^{73}\) Id. at 6.


\(^{77}\) Id.

reasoning? How has the Berger court influenced other jurisdictions with likened factual circumstances?

II. The Precedent Set by Berger v. NCAA

The seminal case governing employment status and compensation rights within the meaning of the FLSA as it relates to NCAA athletes is the 2016 decision of Berger. The United States District Court for the Southern District of Indiana presided over the Berger case and ruled in favor of the NCAA’s motion to dismiss by holding that the plaintiffs did not have standing to pursue a cause of action against the NCAA and its member schools under the FLSA. Additionally, the court held that student-athletes were not employees of universities pursuant to the FLSA. The decision was later appealed and the United States Court of Appeals for the Seventh Circuit affirmed the lower court’s decision.

The recurring inquiry centered around the progeny of cases derived from Berger poses the question: Why are “student-athletes” not recognized as employees for their respective universities if they provide a service that substantially benefits the university? In short, when determining the employment status of an individual under the FLSA, many courts weigh the “totality of the circumstances rather than depending on any technical label, courts examine the economic reality of the working relationship between the alleged employee and the alleged employer to decide whether Congress intended the FLSA to apply to that particular relationship.” Since this was a case of “first impression,” many question whether compensating “student-athletes” was within the intent of Congress. The Berger court asserted that it was not. It is quite clear that the defined term of “employee” is to be construed expansively, while the term “employ” is defined broadly, and the term “work” is undefined within the language of the FLSA. The court in Berger provided some insight on this controversial issue.

In Berger, current and former student-athletes of the Penn State University women’s track and field team brought a cause of action against Penn State, the NCAA, and NCAA member schools for allegedly violating the federal minimum wage laws. The plaintiffs contended that student-athletes were employees within the meaning of the FLSA and should be compensated for their participation in NCAA intercollegiate athletics. In response, the defendants filed a motion to dismiss for failure to state a claim upon which relief should be granted.

Standing:

In order to assert a cause of action, the claimant must have standing to bring the suit. “Constitutional standing refers to the requirement that parties suing in federal court establish that a “Case” or “Controversy” exists within the meaning of Article III of the United States

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80 Id. at 857.
81 Berger, supra note 1, 294
82 Id. at 290
83 Id.
84 Id.
86 Berger, supra note 1, 289
87 Id.
88 Id.; See also FRCP 12(b)(6).
Constitution.” The claimant must establish three elements of standing. The elements are as follows:

First, the plaintiff must suffer an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.

Under the FLSA, alleged employees’ injuries are only traceable to, and redressable by, those who employed them. The appellate court reasoned that the appellants only potential employer was Penn State University because the appellants attended that institution. The court held that the appellants connection to the other NCAA member schools and the NCAA was de minimis. The court reasoned that the appellants did not have standing to sue any defendants other than the Penn State University because the appellant did not allege in its amended complaint that each defendant was their employer. Next, the court tackled the primary issue regarding employment status of the NCAA student-athlete.

A Fight for Minimum Wage:

As previously mentioned, the words “employee” and “employ” are terms of art within the scope of the FLSA that are expansively and broadly defined. For instance, “employee” is defined as any individual employed by an employer. “Employed” means to suffer or permit to work. However, “work” is not defined within the meaning of the FLSA. The question then becomes: How does the claimant prove that he or she has completed “work” as a prerequisite to establishing employment status? As it relates to collegiate athletics, the Department of Labor (DOL) draws a distinction between those students who generally participate in extracurricular activities and those students whose “job” duties are not a part of an overall educational program. The DOL articulated in pertinent part that “… educational program[s] may permit students to engage in activities in connection with … intramural and interscholastic athletics. Activities of students in such programs, conducted primarily for the benefit of the participant as a part of the educational opportunities provided to the students by the school or institution, is not considered work [within

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90 Lujuan v. Defenders of Wildlife, 504 U.S. 555 at 2136 (1992)
91 Id.
92 Berger, supra note 1, 289.
93 Id.
94 Id.
95 Id.
96 29 U.S.C. 203(g).
98 Field Operations Handbook- Ch. 10, FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits § 10b24 (a) & (b)
the scope of the FLSA].” The DOL regulations are looked to by courts as persuasive authority and not dispositive.

Here, in Berger, the appellants argued that student-athletes’ employment status should be evaluated in a similar manner as interns pursuant to the multifactor list articulated by the Department of Labor’s (DOL) Intern Fact Sheet in Glatt v. Fox Searchlight Pictures, Inc. However, the Berger court believed otherwise.

The appellants in Glatt offered the argument that unpaid interns can be classified as employees. The appellants’ contention hinged on the interpretation of the DOL’s Intern Fact Sheet that evaluated the existence of an employment relationship. In order for there to be an absence of an employment relationship, all of the factors must be satisfied. The factors include:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In Glatt, the court declined to apply the DOL’s multifactor test as persuasive authority because it reasoned that the approach in interpreting the list was too rigid (i.e., all the factors must be met to exclude a worker from employee status). Instead, the Glatt court asserted that “not every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to minimum wage… Courts may consider relevant evidence in appropriate cases.” The Glatt court then applied a new list of non-exhaustive factors to address the issue regarding employment status of unpaid interns. The seven-factor test evaluated the following:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

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99 Field Operations Handbook- Ch. 10, FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits § 10b03 (e).
100 Berger, supra note 1, 292.
101 811 F.3d 528 (2016).
102 Id.
103 Id. at 534-535.
105 Glatt, supra note 101, 536.
106 Id. at 537.
107 Id. at 536-537.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.  

The Berger court declined to apply the seven-factor test articulated in Glatt and decided to adopt a more flexible standard. More specifically, the Berger court stated that the Intern Fact Sheet was not intended to apply to student-athletes because the test failed to capture the true nature of the relationship between the alleged employee and the alleged employer. Additionally, the court contended that the economic reality of the relationship between the student-athletes and their schools is defined by traditions of amateurism. More specifically, the court reasoned that the multifactor test “simply does not take into account this tradition of amateurism or the reality of the student-athlete experience.” The court relied on Vanskike v. Peters, in its holding for rejecting the use of a multifactor test.

In Vanskike, a prisoner brought suit against the Department of Corrections claiming that he was entitled to minimum wage as an employee pursuant to the FLSA. The issue before the Seventh Circuit asked whether Vanskike could be classified as an employee of the prison. The court rejected the Bonnette Multifactor Control Test articulated by Vanskike. The test examined the economic reality of the putative employment relationship by determining whether the alleged employer had the power to -- hire and fire the employees, supervise, and control employee worker schedules or conditions of employment, determine the rate and method of payment, and maintain employment records.

The Vanskike court reasoned that the Bonnette Multifactor Test was appropriate in instances “where it is clear that some entity is an employer and the question is which one” as opposed to determining the plausibility of whether a prisoner liken to Vanskike could be employed given the

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108 Id. at 536-537.
109 Berger, supra note 1, 290-291.
110 Id.
112 Berger, supra note 1; See also Vanskike v. Peters, 974 F.2d 806, 809 (1992)
113 974 F.2d 806 (1992).
114 Berger, supra note 1.
115 Vanskike, supra note 113, 806.
116 Id. at 808.
118 Vanskike, supra note 113, 809.
nature of the ‘working’ relationship. The court explained that the Bonnette Test emphasized control over the terms and structure of the employment relationship. One could reason that the Department of Corrections exercised the requisite control over the prisoner in accordance to the Bonnette Test. Subsequently, Vanskike would have been classified as an employee of the Department of Corrections. However, the court in its discretion asserted that “the Bonnette test failed to capture the true nature of the relationship … essentially they presuppose a free labor situation… [In essence] the Department of Labor’s control over Vanskike does not stem from any remunerative relations or bargained-for exchanged of labor for consideration, but from incarceration itself.”

The Vanskike court explained that the Bonnette factors only offered a one-sided view of the term “employee.” The court abandoned the traditional control test at common law that draws a distinction between an employee and an independent contractor and asserted that the measurement of control is not a sufficient indication of an employment relationship, rather such a measurement can be seen as problematic. For instance, the court asserted that it was evident that the Department of Corrections exercised control over the prisoner. The measurement of control in the eyes of the court was excessive to classify the relationship as one of employment. Essentially, the court asserted that the incarceration of individuals is a subset of a punishment that could result in a working relationship arising from their sentence as opposed to a contractual work for hire relationship.

In Berger the court refused to adopt the multifactor test because in its view the test was not a helpful guide. To better assist the court in its evaluation the court looked to the DOL’s Field Operations Handbook (FOH) and contended that the DOL did not intend for student-athletes to be classified as employees for three reasons. First, the language in the Field Operations Handbook stated that students who participate in extracurricular activities are excluded from employee status. Extracurricular activities included intermural and interscholastic athletics. The court reasoned that NCAA regulated sports fell within the category of interscholastic athletics concluding that one’s participation in sports is not considered work. Secondly, the court asserted that participating in collegiate athletics is voluntary. Lastly, the court reiterated that college athletics is an amateur sport at its core which does not garner compensation rights. The Berger court thus held as a matter of law that student-athletes were not employees under the FLSA.

Although the Berger decision was not controlling authority, the Seventh Circuit’s ruling on the issue explicitly rejecting employment status to the collegiate athlete is persuasive authority in other jurisdictions. Many courts frequently reference both Berger and the Department of Labor’s reasoning for denying employee status to collegiate athletes, all in the name of “amateurism.”

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119 Id.
120 Id.
121 Id.
122 Id.
123 Vanskike, supra note 113, 810.
124 Id.
125 Id.
126 Berger, supra note 1, 293.
127 Id. at 292-293.
128 Id.
129 Id.
130 Id. at 293-294.
Following the Berger decision, the court in Dawson v. NCAA decided the matter relating to employment status of collegiate athletes in a similar fashion. The United States District Court of the Northern District of California held that student-athletes were not employees of the NCAA and the PAC-12 Conference pursuant to the FLSA. Upon appeal, the United States Court of Appeal for the Ninth Circuit affirmed the district court’s ruling. The facts of Dawson are parallel to those of Berger; however, the two distinctions are that the appellant in Dawson did not bring a cause of action against the University of Southern California (i.e., his alma mater) and the appellant participated in a revenue-generating sport. Here, Dawson participated in football at USC, a Division I Football Bowl Subdivision member of the Pac-12 Conference. Dawson argued that he was denied full pay for all hour’s worked, including overtime pay, and was frequently permitted to work without receiving required minimum wage payments. It can be reasoned that Dawson associated “work” with his participation in intercollegiate athletics at USC. In his arguments Dawson raised an assertion that stems from Judge Hamilton’s concurrence in Berger. Judge Hamilton concluded that the appellants (i.e., track and field college athletes) in Berger were not employees pursuant to the FLSA; however, he stated the following:

I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men’s basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes.

In its rejection of the appellant’s contentions, the Dawson court relied on Berger, the Department of Labor’s FOH, and additional jurisprudence when declining to recognize Dawson as an employee. First, the court utilized Berger’s methodology when rejecting the Bonnette multifactor test by stating the test failed “to capture the nature of the relationship between the

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132 The PAC-12 Conference is one out of eleven FBS Division I-A Conferences housed under the NCAA umbrella. College Football Conference, (last visited July 17,2020) <http://www.espn.com/college-football/conferences>.
133 Currently (December of 2020), the PAC-12 sponsors 11 men’s sports and 13 women’s sports, with the most recent additions coming in the 2017-18 (women’s lacrosse) and 2015-16 (beach volleyball) academic years. Additionally, the Conference is a member of the Mountain Pacific Sports Federation (MPSF) in four other men’s sports and two women’s sports. See NCAA About the Pac-12 Conference, Mission Statement, (last visited July 19, 2020) <https://pac-12.com/content/about-pac-12-conference>.
134 Dawson, supra note 131, 405-408.
135 Dawson v. NCAA, 932 F.3d 905, 907 (2019).
136 Id. at 403.
137 Id.
138 Id.
139 Berger, supra note 1, 294 (Hamilton, J., concurrence).
athletes and their schools.”\textsuperscript{140} The Dawson court reiterated the notions of amateurism as being the founding principle of collegiate sports as set forth in the Seventh Circuit. With that being said the court held that an expectation of “immediate compensation” had not been established and determined that collegiate athlete’s “play” was not “work.”\textsuperscript{141}

Next, the Dawson court discarded the ideology that traditional revenue generating sports like Division I football and basketball were different from other non-revenue generating sports under the FLSA. In the eyes of the court, the appellant did not present legal authority to support his conclusion. The court relied on Berger and concluded that Judge Hamilton’s concurrence “did not find for employee status of football players and did not purport to represent an alternative line of legal analysis.”\textsuperscript{142} However, one can argue that Judge Hamilton’s concurrence in fact alluded to a departure from the traditional notions of amateurism as it relates to revenue generating sports. Perhaps those sports that generate billions of dollars for universities should be evaluated under a multifactor test.

Lastly, the Dawson court contrasted the DOL FOH’s definition of “work” (which excludes intercollegiate activities as “work”) to the FLSA’s inclusion of work-study students as employees and asserted in part that, “work-study programs exists for the benefit of the school, while football programs exists for the benefit of the student, and in some limited circumstances, also benefit the school.”\textsuperscript{143} As mentioned previously in Berger, the Dawson court asserted that individuals who participate in activities typically seen as extracurricular like interscholastic athletics are generally not recognized to be employees within the meaning of the FLSA.\textsuperscript{144} The court asserted that interscholastic athletics are those “conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution.”\textsuperscript{145}

Many have argued that NCAA regulated sports have little to no educational benefit to the athlete. One could argue that collegiate athletes do not derive course credit for his or her participation in NCAA intercollegiate activities. On the other hand, one could assert that some athletes obtain an educational benefit arising from the opportunity to obtain grant-in-aid as a result of their affiliation, play, and participation with the sports team. One could then ask: Is the athletic scholarship a condition of or dependent on the play of the athlete? If so, how should one evaluate the relationship between college athletes, their respective universities, and the NCAA?

In summary, the Berger court offered insight to the aforementioned questions. The Seventh Circuit concluded that due to the nature of the relationship between the collegiate athlete and the university coupled with the traditions of amateurism, a multifactor test would fail to capture the true essence of the relationship between both parties. The court sought to apply a more flexible standard when evaluating the relationship between the athlete and the universities; however, the court primarily tackled the aspect of amateurism. The Berger court did not present other influences that were taken into consideration in its evaluation.

Part III of this composition highlights an alternative approach to evaluating the employment status of the collegiate athlete.

\textsuperscript{140} Dawson, supra note 131, 405-406.
\textsuperscript{141} Id., at 405.
\textsuperscript{142} Id. at 406.
\textsuperscript{143} Id. at 407.
\textsuperscript{144} Id. at 406.
\textsuperscript{145} Id. at 407.
III. **The Economic Realities Test and Its Application**

In accordance with the FLSA and the NLRA, the defined term “employee” is broad; however, the term does not encompass independent contractors. When unpacking the employment rights of collegiate athletes, the FLSA is an imperative aspect of the analysis because one major right that is covered under the FLSA is the right to financial compensation. There are many instances where collegiate athletes have filed suit for their right to compensation under the FLSA. However, in order to obtain compensation, one must obtain employee status.

To determine whether an individual falls within the category of an employee, many courts have applied a form of an economic realities test when assessing the true nature of the working relationship of the individual and the alleged employer, as either employer-employee or employer-independent contractor. There are numerous benefits that flow from classifying a worker as an employee. The questions that will be addressed in this section asks: What is the economic realities test? And how is it applicable to the collegiate athlete?

A. **The Economic Realities Test**

The economic realities test at its core can be seen as a test that measures the worker’s economic dependency upon the employer and determines whether the worker makes a living in another’s business or, instead is in business for himself or herself. The economic realities test calls for a fact intensive examination of an employment relationship that examines the totality of circumstances rather than a technical label. The classification is evaluated on a case-by-case basis. “The economic realities test must be assessed by reference to the particular situation [where] some factors [might be considered] more important than others depending on the FLSA question at issue and the context in which it arises.” The court examines actual acts.

The Supreme Court in *Rutherford Food Corp. v. McComb*, reiterated that the economic realities test is the appropriate test to implement when determining the classification of the worker within the meaning of the FLSA as opposed to the common law. As it stands, there is no single or uniform formulation of the economic realities test that has been implemented by the courts.

Nevertheless, courts have traditionally applied a number of multifactor tests to guide the “economic reality” inquiry. The tests are used as mechanisms to “gauge the degree of dependence of the alleged employees on the business with which they are connected.” For instance, the U.S. Department of Labor, Wage and Hour Division authored a fact sheet that articulates seven (7) factors that courts traditionally consider when determining the classification of the worker. These factors are as follows:

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146 §120 Determining the Employer / Employee Relationship
147 § 121 Economic Reality Test; See also Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).
149 Berger, supra note 79, 850.
153 Id. at 726-727.
154 Rosenthal, supra note 64, 140.
155 Scantland, supra note 151, 1311.
(1) The extent to which the services rendered are an integral part of the principal’s business;
(2) The permanency of the relationship;
(3) The amount of the alleged contractor’s investment in facilities and equipment;
(4) The nature and degree of control by the principal;
(5) The alleged contractor’s opportunities for profit and loss;
(6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
(7) The degree of independence business organization and operation.\[157\]

B. Is there a Place for the Economic Realities Test in Collegiate Sports?

According to the Berger court the answer is, no. Berger takes a holistic approach when evaluating the employment status of the collegiate athlete. This approach takes primarily into consideration the traditional and historical notions of “amateurism.” The Seventh Circuit reasoned that the multifactor test articulated by the plaintiffs’ “fail[ed] to capture the true nature of the relationship between the alleged employee and the alleged employer.”\[158\] The philosophy behind the phrase “true nature” can be equated to “amateurism.” The court reasoned that a multifactor test “was not the most helpful guide in the situation presented.”\[159\] Instead, Berger relied on the holding in Vanskike and the DOL’s Field Operations Handbook that explicitly excludes collegiate athletics interscholastic competitions from the definition of “work.”

However, according to the court in Dawson the answer is, yes. The United States Court of Appeals for the Ninth Circuit was presented with the question of determining the employee status of the plaintiff, Dawson, who was a collegiate athlete. As previously mentioned, the plaintiff was a football player for the University of Southern California (USC) and petitioned the court to recover failed paid wages, including overtime pay by the NCAA and the PAC-12 conference. The court determined that the plaintiff did not allege that he was an employee of his respective university (USC), but rather alleged that the NCAA and the PAC-12 were his employers. Therefore, the court only addressed the issue of whether the NCAA and the PAC-12 were the plaintiff’s employers.

In its analysis, the court stated that “ultimately, the test for employment under the FLSA is one of ‘economic reality.’ Economic reality accounts for the circumstances of the whole activity rather than considering “isolated factors” determinative.”\[160\] Additionally, as referenced in Walling v. Portland Terminal,\[161\] the Dawson court reiterated that “the Supreme Court has found a number of circumstances relevant in evaluating economic reality, including: expectation of compensation…”\[162\] The court applied two multifactor tests (the Bonnette Factors and the Benjamin Primary Beneficiary Test) to determine if the NCAA and PAC-12 were the plaintiff’s employer. Upon its analysis, the court reasoned that “the economic reality of the relationship between the NCAA and PAC-12 and the collegiate athletes did not reflect an employment...

\[158\] Berger, supra note 1, 291.
\[159\] Id.
\[160\] Id.
\[161\] Dawson, supra note 131.
\[162\] Id.
relationship.”  Although there was not an employment relationship established between the named defendants in Dawson, a multifactor test was applied to determine the economic reality of the relationship. The outcome could have differed if the plaintiff would have brought suit against his university (USC).

Additionally, according to the court in Livers the answer is, yes. Livers takes a different approach and does not refuse to decline the application of a multifactor test.  The court’s application was initially “centered around a holistic application of the economic realities test.”  The court reasoned that a multifactor test is not a blanket test that is “one size fits all.” Essentially, the court asserted that a multifactor test may not be applicable in every situation. However, as it relates to the employment status of the collegiate athlete “an appropriate multifactor test could be identified for evaluating the question of whether a student-athlete who receives an athletic scholarship is an ‘employee’ for FLSA purposes.” The court suggested that the test in Donovan could be a great starting point for an evaluation.

The factual components of Livers are similar to that of Berger and Dawson. In Livers a scholarship college athlete, Lawrence Livers (Livers), filed suit against the NCAA, Villanova University, and dozens of other NCAA member schools for allegedly violating his rights to compensation under the FLSA. The plaintiff filed suit after the lapse of the two-year statute of limitations period. However, an exception to the time-bar requires the plaintiff to prove that the alleged FLSA violation was willful, in which case the limitation period is extended to three years. A FLSA violation is ‘willful’ if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA. The defendants relied on the Department of Labor’s Field Operations Handbook (FOH) in rebutting the ideology of employee status for collegiate athletes. The court reasoned that the plaintiff could not allege facts that were sufficient to establish that the defendant willfully violated the FLSA. Additionally, the plaintiff did not plead facts to overcome the FOH guidance of the court. The court dismissed the claim and allowed the plaintiff to amend its complaint.

In the amended complaint, the court reasoned that the plaintiff alleged plausible claims regarding the ‘willful’ and ‘FOH’ issues that survived at the motion to dismiss stage. The defendants contended that the plaintiff’s allegations were not sufficient to establish the “economic reality” of the relationship between the plaintiff and the defendants. In determining the employee status of the collegiate athlete, both the plaintiff and the defendant in Livers agreed that the Glatt multi-factor test is the most relevant to utilize when establishing the ‘economic reality’ in the case of the employment status of the collegiate athlete.

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163 Dawson, supra note 131.
164 Livers, supra note 72, 15-16.
165 Id.
166 Id.
167 Id.
168 Id.
169 Livers, supra note 72,1-2.
170 Id. at 7-16.
171 Id. at 8.
172 Id. at 16.
173 Id.
174 Livers, supra note 72, 1-2.
175 Id. at 14.
176 Id. at 14-15.
In order to better understand the working relationship between the collegiate athlete and the university and the NCAA, the court in Livers held that applying the economic reality found in Donovan is the most applicable.\textsuperscript{177} Although Livers is not controlling precedent on the issue before us, the court offered a guide to understand the dynamics between both parties.

Subsection C will offer an in-depth application and analysis of the Donovan test and the Glatt test.

C. \textit{The Application:}

\begin{enumerate}
\item \textbf{Donovan Test- The Suggestion by Livers}

Summary of the Donovan Case:

The Court of Appeals for the Third Circuit was presented with the task of determining whether the district court erred in holding that the plaintiffs (i.e., home researchers) were not employees of the defendant pursuant to the FLSA. The court utilized the refined multifactor test articulated in Donovan v. Sureway Cleaners,\textsuperscript{178} and held that the home researchers as a matter of law were employees while the distributors were independent contractors. The court considered the following factors:

1. The degree of the alleged employer’s right to control the manner in which the work is to be performed;
2. The alleged employee’s opportunity for profit or loss depending upon his managerial skill;
3. The alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
4. Whether the service rendered requires a special skill;
5. The degree of permanence of the working relationship;
6. Whether the service rendered is an integral part of the alleged employer’s business.\textsuperscript{179}

In Donovan, the plaintiffs appealed to the Third Circuit in an attempt to be recognized as employees under the FLSA. The facts of the case are as follows:

The employer, DialAmerica Marketing, Inc. (DialAmerica), employed workers as home researchers and in-house researchers. The tasks of the employed workers were to find phone numbers of the subscribers by looking through books and calling directory-assistance operators. The home-researchers were then given 500 box cards initially and were expected to set up appointments to return the cards one week later. Home-workers were free to choose the weeks and hours they wanted to work and the number of cards they desired to receive. The employer controlled the aspects of the manner in which the home-researchers should complete their jobs. Additionally, the home-researchers were not required to keep records of their work hours.\textsuperscript{180}

\textsuperscript{177} \textit{Id.} at 16.
\textsuperscript{178} 757 F.2d 1376 (1985).
\textsuperscript{179} \textit{Id.} at 1383.
\textsuperscript{180} Donovan, \textit{supra} note 178, 1379-1380.
In its application of the facts and the multifactor test, the district court examined the employer’s control over the home researchers and the degree of economic dependence of the home researchers. The district court reasoned that the home researchers lacked supervision because they worked from home without the guidance of a superior and at the dates and times of their own choosing, thus the control factor was not met. Additionally, the trial court determined that the income derived from the home-researcher’s task was mere “pocket money” and was not the home-researchers primary source of income the plaintiffs acquired from working for DailAmerica. The district court therefore concluded that the home-researchers were not economically dependent on their employer.

However, the Third Circuit reasoned that the lower court failed to present an assessment considering all the Donovan Factors. The appellate court rebutted the notion of the employer’s lack of ‘control’ over the worker. The court reiterated that although an individual worked remotely it is not dispositive of employee status under the FLSA. Upon an examination of the FLSA legislative history the court determined that the home-workers were intended to be covered by the FLSA. Next, the appellate court analyzed the economic reality or economic dependency of the home-worker’s circumstances.

In its evaluation of the ‘economic reality’ the court highlighted the following: “that the economic-dependency aspect of the Donovan test does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life. Rather, it examines whether the worker is dependent on a particular business or organization of their continued employment.” Next, the court examined whether the home researchers where an ‘integral part’ of the business. The court reasoned that an examination of the factor does not relate to the percentage of total work done by the worker but is determined by the nature of the work performed by the workers. The court based its determination on whether the work by the home researcher constituted an “essential part” of the employer’s business.” In its analysis the court determined that the workers were in fact an integral part of the defendant’s business. The defendant was a telephone marketing firm that sold magazine renewal subscriptions by phone to potential clients. The primary work of the home researchers was to locate individuals phone numbers and call them to sell products. The court reasoned that the home researchers were engaged in searching for the phone numbers and therefore were an integral part of the business and satisfied the factor.

As the six factors are applied to the present case regarding the employment status of the collegiate athlete it can be argued that NCAA (scholarship) collegiate athletes are in fact employees of their respective universities pursuant to the Donovan factors coupled with considering the totality of the circumstances.

181 Livers, supra note 72, 1383.
182 Donovan, supra note 178, 1384.
183 Id.
184 Id.
185 Id.
186 Id.
187 Id. at 1386.
188 Id. at 1385.
189 Id. at 1386.
190 Id. at 1380.
191 Id. at 1379.
Factor #1

The first factor under the Donovan economic realities test is the degree of control. The question that must be asked and answered is: What is the degree of the alleged employer’s right to control the manner in which the work is to be performed? Before, we analyze the control factor we must first identify the “work” that is being allegedly controlled.

As we know, “work” is undefined within the meaning of the FLSA. However, the Department of Labor explicitly rejects the notion of interscholastic athletic competition as being “work” and relies on the voluntary nature and the traditions of amateurism within collegiate athletics for its exclusion.\(^{192}\) One could argue that the Department of Labor’s assertions are attempts to invalidate the demanding reality of the college athlete that encompasses both physical and mental exertions. The exertions are not limited to the following: year-round training, weekly team meetings addressing a myriad of topics (i.e., conduct, strategies for success, etc.)

Moreover, one could raise the question: Is college athletics truly voluntary and is it an amateur industry? The word “voluntary” means “characterized by free will or choice; freely done or bestowed.”\(^{193}\) One could concede that participating in collegiate athletics is voluntary to a degree. The player essentially has to determine whether he or she would like to join a college sports team in exchange for a scholarship covering tuition. However, one could assert that the voluntary nature of participating in the NCAA as a collegiate athlete is immaterial since participating in any activity requires some form of voluntarism (i.e., the individual must decide to fill the vacancy in a particular job position) similarly to that of teacher-assistance, student-tutors, work-study students, research assistants, or student concession stand workers. Nevertheless, these students have the opportunity to earn a minimum wage as opposed to the collegiate athlete.

Conversely, one could argue that participating in collegiate athletics is not totally voluntary because the remaining athletic associations that are available for the collegiate athlete to compete in (i.e., NAIA and the NJCAA) have similar restrictive regulations as the NCAA.

Secondly, it can be argued that the “amateurism” philosophy within collegiate sports is a misnomer due to the commercialization of the industry and the authority given to some collegiate athletes by the NCAA -- the right to acquire financial gain through prize money.\(^{194}\) The ideology

\(^{192}\) Berger, supra note 1, 292.


\(^{194}\) “The Knight Commission has called for a restructuring of college sports in response to the “highly commercialized environment” of major-college football and basketball. In a letter to NCAA president Mark Emmert, the reform-minded commission emphasized the need to explore "alternative structures for Division I college sport. The 65 schools in the Power Five conferences are currently collecting the overwhelming majority of the $7.2 billion in rights fees from ESPN over the 12-year term of the CFP contract.” Dennis Dodd, Watchdog Group: Commercialization of FBS, College Basketball Requires Restructuring of NCAA, NCAA FB / Cbssports.com, (last visited January 2, 2021) <https://www.cbssports.com/college-football/news/watchdog-group-commercialization-of-fbs-college-basketball-requires-restructuring-of-ncaa/ >.

NCAA Bylaw 12.1.2.4.1 Exception for Prize Money Based on Performance -- Sports Other Than Tennis. In sports other than tennis, an individual may accept prize money based on his or her place finish or performance in an athletics event. Such prize money may not exceed actual and necessary expenses and may be provided only by the sponsor of the event. The calculation of actual and necessary expenses shall not include the expenses or fees of anyone other than the individual (e.g., coach's fees or expenses, family member's expenses). (Adopted: 4/25/02 effective 8/1/02, Revised: 12/12/06 applicable to any expenses received by a prospective student-athlete on or after 8/23/06, 4/26/12, 1/19/13 effective 8/1/13, 4/25/18)
of amateurism has taken shape and has evolved over the years. We are reminded also that the opinions of the Department of Labor are seen as persuasive authority. After evaluating the terms of art under the Donovan factors, one’s attention shifts to examining factor one, control.

Factor one looks to the degree of control that is administered by universities over its student-athletes. For all intents and purposes, we will presume that the activities performed by the collegiate athlete is classified as work. The NCAA explicitly defines the requisite degree of control and the scope of such control that each member school possess. In accordance with Article 2 of the NCAA Constitution the NCAA explains:

It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of this Association [NCAA]. The institution’s president or chancellor is responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expedites.\footnote{195}{NCAA Constitution, Art. 2, Section 2.1.1}

The institution’s responsibility for the conduct of its intercollegiate athletics program includes responsibility for the action of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interest of the institution.\footnote{196}{NCAA Constitution, Art. 2, Section 2.1.2}

It can be reasoned that NCAA member institutions must work in conformity with the NCAA Constitution. In doing so, the institutions exercise power to -- supervise, manage, and enforce the rules governing the bylaws and constitution of the organization. For instance, institutions must supervise the conduct of the collegiate athlete (i.e., during collegiate play and outside the arena of sports) as well as the time in which the collegiate athlete engages in practice and training. Furthermore, the conduct of both the collegiate athlete and the athletic department are controlled to ensure that the athletic department, specifically the “coaching staff and administrators, exhibit fairness, openness and honesty in their relationships with the collegiate athlete.”\footnote{197}{NCAA Constitution, Art. 2, Section 2.2.5} Additionally, each institution controls aspects of the environment collegiate athletes are placed in, meaning the universities must ensure that the environment “fosters a positive relationship between the coach and the student-athlete [collegiate athlete].”\footnote{198}{NCAA Constitution, Art. 2, Section 2.2.4}

In short, one could reason that the educational institutions are required to administer control over the collegiate athletes pursuant to the NCAA bylaws. Therefore, the control factor is satisfied.

Factor #2

The second factor that must be examined is the opportunity for the alleged employee to profit or acquire losses from the employer. The NCAA explicitly states in its bylaws that collegiate

\footnote{195}{NCAA Bylaw 12.1.2.4.2 Exception for Prize Money -- Tennis. 12.1.2.4.2.1 Prior to Full-Time Collegiate Enrollment. In tennis, prior to full-time collegiate enrollment, an individual may accept up to $10,000 per calendar year in prize money based on his or her place finish or performance in athletics events. Such prize money may be provided only by the sponsor of an event in which the individual participates. Once the individual has accepted $10,000 in prize money in a particular year, he or she may receive additional prize money on a per-event basis, provided such prize money does not exceed the individual's actual and necessary expenses for participation in the event.}

\footnote{196}{NCAA Constitution, Art. 2, Section 2.1.1}

\footnote{197}{NCAA Constitution, Art. 2, Section 2.1.2}

\footnote{198}{NCAA Constitution, Art. 2, Section 2.2.5}
athletes are prohibited from gaining profits that derive directly or indirectly from their athletic ability or skill during their matriculation through college. The act of accepting payment or benefits resulting from the collegiate athlete’s athletic skill is a violation of the NCAA amateurism model for college sports and could result in eligibility issues for the college athlete.\(^{199}\) Within that same breath, the collegiate athlete does not derive any financial loss from his or her employer, unless the grant-in-aid is revoked.

Therefore, one could reason that factor two is satisfied in supporting the argument that collegiate athletes are in fact employees of their respective universities. The athletes are not in a position to gain profits from the work that they provide, and the revocation of a scholarship does equate to a loss. However, that loss arguably does not amount to the level to show that the athlete is in business for him or herself.

Factor #3

The third factor examines the alleged employee’s investment in equipment or materials required for the completion of the tasks. In the case of the college athlete, one can argue that training equipment is an essential component that aids in the completion of the collegiate athletes’ daily tasks. For instance, most collegiate athletes utilize training and practice facilities which typically include a stadium, field, or ice rink, etc. Additionally, NCAA universities supply the practice and game day uniforms, shoes, helmets, etc. for the collegiate athlete. The athlete essentially does not have to pay for anything concerning the equipment. However, if the athlete would like to purchase additional equipment for his or her personal use, he or she can but such purchases are typically not required to complete the task. The employer (i.e., educational institution) would be responsible for providing the necessary equipment.

Therefore, one could reason that the third factor of the economic realities test has been met which further proves that college athletes are in fact employees of their respective educational institutions. As previously stated, the athlete does not incur costs related to the equipment needed to satisfy the completion of his or her task.

Factor #4

The fourth factor requires an evaluation of whether the service rendered requires a special skill. In short, the answer is, yes. During the 2018-2019 academic year, there were approximately 7,234,798 high school students who participated in high school sports in the United States.\(^{200}\) Out of those high school athletes less than 18% of those individuals went on to play in NCAA college sports.\(^{201}\) To better illustrate the probability of high school athletes competing beyond high school to NCAA athletic programs, the NCAA has developed quantitative data that charts the probability of high school athletes competing in the NCAA. The data is articulated in Figure 1. More specifically, the NCAA predicts that 7.5% of high school boys baseball participants will likely play for NCAA institutions consisting of Division I, Division II, and Division III universities.\(^{202}\) However, only 2.2 % of high school baseball players will likely matriculate to Division I schools as a collegiate athlete.\(^{203}\) Additionally, it is reported that there is an overall estimate that 3.5% of

\(^{199}\) NCAA Bylaws, Art. 12


\(^{202}\) Id.

\(^{203}\) Id.
high school boys basketball participants will play NCAA basketball. Figure 2 takes an in-depth look at the probability of high school boys basketball athletes competing as NCAA collegiate athletes upon the completion of high school.

![Estimated Probability of Competing in College Athletics](image)

**Figure 1**

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204 Id.
205 Id.
The data shows that there is a low probability of high school athletes matriculating to NCAA member universities as collegiate athletes. It can be reasoned that the recruiting process is very selective. Additionally, one can argue that participating in college athletics requires a special skill to which a limited number of individuals possess.

Therefore, factor four of the economic realities test is satisfied and acts as evidence to further show that NCAA collegiate athletes should obtain employee status. One could reason that employee status should be given to the athletes because the first four factors of the multifactor economics realities test have been satisfied. As previously mentioned, the educational institution exercises a degree of control over the athlete’s completion of their work. Also, the institutions provide the necessary equipment needed for the athletes. Additionally, the athletes cannot derive any profits from their work and have a limited ability to incur a loss. Lastly, to compete in NCAA competition requires a special skillset.

**Factor #5**

The fifth factor that must be evaluated is the degree of permanence of the working relationship between the alleged employee and alleged employer. In the present case, there is arguably a degree

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206 Figure 2 relies on the data collected in Figure 1 and shows the percentage of high school boys’ basketball players who will most likely not compete in NCAA collegiate athletics. The data collected does not take into account those athletes who participate in NAIA or NJCAA sports.
of permanence within the arena of collegiate athletics. One facet is the award of grant-in-aid\(^{207}\) (i.e., scholarship opportunity). The NCAA permits its member schools the authority to award athletic scholarships to perspective collegiate athletes. Typically, scholarships are awarded and renewed yearly; however, in 2012 the NCAA permitted its member Division I schools the authority to award multiyear scholarships to its student-athletes.\(^{208}\) Soon thereafter, “in 2015, NCAA Division I colleges from the Power Five conferences (colleges in the Football Bowl Subdivision, plus Notre Dame) agreed to implement a rule that prevented multiyear Division I scholarships from being canceled or not renewed for any athletic reason.”\(^{209}\) Essentially the new multiyear scholarship rule gives collegiate athletes a since of security and reiterates that the athlete’s scholarship cannot be revoked for poor athletic performance.\(^{210}\) Additionally, one could argue that the new multiyear athletic scholarship constitutes as an employment contract for a specific term. To better illustrate the use of the multiyear scholarship, Figure 3 highlights the CBS Sports charts that takes an overview of forty-three universities that finished as top-25 football or men’s basketball teams during the 2013-2014 season that utilized multiyear scholarships.\(^{211}\)

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\(^{207}\) NCAA Bylaws: 15.01.2.5 Full Grant-in-Aid. A full grant-in-aid is financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance established pursuant to Bylaws 15.02.2 and 15.02.2.1. (Revised: 8/7/14, 1/17/15 effective 8/1/15). See NCAA Bylaw 15.01.2.5.

\(^{208}\) “Many athletic scholarships, like most merit-based scholarships, are granted for one academic year. However, NCAA Division I schools are allowed to provide multi-year scholarships. Allowing these schools to award scholarships for longer than a single year gives student-athletes greater assurance that their education will continue even if they suffer an injury, their athletics performance does not live up to expectations or the coaching staff changes. If a school plans to reduce or not renew a student-athlete aid, the school must provide the student-athlete an opportunity to appeal. In most cases, coaches decide who receives a scholarship, what it will cover and whether it will be renewed.” See NCAA Article ID: KB-2237, What is the Typical Length for an Athletic Scholarship?, (last visited January 2, 2021) <https://ncaa.egain.cloud/kb/EligibilityHelp/content/KB-2237/What-is-the-typical-length-for-an-athletic-scholarship?query=multiyear%20scholarship>.


Since 2012, the NCAA has allowed schools to provide multiyear scholarships. CBSSports.com made open-record requests with the 43 universities that finished 2013-14 as a top-25 football or men’s basketball team. The multiyear scholarship numbers are for all athletes at each school. Note: Athletes who graduated or whose eligibility expired were not counted in the scholarship non-renewal numbers. Non-renewals can occur for many different reasons.

<table>
<thead>
<tr>
<th>SCHOOL</th>
<th>MULTIYEAR SCHOLARSHIPS</th>
<th>LENGTHS</th>
<th>SCHOLARSHIP ATHLETES</th>
<th>SCHOLARSHIPS NOT RENEWED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio State</td>
<td>104</td>
<td>2 yrs (3), 3 yrs (30), 4 yrs (71)</td>
<td>725</td>
<td>71</td>
</tr>
<tr>
<td>Florida</td>
<td>88</td>
<td>N/A</td>
<td>412</td>
<td>N/A</td>
</tr>
<tr>
<td>Arizona State</td>
<td>62</td>
<td>2 yrs (12), 3 yrs (7), 4 yrs (42), 5 yrs (1)</td>
<td>352</td>
<td>37</td>
</tr>
<tr>
<td>Florida State</td>
<td>49</td>
<td>2 yrs (7), 3 yrs (1), 4 yrs (41)</td>
<td>311</td>
<td>33</td>
</tr>
<tr>
<td>Auburn</td>
<td>43</td>
<td>2 yrs (3), 2.5 yrs (6), 4 yrs (19), 5 yrs (15)</td>
<td>430</td>
<td>17</td>
</tr>
<tr>
<td>Michigan State</td>
<td>35</td>
<td>4 yrs (35)</td>
<td>442</td>
<td>31</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>26</td>
<td>4 yrs (26)</td>
<td>476</td>
<td>46</td>
</tr>
<tr>
<td>Virginia</td>
<td>19</td>
<td>3 yrs (1), 4 yrs (18)</td>
<td>522</td>
<td>38</td>
</tr>
<tr>
<td>Alabama</td>
<td>18</td>
<td>2 yrs (2), 4 yrs (16)</td>
<td>400</td>
<td>42</td>
</tr>
</tbody>
</table>
The scholarship opportunity in and of itself is an example of permanence regarding the working relationship between the athlete and the university. Upon agreeing to comply with the regulations of the scholarship and the NCAA bylaws, a collegiate athlete essentially has secured his or her permanent membership on a sports team.

Therefore, one could reason that factor five has been satisfied and further illustrates that NCAA collegiate athletes should be classified as employees pursuant to the FLSA due to their degree of permanence as an athlete for their respective educational institutions.

**Factor #6**

The last factor is whether the service rendered is an integral part of the alleged employer’s business. In this case, the services rendered is the athletic participation and performance of the collegiate athletes. The employer in this case is in the business of college sports. The NCAA is a

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212 Id.
billion-dollar industry\textsuperscript{213} that derives profits from different revenue streams such as television, marketing rights, championships, and National Invitation Tournament (‘‘NIT’’)\textsuperscript{214} as a result of the athletic performance of the collegiate athlete. One could argue that the college athlete is the foundation of the NCAA and the athletic programs for many NCAA member institutions.

The Supreme Court case of NCAA v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association (1984),\textsuperscript{215} emphasized that collegiate athletics is a business. During the 2019 athletic season, the NCAA generated roughly 867.53 million dollars in television and marketing rights fees. Additionally, it has been reported that championships and NIT Tournaments generated 177.87 million dollars.\textsuperscript{216} The NIT revenues stem from “tickets, parking, concessions, merchandise, and all the other non-TV and marketing dollars that flow toward the NCAA.”\textsuperscript{217} Based on the financial data gathered, one could further reason that the collegiate athlete is the heart and soul of the NCAA and its member school’s athletics programs.

Therefore, one could conclude that factor six has been satisfied and can be offered as evidence to further show that NCAA collegiate athletes should be classified as employees pursuant to the FLSA.

**Summary**

In conclusion, one could reason that taking into consideration the totality of the circumstances coupled with an analysis of the factors found in the Donavon Economic Realities Test that an employment relationship has been fostered between the NCAA collegiate athlete and the respective university the athlete attends.

In applying the economic realities test, it can be reasoned that all six (6) factors have been satisfied. One could conclude that the NCAA and its member institutions exercise a large degree of control over several aspects affecting the NCAA collegiate athlete. The collegiate athletes receive no compensation and are not afforded the opportunity to generate profits based on his or her athletic ability as of December 26, 2020. As a counterargument one could assert that the athlete has the ability to lose his or her scholarship which accounts for something. However, that argument is not sound. The ability to lose one’s athletic scholarship can be liken to a firing or a termination which arguably does not show the athlete deriving business as a separate entity but demonstrates the economic dependency the collegiate athletes have on the NCAA and their respective educational institutions.

Moreover, the factor relating to investing in one’s equipment has also been satisfied. The athletes make very little investment if any in the equipment or materials he or she uses in order to complete their tasks. The equipment is typically paid for by the employer through funds generated by the athletic department and not the personal funds of the collegiate athletes. Moreover, the fourth factor requires the collegiate athlete to exhibit high levels of skill in order to complete their job tasks. Statistically there are roughly eight million high school athletes competing in athletics


and of the total number of participants only a small percentage of those athletes will compete in
the NCAA. For instance, only 2.2% of high school baseball players will matriculate to Division I
NCAA colleges/universities, according to prior mentioned statistical data.

Additionally, factor five examined the degree of permanence of the working relationship. One
could determine that the collegiate athlete has a degree of permanence in his or her position as a
result of the multiyear athletic scholarship. The scholarship acts as an employment contract for a
term. Lastly, it is an undisputed fact that the collegiate athlete plays an integral part in the survival
of the business of collegiate sports. A majority of the NCAA’s revenue is built on the foundation
of collegiate athletics. The many revenue streams of the NCAA are centered on the college athlete
from television and media contracts to ticket sales, marketing, and broadcasting rights.

Therefore, one can successfully conclude that the NCAA collegiate athlete satisfies the
Donovan Economic Realities Test and should be considered an employee within the meaning of
the FLSA.

2. **Glatt’s Test**
Summary of Glatt v. Fox Searchlight Pictures, Inc.

The Glatt test initially was established by the United States Court of Appeals for the Second
Circuit in the Glatt case, where the court assessed the employment status of unpaid interns.\(^{218}\) The
district court granted the defendants motion for partial summary judgment.\(^{219}\) However, the
appellate court vacated the lower court’s decision and remanded the case to the lower court.\(^{220}\)

The factual components of the case are as follows: There were three interns who worked for
the defendants, Fox Searchlight and Fox Entertainment Group. The interns contended that the
defendants violated the FLSA and New York State labor law, by failing to pay them a minimum
wage in accordance with the federal and state labor laws.\(^{221}\)

More specifically, the plaintiff, Eric Glatt (Glatt) worked for the defendants as an accounting
intern from December 2, 2009, to February 2010.\(^{222}\) As an intern Glatt was enrolled in a non-
matriculated / non-degree graduate program at New York University’s School of Education when
he began his accounting internship with the defendant.\(^{223}\) He worked from 9:00 a.m. to 7:00 p.m.
five days a week. Glatt’s job duties consisted of administrative work such as: copying, scanning,
and filing documents, tracking purchase orders, transporting paperwork and items to and from the
set, maintaining employee personnel files, and answering questions about the accounting
department.\(^{224}\) Also, Glatt interned for a second term with the defendants and worked from March
2010 to August 2010 in the post-production department where he worked from 11:00 a.m. to 6:00
or 7:00 p.m. Glatt’s job responsibilities included: drafting cover letters for mailings, organizing
filing cabinets, filing paperwork, making photocopies, keeping the takeout menus up-to-date and
organized, bringing documents to the payroll company, and running errands (e.g., purchased a
non-allergenic pillow for the director).\(^{225}\)

\(^{218}\) Glatt, *supra* note 101, 351.
\(^{219}\) *Id.*
\(^{220}\) *Id.*
\(^{221}\) *Id.* at 531- 532.
\(^{222}\) *Id.*
\(^{223}\) *Id.* at 532.
\(^{224}\) *Id.*
\(^{225}\) *Id.*
The second plaintiff, Alexander Footman (Footman), was an intern for the defendants from September 29, 2009 through February or March 2010. At the time of Footman’s internship, he was not enrolled in a degree program. Footman worked ten-hour days for five days a week; however, in November 2009, he worked three days a week. Footman’s job duties were also administrative where he picked up / set up office furniture, arranged lodging for cast and crew, took out the trash, took lunch orders, answered phone calls, watermarked scripts, drafted daily call sheets, photocopied documents, fixed coffee, took deliveries to and from the film production set, rental house, and the payroll office, etc.

The last plaintiff, Eden Antalik, was a publicity intern for the defendant from May 2009 until the second week of August 2009. During her internship she was enrolled in a degree program at Duquesne University that required her to have an internship in order to graduate. Her work consisted of assembling a brief, summarizing mentions of Fox Searchlight films in the media, creating travel arrangements, organizing catering, shipping documents, and setting up rooms for press events.

When assessing the facts, the court rejected applying the multifactor test adopted by the DOL because the test was too rigid. The court instead considered the primary beneficiary test which focused on “whether the intern or the employer is the primary beneficiary of the relationship. The beneficiary test placed emphasis on what the intern received in exchange for his work. Also, the court examined the economic realities as it exists between the intern and the employer. Lastly, the beneficiary test acknowledged that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters the relationship with the expectation of receiving educational or vocational benefits.” The court then modified a version of the beneficiary test and created the Glatt multifactor test. The Glatt factors are as follows:

(1) The extent to which the student and the employer clearly understand that there is no expectation of compensation;
(2) The extent to which the position provides training that would be similar to that which would be given in an educational environment;
(3) The extent to which the position is tied to the student’s formal education program by integrated coursework or the receipt of academic credit;
(4) The extent to which the position accommodates the student’s academic commitments by corresponding to the academic calendar [or does not interfere with scheduled classes or the pursuit of academic degrees];
(5) The extent to which the position’s duration is limited to the period in which the position provides the student with beneficial learning;

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226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
231 Id. at 532-533.
232 Id. at 536.
233 Id.
234 Id.
(6) The extent to which the student’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the student [or to which the alleged employer is the primary beneficiary]; and

(7) The extent to which the student and the employer understand that the assignment is conducted without entitlement to a paid job at the conclusion of the assignment.235

In its application, the court weighed and balanced all of the circumstances while keeping in mind that no one factor is conclusive and every factor need not yield the same outcome for the court to conclude that the worker is not an employee entitled to minimum wage.236 When evaluating the internship program as it relates to the educational environment, the court reasoned that the purpose of an internship is to integrate classroom learning with practical skill development in a real-world.237 In the Glatt case, all plaintiffs were enrolled in or had completed a formal course from an educational institution. The appellate court remanded the case. The aforementioned factors will be applied to the case of the NCAA collegiate athlete.

Factor #1

The first factor that must be analyzed is the extent to which the collegiate athlete and the university clearly understand that there is no expectation of compensation. In the case of the college athlete, it is apparent that the NCAA as well as the two remaining collegiate sports associations (i.e., National Association of Intercollegiate Athletics (NAIA), and the National Junior College Athletic Association (NJCAA)) have clearly adopted and articulated an amateurism model which eliminates the ideology of collegiate athletes having an expectation of receiving compensation of any sort, unless when permissible by the bylaws of either association.

In accordance with NCAA bylaw 12.1.3, an individual will not be eligible to compete in intercollegiate competition in a particular sport if the athlete uses his or her skill for pay, accepts a promise to play, receives a salary, reimbursement of expenses or any other form of financial assistance from a professional sports team.238 Similar to the NCAA, the NAIA makes clear in its 2019-2020 Handbook that “only amateur students shall be eligible to participate in a given sport. An amateur is a student who engages in athletic contests for educational value, personal pleasure, satisfaction, and for the love of the sport, not for monetary or material gain.”239 Additionally, the NAIA makes clear that receiving “directly or indirectly expense reimbursement beyond actual expenses of travel, meals and lodging will result in a loss of amateur standing.”240 Likewise, the NJCAA states in its amateurism clause similar sentiments of the NCAA and asserts, that the engagement in athletics is an avocation and participation should not be a source for personal financial remuneration.241 Additionally, the NJCAA also articulates that an athlete loses amateur status by using his or her athletic skill for pay in any form in that sport or accepts a promise of pay even if pay is received following completion of intercollegiate athletics participation.242

235 Id. at 536-537.
236 Id. at 537.
237 Id.
238 NCAA Bylaw 12.1.3
240 Id.
241 NJCAA Bylaw V.4.A.
242 NJCAA Bylaw V.4.A2.
However, one can rebut the presumption by referring to the many legal actions brought against the NCAA on behalf of collegiate athletes to obtain compensation and overtime payments pursuant to the FLSA.

When analyzing factor one of the Glatt factors, the United States Court of Appeals for the Second Circuit in Wang v. Hearst Corporation,\textsuperscript{243} explained that there is a clear mandate looking at “any promise of compensation, express or implied, suggest that the intern [worker] is an employee.”\textsuperscript{244} As of the 2020-2021 NCAA athletic season, collegiate athletes have a clear mandate expressed by the NCAA bylaws that the collegiate athlete is prohibited from receiving compensation for their work (athletic abilities directly or indirectly). One can therefore, reason that factor one can assist in supporting the conclusion that it is less likely for the collegiate athlete to be classified as an employee because the athlete does not have a viable expectation of receiving compensation based on the current state of the NCAA and its counterpart sports associations.

Factor #2

The second factor that must be analyzed is the extent to which the position provides training that would be similar to that which would be given in an educational environment including the clinical and other hands-on training provided by educational institutions. One could argue that participating in collegiate athletics does not provide similar training of that in an educational setting such as the classroom. The NCAA articulates that participating in NCAA intercollegiate athletics is an avocation and should not be considered as anything more. Generally, the description of a student’s scholarly pursuits where academic credit is earned at an NCAA institution is typically not classified as an avocation. The earning of academic credit generally leads to one obtaining a degree of higher education such as a bachelor’s degree in a specific area of study. Furthermore, NCAA collegiate athletes do not participate in clinicals as part of their tasks.

On the contrary, according to Glatt, the key element of the intern [worker] relationship is the expectation of receiving educational or vocational benefits. One could argue that participating in collegiate athletics provides similar training that one would gain from the educational setting. For instance, both environments foster the learning of intangible skills such as: discipline, work ethic, strategic thinking, time management, leadership, goal setting, and teamwork.

However, one could argue that the educational benefit that a student derives from the classroom is grounded more in a substantive subject matter. One could rebut the above assertion by contending that the facts surrounding Mark v. Gawker Media LLC;\textsuperscript{245} Wang v. Hearst Corporation;\textsuperscript{246} and the Glatt case did not include intangible skills learned, developed, or reinforced. Instead, the federal courts analyzed the tangible activities -- photocopying documents, drafting documents, assisting staffers, taking pictures and video, researching, conducting interviews, etc. and determined that the interns met factor two.

Therefore, the analysis of factor two is debatable and could split either way depending on one’s understanding of both the athletic and educational settings. Arguably factor two may or may not favor collegiate athletes.

Factor #3

The third factor that must be examined is the extent to which the position is tied to the student’s formal education program by integrated coursework or the receipt of academic credit. One could

\textsuperscript{243} 877 F.3d 69 (2017).
\textsuperscript{244} Id. at 73.
\textsuperscript{245} 13-cv-4347(AJN), 2016 WL 1271064(2016).
\textsuperscript{246} 877 F.3d 69 (2017).
argue that the position of being a collegiate athlete is tied to the student’s formal education because the athletic scholarship provides a means for a tuition waiver for those participating in NCAA regulated sports. However, one could rebut this presumption by asserting that although an award of a scholarship may cover the cost of tuition, books, fees, housing, and meals in most cases -- the participation in collegiate athletics is not integrated in the student’s coursework nor does the athlete receive academic credit from his or her involvement. Participating in NCAA collegiate athletics is not similar nor is it synonymous to a physical education (“P.E.”) course where students receive an academic credit. Additionally, participating in NCAA collegiate athletics is not correlated or a prerequisite to fulfilling a degree requirement. A great illustration of the integration factor would be the instance where one of the plaintiffs in Mark was required to take an internship class to accompany his internship.247

Therefore, one could reason that participation in NCAA collegiate athletics is not tied to a formal educational program due to the lack of academic course credit and the lack of integration to the coursework.

Factor #4

The fourth factor that must be analyzed is the extent to which the position accommodates the student’s academic commitments by corresponding to the academic calendar [or does not interfere with scheduled classes or the pursuit of academic degrees]. The NCAA contends that it accommodates student-athletes in their academic pursuits by offering many resources and establishing policies that are for the benefit of the collegiate athlete. More specifically, the NCAA explains that “an active member institution is obligated to establish policies … concerning student-athletes missing class time due to participation in intercollegiate athletics and in athletic competition scheduled during final examination periods.”248 Moreover, the NCAA makes it apparent that missing class outside of intercollegiate games is unacceptable. Within its bylaws the NCAA makes clear that missing class-time is prohibited for the purposes of meeting with agents or a professional team249, participating in NCAA or conference-sponsored media activity250, or attending practice activities, except if practice is being conducted when a team is traveling to an away game.251 Essentially, the NCAA has implemented policies to curtail the percentage of collegiate athletes missing classes due to their athletic obligations.

Nevertheless, many collegiate athletes stated that their participation in collegiate sports has prevented them from taking his or her desired class. In order to change this narrative many schools have made online classes available to the student body including the collegiate athlete.252 Some institutions provide collegiate athletes with academic resources such as an Office of Student-Athlete Services that offers academic counseling (i.e., setting grade goals for each class)253 or an Educational Enrichment Services Office (EES) that provides tutorial support for all student-athletes.254

247 Mark, supra note 245, 10.
248 NCAA Bylaw 3.2.4.14
249 NCAA Bylaw 12.3.1.2.4
250 Id.

251 NCAA Bylaw 12.5.3
254 Id. at 15.
One could contend that although the NCAA and its member institutions provide resources for the collegiate athlete to potentially obtain academic success, there is still an emphasis placed on excelling athletically that tends to run afoul with the academic aspect of the collegiate athletic experience. According to the NCAA GOAL Study 2015, the median time spent for athletes in their respective sports is as follows: Division I athletes spent 34 hours/per week engaged in athletic activity, Division II athletes spent 32 hours/per week engaged in athletic activity, and Division III athletes spent 28.5 hours/per week engaged in athletic activity.²⁵⁵

According to the aforementioned study “there were slightly higher numbers of Division I student-athletes that indicated in 2015 that their athletic participation has prevented them from enrolling in their desired major.”²⁵⁶ More specifically, FBS football players reported a median of 42 hours/ per week engaged in athletic activities; Division I baseball athletes also reported 40 hours/per week engaged in athletic activity; likewise, Division I softball athletes reported 39 hours/ per week engaged in athletic activity.²⁵⁷ Additionally, it has been reported that the median number of hours that NCAA collegiate athletes spent in the 2015 season on academic work per week was: 38.5 hours (Division I), 38.5 (Division II), 40.5 (Division III). In evaluating the hours spent on athletics and academic hours accumulated, it has been reported that while the athletes are in season the athlete is allowed to devote only four hours per day to athletics which converts to twenty per week on athletics. One could reason that the athlete dedicates more time than authorized to athletics.²⁵⁸

Consequently, the argument that the NCAA accommodates its collegiate athletes in their scholarly pursuits is evident to a degree; nevertheless, some collegiate athletes have experienced instances where athletics interferes with their educational endeavors. Therefore, one could reason that the fourth factor has been met in favoring the collegiate athlete’s argument of employee status.

**Factor #5**

The fifth factor requires one to analyze the extent to which the position’s duration is limited to the period in which the position provides the student with beneficial learning. When applying this factor, the Second Circuit kept in mind that “designing an internship is not an exact science, and that the length of the internship cannot be expected to always match perfectly with the skills to be taught and the experience to be gained through the program.” Nevertheless, in order for factor five to weigh in favor of the plaintiff the “length of the internship must be grossly excessive in comparison to the period of beneficial learning.”²⁵⁹

In the case of the NCAA collegiate athlete the length of employment could range from one year to five years depending on the term of the employment contract. If the reader takes the approach that the learning benefits included intangible skills, then one could argue that the time collegiate athletes have the ability to learn soft skills is grossly excessive in comparison to the period of beneficial learning because the athlete spends more time focusing on athletics than in the classroom setting.

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²⁵⁶ Id. at 3.
²⁵⁷ Id.
²⁵⁹ Mark, supra note 245.
However, one can argue that the athletic contract ceases at the end of the sports season while the educational benefits continue through the end of the year and/or during the summer periods. Therefore, the participation in athletics is not grossly excessive in caparison to the period of beneficial learning.

In summary, one could argue that factor five leans in favor of the plaintiff or the defendant. One could contend the participation that collegiate athletes engage in as athletes does in fact exceed the period of beneficial learning. Conversely, one can assert that the plaintiff’s participation in NCAA athletics does not exceed the period of beneficial learning because the athletic engagement ceases after the completion of the sports season or before graduation.

**Factor #6**

The sixth factor requires one to examine the extent to which the student’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the student [or to which the alleged employer is the primary beneficiary]. When examining factor six the court in Mark explained that “the FLSA does not permit employers to simply replace employees with student workers and call them interns to avoid paying minimum wage.”[^260] The “appropriate role of an intern is generally that of one whose work complements the labor of paid employees – though that complementary labor must be educational rather than mere scut work that the paid employees would rather avoid.”[^261]

It can be argued that the collegiate athletes work of participating in rigorous training and preforming well during intercollegiate competition complements the work of staff members of the athletic department such as the coaching staff. The performance of the athlete facilitates the retention of the coaching staff and the salary of the coaches; moreover, the history of well performing athletes from the school can aid in recruiting prospective athletes.

However, one could argue that the second prong of this factor is arguably not met because there is or is not any significant educational benefit that the athlete derives from participating in NCAA regulated sports outside of a tuition waiver.

Therefore, one can reason that factor six favors for the defendants.

**Factor #7**

The last factor that the courts take into account is the extent to which the student and the employer understands that the assignment is conducted without entitlement to a paid job at the conclusion of the assignment. Generally, it can be reasoned that the collegiate athlete does not continue his or her employment with the NCAA and their respective university upon the fulfillment of their term contract or upon graduation. Nevertheless, an exception to this general principal is if the collegiate athlete accepts a coaching position with the university upon the completion of their employment term. However, one can argue that this exception does not rise to the level that would satisfy factor seven because the NCAA makes clear that collegiate athletes are prohibited from receiving remuneration of any kind as a result of their athletic skills and abilities; therefore, it is misplaced to be of the opinion that collegiate athletes will automatically receive a job by their employer upon graduation from their institution.

[^260]: Id. at 11.
[^261]: Id.
Summary

In conclusion, the Glatt Economic Realities Test is not as cut and dry or black and white as the Donovan Economic Realities Test. The latter test takes a different approach when unpacking whether collegiate athletes have fostered an employment relationship between the NCAA and its member institutions. The Glatt Economic Realities Test has a number of subjective outcomes to many of the factors analyzed. One could argue that NCAA collegiate athletes are employees under the Donovan test. If so, the analyses would stop here because all the factors would have been satisfied.

On the other hand, one could rebut the assertion of employee status of the collegiate athlete based on the subjective nature of the Glatt test. For instance, the first factor examined the expectation of compensation the collegiate athlete has. One could assert that the athlete does not have a high level of expectation for compensation because the expressed language of the NCAA bylaws makes it clear that the athlete should not receive compensation based on their athletic performance. The second factor examines the similarities of training between the educational environment and the training provided in the athletic arena. One can argue that the educational environment offers similar training by providing the college athlete with an opportunity to utilize his or her soft skills. However, the third factor looked to examine the integration of coursework or the receipt of academic credit the collegiate athlete would obtain based on their position. Here, one can reason that the athlete does not derive academic credit nor does the athletes coursework integrate with his or her performance in their sport.

Additionally, the fourth factor looks to whether the university accommodates collegiate athletes in their scholarly pursuits off the court, field, ice, etc. The outcome of this factor is one of subjectivity. One could argue the following: Yes, the university provides the athlete with tutors, time to make up exams, etc. However, one could argue that universities put more emphasis on athletics as opposed to education. It has been reported many times that the collegiate athlete exceeds the requisite number of hours allowed for athletic pursuits by the NCAA. Generally, twenty hours of athletic activity is required per week most times that amount is exceeded, and the athlete is left with the remaining hours to complete their academic course work.

The fifth factor analyzed the extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning. One could contend that the duration of the employment contract between the collegiate athlete and the university was for a specific time. Additionally, one could argue that the derived benefits were not excessive in comparison to the period of beneficial learning because the athletic participation ended prior to the completion of the academic year. On the other hand, one could contend that the athletic participation that collegiate athletes engage in does in fact exceed the period of beneficial learning because some athletes spend more time in activities relating to their sport as opposed to their educational pursuits.

The next factor examines the extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern. This factor could have multiple outcomes in favor of the plaintiff or the defendant.

The last factor examines whether the intern and employer understand that the internship is conducted without entitlement to a paid job. Generally, collegiate athletes are not entitled to a paid job upon completion of the contract term. However, the exception to this rule is that many collegiate athletes upon graduation take coaching positions at their alma mater.

If one draws the conclusion that the NCAA collegiate athlete should not hold employee status based on the outcome of the Glatt Economic Realities Test, one should then look to the National
Labor Relations Act (NLRA) to gain additional insight on this issue. Many collegiate athletes have sought to gain recognition under the NLRA as employees in order to unionize. The NLRA is another avenue for the athlete to obtain employee rights and compensation. Part IV will examine the NLRA in an attempt to answer the question of employee status in relation to the NCAA collegiate athlete.

IV. The National Labor Relations Act and the NCAA Scholarship Collegiate Athlete

A. What Type of Worker is Covered Under the NLRA?

The purpose of the National Labor Relations Act (“NLRA”) is likened to the FLSA in that its core principals are centered on protecting the rights of employees. However, the NLRA extends its reach solely to the private labor sector by curtailing labor and management practices while encouraging collective bargaining.\(^{262}\) More specifically, the NLRA allows “employees to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”\(^{263}\) In order to receive the benefits that flow from the NLRA the worker must hold employee status.

Pursuant to 29 U.S.C. §§ 2:152 (3) of the NLRA, the term “employee” is defined expansively and lists only a few limited exceptions by stating: “the term employee shall include any employee….”\(^{264}\) The legal framework for evaluating who is considered protected under the NLRA has origins that were found within the 1947 Labor Management Relations Act better known as the Taft-Hartley Act.\(^{265}\) The Taft-Hartley Act amended section 2(3) of the NLRA to mandate that the term “employee” should not include one who holds independent contractor status.\(^{266}\) The purpose of establishing the Taft-Hartley amendments was to create a uniform agency principle amongst the National Labor Relations Board (“NLRB”) and the courts to distinguish between employees and independent contractors.\(^{267}\)

Following the amendment by the Taft-Hartley Act, the NLRA clearly set forth that agricultural laborers, domestic workers, an individual employed by his / her parent or spouse, independent contractors, an individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act are exempt from coverage under the NLRA. Now that the NLRA has set forth who is covered within its meaning (i.e., private sector employees), the question then becomes: How is employee status determined pursuant to the NLRA?

1. What Test is Applicable to Set Out the Determination of Employee Status Under the NLRA?

In order to determine whether a worker is an employee within the meaning of the NLRA the NLRB, in SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338,\(^{268}\) reiterated that

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\(^{266}\) Id.

\(^{267}\) Id.

\(^{268}\) 16-RC-010963,367 NLRB No.75 (2019).
the common law agency test is applicable; however, the evaluation of the test has since shifted in its focus. The common law test now focuses on the workers’ entrepreneurial opportunity for gain or losses as opposed to the right of control the employer has over the manner and means of the work.

The legal framework for evaluating the common law agency test has origins stemming from jurisprudence and Restatement (Second) of Agency §220 (1958). The test consists of a non-exhaustive multifactor list in which the NLRB explained that “there is no shorthand formula … all the incidents of the relationship must be assessed and weighed with no one factor being decisive.” The common law factors are as follows:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.
(b) Whether or not the one employed is engaged in a distinct occupation or business.
(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
(d) The skill required in the particular occupation.
(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
(f) The length of time for which the person is employed.
(g) The method of payment, whether by the time or by the job.
(h) Whether or not the work is part of the regular business of the employer.
(i) Whether or not the parties believe they are creating the relation of master and servant.
(j) Whether the principal is or is not in business.

Upon the establishment of the common law factors, the courts and the NLRB in prior history have been conflicted with its evaluation as to whether the analysis should be viewed through a certain lens.

2. The Shift from the “Right to Control” to “Entrepreneurial Opportunity to Gain or Lose”

The first instance where the Supreme Court of the United States was presented with the question of a worker’s employment status appears in N.L.R.B. v. United Insurance Co. of America. In the aforementioned case, debit-agents were the subject of an appeal that rendered them independent contractors. However, the Supreme Court held that the debit-agents were in fact employees. When reaching its conclusion, the court analyzed the facts by utilizing the common law multifactor agency test. In the court’s evaluation of the factors, it articulated that there is no shorthand formula, magic phrase, or factor that is weighed greater than the other when determining

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269 Id. at 1-2.
271 SuperShuttle DFW, Inc., supra note 268, 2.
272 Restatement (Second) of Agency § 220 (1958).
employment status, but all the incidents of the relationship must be assessed.\textsuperscript{274} It is said that there is no Supreme Court decision that refutes the viability of the precedent established by the \textit{United Insurance Co. of America} case when utilizing the common law agency test as the standard when establishing the employment relation.\textsuperscript{275}

Additionally, the decision rendered in \textit{Roadway Package System}, (1998) reiterated the applicability of the common law agency test; however, the NLRB reasoned that the “right to control” was not the chief factor to be considered in the analysis of employment status, rather all factors should be weighed. The NLRB explained that “the common-law agency test encompasses a careful examination of all factors and not just those that involve a right to control.”\textsuperscript{276}

Following the abovementioned seminal cases, the NLRB continued to consider the aspects of entrepreneurial opportunity and the right to control as it related to the common-law agency test. The cases of \textit{FedEx Home Delivery v. NLRB}\textsuperscript{277}, \textit{Alexander v. FedEx}\textsuperscript{278}, and the \textit{SuperShuttle DFW, Inc.} decision highlighted a period where the NLRB “shifted” its opinion regarding the evaluation of the common-law agency test.

The United States Court of Appeals (District of Columbia) in the 2009 case of \textit{FedEx Home Delivery} marked the period where the establishment of one’s entrepreneurial opportunity took shape and moved away from the right to control. The court reasoned that the right to control does not adequately illustrate the employment relationship between workers and the employer.\textsuperscript{279} The court painted the picture of a full-time cook who is regarded as an employee; however, under the right to control test the full-time cook would be considered an independent contractor since the employer did not control the manner and means of which the cook’s job is completed.\textsuperscript{280} In order to rectify the conflict, where “some factors cut one way and some the other position”\textsuperscript{281} the court shifted its analysis to focus on: Whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss.\textsuperscript{282}

However, the Ninth Circuit of the United States Court of Appeals in \textit{Alexander} rendered a differencing in opinion and established that the “right to control” test took precedent over the evaluation of one’s entrepreneurial opportunity to acquire gains or losses. The question then becomes: Why was there a need for a “shift?” The court reasoned that the “extrinsic evidence supports a conclusion that FedEx had the right to control its drivers.”\textsuperscript{283} The \textit{FedEx} court held that the operation agreement and \textit{FedEx’s} policies and procedures authorized much control over the manner and means to which the workers (i.e., drivers) completed their jobs. For instance, \textit{FedEx} controlled the appearance of the drivers and their vehicles, the work hours of the drivers, the time and manner of how packages were delivered. The court held that the \textit{FedEx} drivers were deemed employees in relation to the right to control the manner and means of the job duties for the delivery drivers.

In contrast, the more recent decision rendered by the NLRB in \textit{SuperShuttle DFW, Inc.} reverted back to the reasoning in \textit{FedEx Home Delivery} (“\textit{FedEx I}”) when evaluating the employee

\textsuperscript{274} \textit{Id.} at 991.
\textsuperscript{275} \textit{SuperShuttle DFW, Inc.}, \textit{supra} note 268, 16.
\textsuperscript{276} \textit{Roadway Package System Inc.}, \textit{supra} note 265, 850.
\textsuperscript{277} 563 F.3d 492, (2009).
\textsuperscript{278} 765 F.3d 981, (2014).
\textsuperscript{279} \textit{Id.} at 984.
\textsuperscript{280} \textit{FedEx Delivery}, \textit{supra} at 277, 497.
\textsuperscript{281} \textit{Id.}
\textsuperscript{282} \textit{Id.}
\textsuperscript{283} \textit{Alexander}, \textit{supra} note 278, 988.
status of the worker. The SuperShuttle decision reaffirmed that the entrepreneurial opportunity for gain or loss should be used when evaluating the overall significance of the agency factors.284

In summary, there are many instances where the judiciary and the NLRB have established that the common law agency test is applicable when determining the employee status of an individual. Additionally, when analyzing the multifactor common-law test, one must consider the overarching aspect of the opportunity of the worker to obtain entrepreneurial gains or losses. Many workers realize the benefits in seeking employee status under the NLRA. Similarly, collegiate athletes have sparked national attention with their past efforts to gain recognition as employees pursuant to the NLRA. The next section will exclusively discuss the relationship between the collegiate athlete and the NLRA as well as answer the question: Should the NCAA collegiate athlete hold employee status?

B. Why Do “Student-Athletes” Desire NLRA Protections?

The longstanding debate over the employment status of the NCAA collegiate athlete was a matter of first impression for the NLRB in 2014.285 The petitioners in the case of Northwestern University v. College Athletes Players Association (“CAPA”),286 were NCAA Division I collegiate football players who attended and played for Northwestern University. The petitioners were represented by the College Athletes Players Association (“CAPA”) and sought to receive protections pursuant to the NLRA as employees. The two main benefits that the petitioners sought to acquire flowed from their ability to unionize and to collectively bargain.287 More specifically, CAPA sought to gain collective bargaining rights on behalf of the collegiate athletes to guarantee coverage for sports-related medical expenses for current and former players; minimizing the risk of sports-related traumatic brain injury; improve graduation rates; establish an educational trust fund to help former players complete their degree and reward those who graduate on time; evolve the NCAA regulations or future legal mandates; increase athletic scholarships and allow players to receive compensation for commercial sponsorship; and secure due process rights.288

1. Unpacking the Relationship Between the NLRB and the Collegiate Athlete

The relationship between the NLRB and collegiate athletes can be characterized as vacillating. In 2014, the NLRB Regional Director for Region 13, Mr. Peter Ohr, heard the matter of employee status regarding grant-in-aid scholarship football players at Northwestern University. CAPA argued in favor of employee status for the collegiate athletes pursuant to the right of control test articulated by common law.289 In contrast, the University contended that the scholarship student-
athletes were not employees within the scope of the NLRA and asserted that the Brown test articulated in the case of Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,\(^{290}\) was applicable when determining employee status of the athletes.\(^{291}\) However, the Regional Director concluded otherwise and rendered that the Northwestern football players were employees and should be permitted to conduct a secret ballot election.\(^{292}\)

In Mr. Ohr’s analysis, he found the following: (1) those football players receiving grant-in-aid scholarships performed services for the benefit of the University in which they received compensation; (2) the scholarship athletes are subject to the University’s control regarding their performance of the athlete’s duties; (3) the scholarship players are employees pursuant to common law.\(^{293}\)

Mr. Ohr reasoned that the scholarship football players provided great benefits to the University by enhancing the University’s winning reputation and had positively impacted alumni giving as well as increased the enrollment rate.\(^{294}\) Additionally, Mr. Ohr equated the athletic scholarship that the athletes signed to an employment contract; therefore, the signing of the contract acted as a tender.\(^{295}\) Also, he asserted that the scholarship in the form of tuition, fees, room, board, and books are compensation and acted as a transfer of economic value.\(^{296}\)

Next, Mr. Ohr reasoned that the University controlled many details of the collegiate athlete’s experience from early morning practices to afternoon practices, film, meetings, and curfew times. Moreover, the record reflected that the scholarship athletes engaged in 40 to 50 hours per week of football related activities. Moreover, under the common law, Mr. Ohr explained that walk-ons\(^{297}\) were not employees due to the flexibility of control by the University and the lack of compensation their received.\(^{298}\) Following the decision by Mr. Ohr, the Northwestern scholarship football players on April 25, 2014, casted their ballots for union votes to determine whether the College Athletes Players Association (CAPA) would represent them.\(^{299}\) The ballots were sealed until the NLRB reached a decision regarding the employee status of the collegiate athlete.\(^{300}\)

The issue of employee status of the collegiate athlete came to a head in 2015 when the NLRB declined to assert jurisdiction over “the petition filed by CAPA seeking to represent Northwestern University’s football players who receive grant-in-aid scholarships.”\(^{301}\) Despite the efforts of the

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\(^{290}\) 1-RC21368, 342 NLRB No.42(2004).
\(^{291}\) Northwestern University, supra note 286.
\(^{293}\) Id. at 13-18.
\(^{294}\) Id.
\(^{295}\) Id.
\(^{296}\) Id. at 15-18.
\(^{297}\) A ‘walk-on’ is traditionally “someone who was not recruited by an NCAA Division I or II school to participate in sports and does not receive a scholarship from the school, but becomes a member of one of the school’s athletics teams.” See NCAA Student-Athlete, Transfer Terms: Eligibility Timeline, <http://www.ncaa.org/student-athletes/current/transfer-terms>, (last visited 12/27/2020).
\(^{298}\) Northwestern, supra note 286, 17.
\(^{300}\) Id.
\(^{301}\) National Labor Relations Board, Board Unanimously Decides to Decline Jurisdiction in Northwestern Case, (last visited October 2020), <https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-to-decline-jurisdiction-in-northwestern-case> (2015); It should be noted that this was a case of first impression for the NLRB because the NLRB had never been confronted with the issue concerning employee rights of NCAA collegiate
petitioners and allies that submitted amicus briefs in support of the petitioners, the NLRB held that ruling on the matter would disrupt the nature of collegiate sports and would not promote stability in labor relations.\(^{302}\) Although, the NLRB did not exercise jurisdiction over the matter, it can be argued that the NLRB did not definitively “rule on the issue”\(^ {303}\) regarding whether the athletes were protected employees pursuant to the NLRA.

Following the NLRB’s decision, the NLRB’s general counsel, Mr. Richard Griffin, authored a memorandum on January 31, 2017, and answered the question that the NLRB evaded. The general counsel determined that the scholarship Northwestern football players were employees within the meaning of the NLRA.\(^ {304}\) In its evaluation, the governing rule of common law agency was applied. The rule explains that an employee is one “who perform[s] services for another an [is] subject to the other’s control or right of control.” \(^{305}\) Mr. Griffin agreed with the prior ruling of the NLRB Regional Director, Mr. Ohr and explained that services were rendered by the scholarship athletes in the form of generated profits of approximately $76 million by the University, the positive impacts of the collegiate athletes on alumni giving and student enrollment.\(^ {306}\) Additionally, it was reasoned that the University controlled many aspects of the football players actions by keeping the NCAA rules in the forefront of the control. For instance, the University regulates the number of practices / competition hours the collegiate athletes engaged in, the scholarship eligibility of the athlete, minimum grade point average, restrictions on gifts and the number of scholarship players, and mandatory drug testing.\(^ {307}\) However, in response to the memorandum, the NCAA general counsel stated that the determination by the NLRB general counsel is not dispositive and is not controlling precedent.\(^ {308}\) However, it can be argued that the 2017 memorandum can be used as persuasive authority.

Currently, the NLRB has not changed its 2015 decision regarding asserting jurisdiction over the collegiate athletes. The analysis offered by Mr. Ohr and Mr. Griffin regarding the employee status of the scholarship collegiate athlete places the element of control by the university in the forefront. In doing so, both found that employee status and the right to unionize should be afforded to the petitioners. Considering the current precedent established by the NLRB in SuperShuttle, the evaluation of employee status of the worker still remains the common-law agency test. However, one could argue that the NLRB should also analyze cases that have similar questions of law with the viewpoint of the workers entrepreneurial opportunity to receive gain or loss as opposed to the

athletes pursuant to the NLRA. See Rischard F. Griffin, Office of the General Counsel: Memorandum GC 17-01, 16 (2017).


\(^{303}\) Id.


\(^{305}\) Id. at 18.

\(^{306}\) Id. at 19.

\(^{307}\) Id.

right to control. The next section will analyze the issue of employee status according to the SuperShuttle decision.

C. Evaluating the Employee Status of Scholarship Collegiate Athletes in Light of the SuperShuttle Decision

When determining the employee status of an individual within the broad meaning of the NLRA, the NLRB reiterated that the multifactor test under the common law is applicable. As indicated previously, the following factors will be analyzed regarding scholarship collegiate athletes’ employee status and their entrepreneurial opportunity to receive economic gains and losses:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- (d) The skill required in the particular occupation.
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (f) The length of time for which the person is employed.
- (g) The method of payment, whether by the time or by the job.
- (h) Whether or not the work is part of the regular business of the employer.
- (i) Whether or not the parties believe they are creating the relation of master and servant.
- (j) Whether the principal is or is not in business.\footnote{Restatement (Second) of Agency § 220 (1958).}

Factor # 1: Control

The first factor to be considered under the common law agency test is control. The question that must be asked and answered is: What is the extent of control the University and the NCAA exercise over the details of the collegiate athletes’ work. Before, examining the control aspect of the question, one must first determine what constitutes as “details” and “work” pursuant to the common-law. A similar analysis was performed under the FLSA.

When unpacking the first factor, the term “details” can be interpreted as the “manner and means” by which the business or work is conducted.\footnote{SuperShuttle DFW, Inc., supra note 268, 12.} Moreover, the term “work” in this case is construed broadly to cover the collegiate athletes’ daily practices, performances in the athletic arena, and miscellaneous sports related activities the collegiate athletes participate in (i.e., film sessions, meetings, media / press appearances, etc.).

The next aspect of the first factor turns on the “control” element as it relates to the scholarship collegiate athlete. It can be argued that the University and the NCAA has a substantial amount of control over the collegiate athletes.
Instances where control was apparent regarding the collegiate athlete’s work include: the monitoring of the practice and competition hours the collegiate athletes participate in, both entities have control over scholarship eligibility, terms and conditions of the scholarships, the administration of mandatory drug test, conduct and behavior of the athlete, etc.\textsuperscript{311}

In summary, when evaluating the control factor in accordance with the common law agency test, the first factor has been satisfied.

**Factor # 2: Engagement in a Distinct Occupation or Business**

The second factor that must be evaluated pursuant to the common law agency test is the ability to engage in a distinct occupation or business. More specifically, the second factor can be interpreted as such, “if a worker is engaged in a distinct occupation or business, then that would suggest that the worker is an independent contractor rather than an employee.” \textsuperscript{312} To be engaged in a distinct occupation or business essentially means that the employed holds themselves out as a separate business while working for their employers.

Here, one could argue that the scholarship collegiate athlete does not hold him or herself out as a separate business while working for their employer because the NCAA bylaws prohibit athletes from generating profits directly or indirectly from their athletic ability. Conversely, one could argue that the collegiate athlete now can profit from their name, image, and likeness without disrupting NCAA bylaws \textsuperscript{313} and therefore are holding themselves out as a separate business. One may or may not reason that factor two has been satisfied.

**Factor # 3: Supervision or Lack of Supervision**

The third factor looks to the degree of supervision the employer exercises over the employee. More specifically, the third factor analyzes the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision. In the case of the NCAA scholarship collegiate athlete, one can argue that the university exercises supervision over its athletes through the athletic department (e.g., coaching staff and the bylaws).

**Factor # 4: Skills for the Job**

The fourth factor that needs to be evaluated is the skill level required in the occupation. As previously mentioned in Part 3 Section C (1) Factor # 4, an individual who seeks to work for an NCAA university in the capacity as a collegiate athlete requires a great level of athletic skill that many aspire to achieve.

In summary, it can be reasoned that the fourth factor has been satisfied.

**Factor # 5: Supplies of Instrumentalities to Complete the Work**

The next factor evaluates whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work. Yes, it can be reasoned that the university supplies the collegiate athletes with equipment, uniforms, and facilities in order for their


work to be completed. Typically, NCAA scholarship collegiate athletes do not have to buy their own equipment to complete their work. As previously mentioned in Part 3 Section C (1) Factor #3, it is evident that this factor has been satisfied and should be weighed in supporting the finding that the NCAA scholarship collegiate athlete is an employee of their respective college or university.

**Factor # 6: Length of Employment**

The sixth factor looks to the length of employment. In accordance with NCAA bylaws, scholarship collegiate athletes have the opportunity of being eligible for “employment” for up to five years if the athlete is a redshirt athlete. However, the NCAA enacted an exception that allows NCAA institutions the opportunity to provide spring-sport collegiate athletes (i.e., baseball, softball, lacrosse, and volleyball athletes) an opportunity to gain an additional season of competition to extend their term of eligibility due to the global pandemic of the Corona Virus (“COVID-19”).

The question of using the term of “employment” for the NCAA scholarship collegiate athlete was raised in an NLRB hearing between Northwestern University and its scholarship football players. Northwestern contended that the collegiate athletes were not employees; however, if the NLRB held the petitioners to be employees, the University argued that the collegiate athletes should be seen as temporary employees due to the length of the collegiate athletes “employment.” The NLRB Regional Director in its memorandum wrote that “it will not find individuals to be temporary employees simply because their employment will terminate on a certain date.” Additionally, the NLRB has never applied the term “temporary” employees whose employment, albeit of finite duration, might last from 3 to 7 or more years. It can be reasoned that some collegiate athletes have a term of employment that is recognized by the NLRB of a period between four (4) to five (5) years.

In summary, factor six is satisfied to show the length of employment of the collegiate athlete. Additionally, the term of employment will aid in the showing of employee status amongst the collegiate athletes.

**Factor # 7: Method of Payment**

The seventh factor that must be considered is the method of payment. When unpacking this element one can reason that the grant-in-aid scholarships received by the NCAA collegiate athlete is considered payment. Payment typically derives from a service rendered. One can argue that the

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314 Regional 13 Memorandum, *supra* note 292, 17.

“In Divisions I or II, redshirting refers to someone who is enrolled full-time at a school but does not play for an entire academic year for the sole purpose of saving a season of competition. A redshirt does not play in any college games or scrimmage in a given sport for an entire academic year, even though that student is otherwise eligible. If you do not play in a sport the entire academic year, you have not used a season of competition. However, if you play in even one second of a game as a college student-athlete, you are not a redshirt. Redshirting does not exist in Division III because if you play or practice after your first opportunity to compete, you are charged with a season of participation.” See NCAA Student-Athlete, Transfer Terms: Eligibility Timeline, (listed December 24, 2020) <http://www.ncaa.org/student-athletes/current/transfer-terms>.


317 *Id.*
services rendered from the collegiate athlete is their athletic work that contributes to the success of the university and the NCAA.\footnote{Id. at 14.} As of the 2019-2020 season an athletic scholarship for a Division I NCAA university was worth an average of $18,013 for males and an average of $18,722 for female scholarship holders.\footnote{Patrick O’Rourke, Average per Athlete 2020: US Colleges awarded over $ 4 billion in Athletic Scholarships during 2019-2020, Scholarship Stats, (last visited December 2020) <https://scholarshipstats.com/average-per-athlete> (2020).} According to statistical data, 357 NCAA universities gave a value of $2.76 billion in scholarships during the 2019-2020 year. Below Figure 4 will show the amount of money each division spends on compensation / payment towards the collegiate athletes in the form of scholarships.

<table>
<thead>
<tr>
<th>Athletic Division</th>
<th># of Schools</th>
<th>Male Athletes</th>
<th>Female Athletes</th>
<th>Avr Male Scholarship</th>
<th>Avr Female Scholarship</th>
<th>Value of Scholarships</th>
<th>% of Scholarship</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCAA I</td>
<td>357</td>
<td>90,241</td>
<td>74,986</td>
<td>$18,013</td>
<td>$18,722</td>
<td>$2.76 billion</td>
<td></td>
</tr>
<tr>
<td>NCAA II</td>
<td>303</td>
<td>65,255</td>
<td>46,498</td>
<td>$6,588</td>
<td>$8,054</td>
<td>$752 million</td>
<td></td>
</tr>
<tr>
<td>NCAA III</td>
<td>445</td>
<td>106,843</td>
<td>76,406</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>NAIA</td>
<td>238</td>
<td>44,678</td>
<td>29,767</td>
<td>$8,093</td>
<td>$7,870</td>
<td>$546 million</td>
<td></td>
</tr>
<tr>
<td>NJCAA</td>
<td>480</td>
<td>36,151</td>
<td>24,177</td>
<td>$2,376</td>
<td>$3,259</td>
<td>$157 million</td>
<td></td>
</tr>
<tr>
<td>Other Divisions</td>
<td>254</td>
<td>24,196</td>
<td>15,654</td>
<td>$326</td>
<td>$482</td>
<td>$14 million</td>
<td></td>
</tr>
</tbody>
</table>

Figure 4\footnote{Id.}

In summary, one can reason that factor seven is satisfied because NCAA scholarship collegiate athletes receive payment in the form of scholarships that traditionally cover tuition, books, housing, etc.

**Factor # 8: Work as an Integral Part**

The next factor that is considered relates to the level of work integration. More specifically the question that needs to be asked and answered is: Whether or not the work is part of the regular business of the employer. The employer(s) in this instance are in the business of collegiate sports and collegiate education. It has been recently reported as of March 20, 2019, that the NCAA generated $867.53 million in revenue from television and marketing rights fees segment.\footnote{Christina Gough, National Collegiate Athletic Association (NCAA) revenue by segment 2012-2019, Statista, (last visited December 2020), <https://www.statista.com/statistics/219605/ncaa-revenue-breakdown/#statisticContainer>, (2020).} More specifically, $177.87 million was generated from Championships & NIT Tournaments and $55.4 million was accumulated in revenue resulting in ticket sales and services during the 2019 season. The underlying commonality regarding all sources of revenue is that the scholarship NCAA Division I collegiate athlete is the foundation to the revenue streams. It can therefore be argued that the NCAA collegiate athletes are so integrated into the business of the NCAA and its member
institutions that a removal of the worker would have a detrimental effect on the universities and the NCAA as an organization.

In summary, factor eight has been satisfied. The interconnectedness of the collegiate athlete and the NCAA is evident that the athlete is an essential part of the business of collegiate athletics. Therefore, factor eight can provide proof to support the assertion of employee status of the scholarship NCAA collegiate athlete. The premise of the television/media contracts, tournaments, and ticket sales are based on the performance of the NCAA collegiate athletic teams.

**Factor # 9: The Creation of the Master-Servant Relationship**

The next factor looks to the creation of the master-servant\(^{322}\) (employer-employee) relationship. The ninth factor specifically asks: Whether or not the parties believe they are creating the relationship of employer and employee. The ninth factor is a bit controversial and is a major factor regarding the employment status of the collegiate athlete. On one hand, it can be argued that some NCAA Division I collegiate athletes have made many attempts of creating the employer-employee relationship through lawsuits asserting violations of the FLSA and the NLRA.

However, one can argue that the employer(s) (i.e., the NCAA & NCAA member institutions) have made it clear that the organization has not and does not intend to create an employment relationship with the collegiate athlete. The NCAA denied the recognition of the collegiate athlete’s unionization attempts.\(^{323}\) Additionally, the NCAA has exclaimed that the recently enacted state legislation regarding the ability for the NCAA collegiate athlete to profit from their name, image, and likeness does not constitute employee status. Additionally, the NCAA has stated that it will not pay its collegiate athletes for using their name, image, and likeness.\(^{324}\)

In summary, it can therefore, be reasoned that as of 2021 an employment relationship has not been created or recognized by the judiciary or by the NLRB regarding the collegiate athlete.

**Factor # 10: Principal & Business**

The last factor that must be examined under the common-law agency test asks, whether the principal is or is not in business. In the present case, it is an undisputed fact that the principal is the NCAA member institutions who operate as a business. The institutions are in the business of collegiate athletics. Therefore, the tenth factor under the common-law agency test is satisfied.

**Additional Consideration:**

An additional issue that must be considered is whether the alleged employee has an opportunity for profit or loss. Here, when considering the totality of the circumstances one could reason that the NCAA scholarship collegiate athlete does not have the opportunity to generate profits relating to their athletic skills or work; however, the collegiate athlete does have the opportunity to suffer

\(^{322}\) A “master or employer is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.” See Restatement (Second) of Agency, § 2(1) (1958).

\(^{323}\) Donald Remy, NCAA Responds to Union Proposal, (last visited December 2020) <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal#--text=Student%2Dathletes%20are%20not%20employees,in%20college%20sports%20is%20voluntary%20and%20there%20is%20no%20employment%20relationship%20between%20the%20athletes%20and%20the%20NCAA.&text=There%20is%20no%20employment%20relationship%20between%20the%20athletes%20and%20the%20NCAA.>

a loss which is in the form of losing his or her scholarship. It could be argued that an aspect of loss that a collegiate athlete might incur is not dispositive of independent contractor status but rather comparable to an individual being terminated or fired from the job.

**Summary**

In conclusion, there are strong and sound arguments that one could raise to further prove that the NCAA scholarship collegiate athlete should be recognized as employees within the scope of the NLRA. As previously mentioned, the alleged employer (i.e., the NCAA and NCAA member institutions) are joint employers that exude control over the collegiate athlete in their fulfillment of their job duties. Additionally, the athlete is an integral part of the business that produces great revenue streams for the employers. Furthermore, the athletes are supervised by both employers from practice to compliance regulations. Also, being a collegiate athlete requires great skill which make the selection process extremely competitive and tedious. Moreover, collegiate athletes are not required to purchase uniforms, instrumentalities, or equipment to satisfy the completion of their work. Next, the length of time for the employment is dependent on the specific athlete; however, the employer has allowed collegiate athletes up to five years to perform their job tasks. One can determine that the work of the collegiate athlete is intertwined with the business of the employer. If the athletes were removed from the NCAA, it can be reasoned that the employer would lose a substantial part of their business. However, the employer-employee relationship has not been adopted by both parties. Lastly, the principal is a business.

After applying the factors under the common-law agency test to the NCAA scholarship collegiate athlete, one could determine that collegiate athletes are employees. Moreover, when evaluating the athletes in light of their entrepreneurial opportunity to receive gains or losses based on their athletic skillset it can be concluded that the athletes as of the 2020-2021 academic year do not have the ability to generate profits. The losses that they could incur would not be significant enough to render them independent contractors. The loss could be seen as a termination or a firing of sorts.

The next section will offer recommendations that should be considered when addressing the topic of employee status of the NCAA scholarship collegiate athlete.

V. **Recommendations**

After carefully reviewing both the Fair Labor Standards Act and the National Labor Relations Act coupled with the facts surrounding NCAA collegiate athletes in regards to their employment status, I would submit for your consideration that NCAA collegiate athletes should be classified as employees pursuant to both Acts and, thus, should be entitled to all the benefits that flow from the FLSA and the NLRA such as a uniform minimum wage, overtime payments, rights to unionize and to collectively bargain.

The NCAA collegiate athlete of the twenty-first century and the industry of intercollegiate athletics has evolved throughout the decades. The primary holder of power controlling collegiate athletics is the NCAA and NCAA member institutions. Collegiate athletics has progressed into a billion-dollar business where the NCAA and its member institutions employ many individuals such as the collegiate coaching staff, members of the athletic department, and other related staff members (e.g., concession staffers in the different athletic arenas, etc.) However, the collegiate athletes who are at the center of the discussion or in other words who are the main attraction have
not received the same fundamental rights of employment as others simply because they hold dual roles as athletes and students of their respective universities.

My recommendation is to modify the structure of the NCAA by amending the bylaws to the following: 1) eliminate the term and definition of “amateur” and replace it with the term and definition of “employee”; 2) create a committee within the NCAA that specifically regulates the collegiate athlete’s work hours, overtime, and compliance with federal laws; 3) allow collegiate athletes to receive a minimum wage of $15.00 per hour when work is being done; 4) allow collegiate athletes the opportunity to receive 10% of the overall profits generated by the athletic department for their respective universities; and 5) allow collegiate athletes the right to unionize. The above recommendations will be explained in detail below.

**Recommendation #1- Eliminate the Term and Definition of “Amateur”**

It is an undisputed fact that the NCAA endorses the terms “amateur” and “amateurism.” In accordance to the NCAA 2020-2021 Manual, the principle of amateurism explains in part that “student-athletes … should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”

However, to describe collegiate athletics as an “avocation” or similarly put, a hobby or an extracurricular activity undermines the work and efforts of the athlete. One could argue that participating in collegiate athletics is far from an avocation. In many instances athletics is placed at the forefront before the educational pursuits of the athlete. The industry of collegiate athletics is an extremely lucrative “avocation” that many colleges, organizations, and companies benefit from while the athlete does not financially. Additionally, within the meaning of amateurism as expressed by the NCAA, the organization seeks to protect the athletes from “exploitation by professional and commercial enterprises.”

Exploitation is defined as “the act of selfishly taking advantage of someone or a group of people in order to profit from them or otherwise benefit oneself.”

One could argue that the NCAA and its member institutions participate in the act of exploiting the collegiate athletes based on their athletic prowess and performance. As previously stated, the industry of intercollegiate athletics is a billion-dollar business which begins and ends with the NCAA and the collegiate athlete. It can be argued that the collegiate athlete receives payment in the form of athletic scholarships; however, the scholarship is not an adequate representation of the value that the athlete brings to the table. Legally, collegiate athletes pass both the economic realities test and the common-law agency test that is recognized by the FLSA and the NLRA.

Therefore, the term “amateur” should be replaced with the term “employee.” The term “employee” as it applies to the NCAA collegiate athlete should be defined as “an individual who was hired by an employer to do a specific job.”

Within the scope of the employment relationship the term “hired” should be defined as an individual who signs (i.e., accepts) a contract for hire for the exchange of services rendered by the employee and payment coupled with a signature of

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325 2020-2021 NCAA Manuel, 2.9 The Principle of Amateurism, NCAA, (last visited December 15, 2020)  

326  Vocab Builder, What Does Exploitation Mean?,(last visited December 16, 2020)  

327 Susan Heathfield, What, Exactly, Is an Employee?, (last visited December 15, 2020)  
acceptance rendered by the employer. In this case, the letter of intent (i.e., the athletic scholarship) acts as the employment contract and the signing of the contract acts as a tender of a promise to provide services by the collegiate athlete and the promise to provide payment by the employer (i.e., the university and the NCAA). Therefore, an employment relationship has formed based off the signing of the contract coupled with circumstantial evidence demonstrating the employment relationship.

**Recommendation # 2 - Creation of an Employee Compliance Committee**

The second recommendation calls for the creation of an employee compliance committee within the NCAA that regulates the employment of the collegiate athlete and the universities / NCAA to ensure that both parties are acting in accordance to federal law. In addition to the establishment of an employee compliance committee, the NCAA bylaws must be amended to recognize the committee.

**Recommendation # 3 - Minimum Wage**

The third recommendation calls for the establishment of minimum wage for NCAA collegiate athletes who obtain athletic scholarships. The recommended minimum wage for the NCAA collegiate athlete would be $15.00 per hour. For instance, the District of Columbia has a minimum wage of $15.00 per hour while the State of Georgia has a set minimum wage of $7.25 per hour. In some cases, like Tennessee there is no set state minimum wage law; however, “employers subject to the FLSA must pay the current Federal minimum wage of $7.25 per hour.” In an attempt to curtail the appearance of a competitive edge amongst universities a proposed uniform amount should be set that spans across all fifty (50) states. Realistically, there will always be an unspoken competitive edge amongst universities that does not encompass compensating the collegiate athlete. The competitive edge arises from the caliber of coaching staff employed, the state-of-the-art facilities, the sponsorships, and the high-profile media / television deals that universities involve themselves in.

**Recommendation # 4 - Share 10% of Total Profits**

The fourth recommendation is to allow collegiate athletes the right to share a percentage of the total revenues derived from their respective NCAA member institution’s athletics department. The number of calculated profits would vary based on the university, however, the percentage should not. The profits would be based on the amount that the athletic department receives from ticket sales, broadcast rights, marketing rights fees, tournament play, and Bowl appearances. An illustration of the profit-sharing model would be as follows: School (A)’s athletic department generates $65 million in profits based off the athletic performance of the collegiate athletes (the team) directly or indirectly. Ten percent of $65 million is $6,500,000. Let’s say there are 250 NCAA collegiate athletes enrolled at School (A). The ten percent of the profits would be divided amongst the 250 collegiate athletes. Roughly each collegiate athlete would receive $26,000 from the profits derived from the university / athletic department.

The principle behind profit-sharing is liken to a retirement plan in the traditional workforce. I believe the inclusion of profit-sharing would only add greater value to the NCAA by acknowledging that intercollegiate athletics is a business that gives its employees (i.e., collegiate athletes) a sense of ownership within the organization. Additionally, the profit-sharing model

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would continue to foster the importance of education because it is expected that more collegiate athletes would complete their four-year college term given the incentive of profit-sharing. Under recommendation number four (4) the collegiate athlete would be allowed to enjoy the fruits of his or her labor in a more tangible form.

**Recommendation # 5- Rights to Unionization**

The last recommendation is to allow the NCAA scholarship collegiate athlete the right to unionize pursuant to the NLRA. In order to obtain protection regarding labor relations and collective bargaining pursuant to the NLRA, the employees must hail from private entities or businesses. The NLRA protections do not reach to public entities. A distinction amongst the NCAA collegiate athlete must be made to assess who is protected under the NLRA.

Although the unionization would not cover all collegiate athletes, the recognition of employee status amongst NCAA scholarship athletes from private universities would open the doors in the future for greater possibilities amongst scholarship athletes and non-scholarship athletes of public universities to obtain similar protections. As mentioned previously, the right to unionize and to collectively bargain would allow the athletes to have a voice in the decision room regarding all aspects of the NCAA scholarship collegiate athlete.

Summary:

In conclusion, each recommendation presented was crafted with the welfare of the NCAA collegiate athlete at the forefront. The five recommendations will ultimately contribute to a fairer and just business of intercollegiate athletics.

VI. **Conclusion**

In summary, this article was written to tackle the question: Should NCAA collegiate athletes be classified as employees pursuant to the FLSA and the NLRA? The highly debated topic of employee status of the collegiate athlete has garnered opinions and comments from legal scholars and others alike. When unpacking this issue, it is pertinent to keep in mind the legal interpretation and definition of the term “employee” pursuant to both the FLSA and the NLRA. As previously mentioned, both Acts define the term “employee” in broad language. Therefore, jurisprudence was the guide when determining who fell within its meaning. The economic realities test articulated by Donovan and Glatt as well as the common-law agency test are all applicable in unpacking the issue of employment status of the collegiate athlete.

According to the application of the tests one could reason that the NCAA collegiate athlete should be classified as an employee pursuant to both federal laws. Moreover, the recommendations offered can be used to push the needle forward and aid in the discussion regarding the future of NCAA collegiate athletics and its athletes.

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