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# THE NCAA IS DROPPING THE BALL: REFINING THE RIGHTS OF STUDENT-ATHLETES

## INTRODUCTION

“Clearly, the collegiate model is dead.”<sup>1</sup> Collegiate athletics resemble more of a big business than an organization whose purpose is the protection and academic advancement of student-athletes.<sup>2</sup> These athletic programs yield large revenues that fund significant portions of university budgets, begging the question: Should student-athletes be compensated as employees? The National Collegiate Athletic Association (NCAA) has recently been the subject of numerous lawsuits regarding the rights of student-athletes. In the past year, both *Northwestern University & Collegiate Athletes Players Ass’n*<sup>3</sup> and *O’Bannon v. National Collegiate Athletic Ass’n*<sup>4</sup> significantly changed the way student-athletes are viewed within the NCAA. In *Northwestern University*, the Regional Director of the National Labor Relations Board (NLRB) decided that the Northwestern football players were employees under the National Labor Relations Act (NLRA),<sup>5</sup> meaning that these Northwestern student-athletes could take part in collective bargaining.<sup>6</sup> Northwestern University appealed this decision, and on August 17, 2015, the NLRB reached a unanimous decision not to assert jurisdiction and dismissed the petition without deciding whether the Northwestern football players were employees.<sup>7</sup> In *O’Bannon*, the court held that the NCAA rules prohibiting player compensation are an unreasonable restraint of trade under the Sherman Antitrust Act, specifically with regard to the use of players’ names, images, and

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1. Pete Thamel, *Commissioner Steps Down Amid Big East’s Instability*, N.Y. TIMES, May 7, 2012, [http://www.nytimes.com/2012/05/08/sports/ncaabasketball/john-marinatto-resigns-as-big-east-commissioner.html?\\_r=0](http://www.nytimes.com/2012/05/08/sports/ncaabasketball/john-marinatto-resigns-as-big-east-commissioner.html?_r=0) (quoting John Marinatto, former Big East Commissioner).

2. For the purpose of this Comment, “student-athlete” is limited to revenue-generating Division I men’s football and basketball programs.

3. See generally No. 13-RC-121359, 2014–2015 NLRB Dec. (CCH) ¶ 16781 (Mar. 26, 2014), <https://www.nlr.gov/case/12-RC-121359> <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f> [hereinafter NLRB, Northwestern Univ.] (holding that the student-athletes were employees of Northwestern University).

4. See generally 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part, vacated in part*, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015) (holding that the NCAA rules prohibiting player compensation were an unreasonable restraint of trade under the Sherman Antitrust Act).

5. 29 U.S.C. § 152(3) (1935).

6. NLRB, Northwestern Univ., *supra* note 3, at 23.

7. Northwestern Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015) [hereinafter NLRB, Northwestern Univ. Appeal].

likenesses.<sup>8</sup> The Ninth Circuit Court of Appeals upheld this portion of the decision on September 30, 2015.<sup>9</sup>

Student-athletes should be compensated for the benefits they provide to both their universities and the NCAA. Student-athletes are unique in that they are subject to a reverse life cycle of employment; instead of their wages and earning capacity increasing over their career, their productivity and skills are only valuable for a significantly shorter period of time in their youth. Consequently, student-athletes should be able to profit off of their lucrative skill set while they have the ability to do so. Arguments against compensation are tantamount to a form of age discrimination. Although discrimination against the young is not recognized by law,<sup>10</sup> discrimination against a group of people based on their age is not acceptable; the only difference is that the law extends protection to one age group and not the other.<sup>11</sup> As a consequence of discrimination and the reverse life cycle of employment, tangible consequences adversely affect a specific group of people: student-athletes. These athletes need protection and recognizing them as employees can afford them this protection.

Part II of this Comment provides the history of the NCAA and discusses the fundamental ways in which the NCAA has changed since its formation, which is integral to understanding why the current structure of the NCAA is outdated.<sup>12</sup> Part II also provides relevant background information for *Northwestern University* and the legal significance of allowing players to unionize.<sup>13</sup> Further, Part II dis-

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8. *O'Bannon*, 7 F. Supp. 3d at 1007–08.

9. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 14-16601, 2015 WL 5712106, at \*29 (9th Cir. Sept. 30, 2015). However, the court did not hold that the district court clearly erred in finding that students could “receive [name, images, and likenesses] NIL cash payments untethered to their educational expenses.” *Id.* at \*24.

10. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (1994), this Comment does not propose that the young should be statutorily protected under this Act; however, it does propose that they should be protected by the NLRA, the Fair Labor Standards Act (FLSA), and antitrust law.

11. Congress passed the ADEA, which made it illegal for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution*, 72 N.Y.U. L. REV. 780, 785 (1997) (quoting Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4, 81 Stat. 602, 603 (1967) (codified as amended at 29 U.S.C. § 623 (a)(1))). The protected group under the Age Discrimination in Employment Act (ADEA) includes “‘any individual’ age forty and older.” Kelly J. Hartzler, Note, *Reverse Age Discrimination Under the Age Discrimination in Employment Act: Protecting All Members of the Protected Class*, 38 VAL. U. L. REV. 217, 218 (2003) (quoting 29 U.S.C. § 623(a)(1)).

12. See *infra* notes 20–51 and accompanying text.

13. See *infra* notes 54–112 and accompanying text.

cusses the Fair Labor Standards Act (FLSA), the U.S. Department of Labor's six-factor test for determining whether interns at a for-profit business are employees, and the *O'Bannon* decision's significance in the conversation about student-athletes' right to be compensated.<sup>14</sup> Lastly, Part II discusses age discrimination and the theory of reverse age discrimination as it relates to student-athletes.<sup>15</sup> Part III provides an analysis of student-athletes' rights under the NLRA, the FLSA, and antitrust law.<sup>16</sup> Part III also proposes a model of payment that would properly compensate student-athletes for the hours they commit to their athletic programs.<sup>17</sup> Part IV explores some of the policy implications of compensating athletes and explains that the new changes to the NCAA will not adversely affect the collegiate sports industry.<sup>18</sup> Part IV also addresses how the ability to collectively bargain will benefit student-athletes in many respects.<sup>19</sup>

## II. BACKGROUND

### A. *The History of the NCAA and Where It Stands Today*

The presidents of sixty-two U.S. colleges and universities founded the NCAA in 1905 to create a uniform set of rules to regulate inter-collegiate football.<sup>20</sup> Today, the NCAA operates as a private, voluntary association with over 1,000 active members, 346 of which are Division I colleges or universities.<sup>21</sup> The NCAA annually publishes a manual, which lays out the rules and regulations that govern college athletics.<sup>22</sup> Member institutions must implement and apply these regulations, otherwise, the institutions may be subjected to NCAA enforcement procedures.<sup>23</sup> The NCAA holds exclusive power in

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14. See *infra* notes 118–57 and accompanying text.

15. See *infra* notes 158–62 and accompanying text.

16. See *infra* notes 160–294 and accompanying text.

17. See *infra* notes 295–325 and accompanying text.

18. See *infra* notes 326–60 and accompanying text.

19. See *id.*

20. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), *aff'd in part, vacated in part*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015).

21. *Composition and Sport Sponsorship of the Membership*, NCAA (2014), <http://www.ncaa.org/about/who-we-are/membership/composition-and-sport-sponsorship-membership>. “Division I schools generally have the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships.” *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Feb. 28, 2015). Division I schools commit to maintaining a high academic standard for student-athletes in addition to providing them with a wide range of opportunities. *Id.*

22. NCAA, 2014-15 NCAA DIVISION I MANUAL 1 (2014), <http://www.ncaapublications.com/productdownloads/>.

23. *Id.*

creation and enforcement of the bylaws.<sup>24</sup> According to the NCAA Manual, the NCAA seeks “[t]o initiate, simulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit.”<sup>25</sup> Member institutions’ competitive athletic programs are intended to be a fundamental and vital aspect of the education system.<sup>26</sup> A basic purpose of the NCAA is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>27</sup> To maintain its purpose and goals, the NCAA develops and outlines rules for its membership institutions’ athletic programs in the NCAA constitution and bylaws.<sup>28</sup>

The NCAA’s membership institutions are divided into three Divisions: I, II, and III.<sup>29</sup> Division designation is dependent on the school’s ability to provide opportunities to student-athletes for their participation in intercollegiate athletics.<sup>30</sup> Schools identified as Division I “provide the greatest number and highest quality of opportunities” to student-athletes by sponsoring more athletic teams and providing student-athletes with more financial aid as compared to Division II and III schools.<sup>31</sup> For football, Division I schools are further organized into two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).<sup>32</sup> FBS schools are permitted to offer eighty-five full scholarships to their football players.<sup>33</sup> FCS schools may offer up to sixty-three full scholarships annually.<sup>34</sup> The level of competition in FBS is considered higher than in FCS.<sup>35</sup>

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24. *See id.*

25. *Id.* (Constitution, Article 1.2).

26. *Id.* (Constitution, Article 1.3.1).

27. *Id.*

28. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), *aff’d in part, vacated in part*, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015); NCAA, *supra* note 22.

29. *O’Bannon*, 7 F. Supp. 3d at 963.

30. *Id.*

31. *Id.* at 963.

32. *Id.* at 964.

33. *Id.*

34. *Id.*; *College Athletic Scholarship Limits*, SCHOLARSHIP STATS, <http://www.scholarshipstats.com/ncaalimits.html> (last visited Aug. 23, 2015).

35. *O’Bannon*, 7 F. Supp. 3d at 964.

Division I schools, for both football and basketball, are further organized into conferences that function as smaller leagues within the NCAA.<sup>36</sup> The conferences organize their regular season games and tournaments.<sup>37</sup> Each conference must comply with the NCAA's constitution and bylaws; however, the conferences do operate independently in generating their own revenue and creating their own rules consistent with NCAA policy.<sup>38</sup>

The NCAA Manual preserves the principle of amateurism<sup>39</sup> and states that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation 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.”<sup>40</sup> This means that student-athletes are prohibited from receiving remuneration beyond their athletic scholarships for their athletic services.<sup>41</sup> Article 12 of the NCAA's operating bylaws restrict the amateur athletes' ability to obtain compensation for their athletic prowess beyond what they receive in scholarship money, including any profits resulting from their names or likenesses.<sup>42</sup> Any remuneration above the university's permissible scholarship will result in the student-athletes losing their amateur status and being ineligible for collegiate athletics.<sup>43</sup>

The NCAA and its member institutions make an immense profit off of amateur athletes and have an interest in renouncing them as employees.<sup>44</sup> In 2013, the NCAA made “\$913 million in total revenue” and “\$852 million in total expenses,” amounting to a \$61 million

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36. NCAA and NAIA Divisional and Conference Affiliations, 2015 C. FOOTBALL, <http://prwolfe.bol.ucla.edu/cfootball/conferences.htm> (last visited Oct. 23, 2015); see *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Feb. 27, 2015).

37. *O'Bannon*, 7 F. Supp. 3d at 964.

38. *Id.*

39. Amateurism is a fundamental principle of college athletics because it is the main distinction between student-athletes and professionals. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 21, 2015). Principals of amateurism and the NCAA rules ensure that student-athletes put academics first and athletics second. *Id.* A key principle of amateurism is that “student-athletes should be protected from exploitation.” NCAA, *supra* note 22, at 4 (Constitution, Article 2.9).

40. NCAA, *supra* note 22, at 4 (Constitution, Article 2.9).

41. Justin C. Vine, Note, *Leveling the Playing Field: Student Athletes Are Employees of Their University*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 235, 242–43 (2013).

42. NCAA, *supra* note 22, at 58–86 (Bylaw, Article 12).

43. *Id.* at 59.

44. Vine, *supra* note 41, at 242.

profit.<sup>45</sup> A majority of this amount (\$681 million) was derived from the multimedia and marketing rights agreement connected to March Madness, the Men's Division I basketball tournament.<sup>46</sup> The NCAA distributed \$527 million to Division I schools and conferences.<sup>47</sup>

Membership institutions also make significant revenues off of their athletic programs, especially with football. *Forbes* documented the revenues and expenses of the top twenty-five football teams for the 2011–2012 season, most notably: Texas (\$103,813,684 in revenue with \$25,896,203 in expenses), Michigan (\$85,209,247 in revenue and \$23,640,337 in expenses), Alabama (\$81,993,762 in revenue and \$36,918,963 in expenses), Georgia (\$74,989,418 in revenue and \$22,710,140 in expenses), and Florida (\$74,117,435 in revenue and \$23,045,846 in expenses).<sup>48</sup>

College basketball also contributes significant revenues to universities and the NCAA. *Forbes* ranked college basketball's most valuable teams in 2014 as follows: Louisville (\$39.5 million), Kansas (\$33 million), Kentucky (\$32 million), North Carolina (\$25.7 million), Indiana (\$25.4 million), Arizona (\$25.2 million), Ohio State (\$22.9 million), Wisconsin (\$21.1 million), Syracuse (\$21 million), and Duke (\$14.9 million).<sup>49</sup>

Schools invest a significant amount of money in their athletic departments with the hopes of generating even more profits.<sup>50</sup> For some of these teams, the key to their program's success is big spending, while for other teams, much of their revenue is gained from strong licensing programs.<sup>51</sup>

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45. Steve Berkowitz, *NCAA Has Net Assets of \$627 Million, Say Records*, USA TODAY (Mar. 20, 2014, 2:36 PM), <http://www.usatoday.com/story/sports/college/2014/03/20/ncaa-expenses-revenue-money-mark-emmert/6651133/>.

46. *Id.*

47. *Id.*

48. Alicia Jessop, Contributor, *The Economics of College Football: A Look at the Top-25 Teams' Revenues and Expenses*, FORBES (Aug. 31, 2013, 10:32 AM), <http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/>. This chart reflects data obtained from the Department of Education. *Id.* Although the Department of Education does not provide solid reporting guidelines, it "is the only data publically available related to athletic departments' spending and revenue generation." *Id.*

49. Chris Smith, *College Basketball's Most Valuable Teams 2014: Louisville Cardinals on Top Again*, FORBES (Mar. 17, 2014, 9:29 AM), <http://www.forbes.com/sites/chris-smith/2014/03/17/college-basketballs-most-valuable-teams-2014-louisville-cardinals-on-top-again/>.

50. William W. Berry III, *Educating Athletes: Re-Envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795, 805 (2014).

51. See Jessop, *supra* note 48. A strong licensing program may entail teams that either have their own network or are a part of a conference that has its own network. *Id.* Merchandising may also provide an extra stream of revenue for the university and their athletic program. See *id.*

B. *The Northwestern University Student-Athletes' Petition*

Kain Colter, a Northwestern football player, filed a petition with the NLRB, asking the Board to recognize Northwestern football players as employees of their university who are eligible to unionize.<sup>52</sup> In the petition, grant-in-aid football players claimed that they were employees of Northwestern University under the NLRA and were therefore entitled to representation for collective bargaining purposes.<sup>53</sup> In March 2014, the NLRB Director for Region 13 issued a decision in *Northwestern University*, finding that the student-athletes were in fact employees.<sup>54</sup>

The employer, Northwestern University, is a private, nonprofit undergraduate university located in Illinois that maintains its intercollegiate athletic program as a part of the NCAA.<sup>55</sup> Northwestern is part of the Big Ten Conference,<sup>56</sup> and its Division I football team competes against eleven other member colleges.<sup>57</sup> Patrick Fitzgerald has been the head football coach since 2006.<sup>58</sup> The football team has about 112 players, of which, eighty-five receive grant-in-aid scholarships to cover their tuition, fees, room, board, and books.<sup>59</sup> The remainder of the team consists of walk-ons who only receive need-based financial aid if they qualify.<sup>60</sup> When making a scholarship offer to a recruit, Coach Fitzgerald provides the individual with a National Letter of Intent and a four-year scholarship, also known as a “tender.”<sup>61</sup> The tender explains to the recruit that the scholarship can be reduced or canceled under a variety of circumstances.<sup>62</sup> The tender also explains that the

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52. Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 65–67 (2014).

53. NLRB, *Northwestern Univ.*, *supra* note 3, at 2.

54. Brian Bennett, *Northwestern Players Get Union Vote*, ESPN (Mar. 27, 2014, 9:23 AM), [http://espn.go.com/college-football/story/\\_id/10677763/northwestern-wildcats-football-players-win-bid-unionize](http://espn.go.com/college-football/story/_id/10677763/northwestern-wildcats-football-players-win-bid-unionize).

55. NLRB, *Northwestern Univ.*, *supra* note 3, at 2.

56. The Big Ten Conference is the oldest and one of the more successful Division I collegiate athletic conferences in the United States. *See About the Conference*, BIG TEN, <http://www.bigten.org/school-bio/big10-school-bio.html> (last visited Feb. 4, 2015).

57. NLRB, *Northwestern Univ.*, *supra* note 3, at 2.

58. *Id.* at 3. Coach Fitzpatrick is the second-longest tenured Big Ten head coach and has now served eight seasons at Northwestern. *See Staff Directory: Pat Fitzgerald*, NU SPORTS, <http://www.nusports.com/staff.aspx?staff=89> (last visited Feb. 28, 2015).

59. NLRB, *Northwestern Univ.*, *supra* note 3, at 3.

60. *Id.* at 3 n.3.

61. *Id.* at 4.

62. *Id.*

If the player: (1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary action; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any time for any

scholarship cannot be reduced on the basis of athletic ability or injury.<sup>63</sup> To accept Northwestern's offer, the recruit must agree to these terms.<sup>64</sup>

The NLRB applied the common law definition in deciding whether the Northwestern football players were employees.<sup>65</sup> "Under the common law [definition], an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."<sup>66</sup> When applying the common law test, the NLRB Regional Director examined whether the grant-in-aid scholarship football players: (1) performed services for the benefit of the employer; (2) received compensation for those services; and (3) were subjected to the employer's control in the performance of their duties as football players.<sup>67</sup>

The NLRB reasoned that the football players performed valuable services for Northwestern University.<sup>68</sup> The Northwestern football program generated \$235 million in revenues from 2003–2012 through ticket sales, television contracts, merchandise sales, and licensing agreements.<sup>69</sup> Northwestern utilized this economic benefit in any way it chose.<sup>70</sup> Northwestern also received a benefit because of its reputation of having a winning football team, which likely influenced alumni contributions and increased the number of applicants applying to the university.<sup>71</sup> The Board found that Northwestern's goal was to "field the most competitive team possible."<sup>72</sup> To accomplish this, players are recruited based on their athletic ability.<sup>73</sup> In return for the athletic services student-athletes provide to Northwestern, they receive scholarships that serve as their compensation.<sup>74</sup> The scholarships last up to

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reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent.

*Id.*

63. *Id.*

64. *Id.*

65. NLRB, Northwestern Univ., *supra* note 3, at 13.

66. *Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004) (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

67. NLRB, Northwestern Univ., *supra* note 3, at 14–15.

68. *Id.* at 14.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. NLRB, Northwestern Univ., *supra* note 3, at 14. "[A]thletic departments spare no expense when attempting to recruit the best high school athletes" due to the immense pressure from fans to win games. *Berry*, *supra* note 50, at 805.

74. NLRB, Northwestern Univ., *supra* note 3, at 14.

five years and cover tuition, fees, room, board, and books.<sup>75</sup> These scholarships are valued at \$76,000 per calendar year; each player will receive over \$250,000 throughout the course of four or five years.<sup>76</sup> Additionally, the players sign a tender, which operates as an employment contract and memorializes the duration as well as conditions under which each student-athlete is to be compensated.<sup>77</sup> Because student-athletes are forbidden from receiving additional compensation derived from their athletic ability or reputation under NCAA regulation, the players are dependent on their scholarships to cover their basic needs.<sup>78</sup> The coach may reduce or cancel these scholarships under a variety of circumstances.<sup>79</sup> Because the scholarship can be immediately reduced or canceled (under certain circumstances), the Board determined that the scholarship is in fact tied to the student-athlete's performance of athletic services.<sup>80</sup>

The NLRB also considered the amount of control Northwestern had over the players.<sup>81</sup> The season begins with a training camp, which starts six weeks prior to the academic year.<sup>82</sup> The coaches prepare daily itineraries containing each player's football related activities, which take place from 5:45 AM to 10:30 PM.<sup>83</sup> During preseason, this rigorous schedule requires players to dedicate fifty to sixty hours per week toward the Northwestern football program.<sup>84</sup> During the regular season, which takes place from September through November, the team competes in twelve games against other colleges on almost every Saturday.<sup>85</sup> Moreover, throughout the regular season, players dedicate forty to fifty hours per week to football.<sup>86</sup> These hours are spent at practices, meetings, film sessions, workouts, and both traveling to and competing in games.<sup>87</sup> Once the academic year begins, the NCAA limits "countable athletically related activities"<sup>88</sup> (CARA)

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*; Vine, *supra* note 41, at 243–44. See generally NCAA, *supra* note 22, at 57–60 (listing the rules on scholarships, payments, and expenses).

79. NLRB, Northwestern Univ., *supra* note 3, at 15.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. NLRB, Northwestern Univ., *supra* note 3, at 6.

86. *Id.* at 15.

87. *Id.* at 15–16.

88. NCAA rules limit the players "countable athletically related activities" (CARA) to 20 hours per week from the first regular season game until the final regular season game (or until the end of the Employer's fall quarter in the [case where the team]

hours to twenty hours per week; however, the players realistically devote forty to fifty hours despite this regulation.<sup>89</sup> The Board found that the coaches control “nearly every aspect of the players’ private lives [based on] rules that they must follow under threat of discipline [or] loss of a scholarship.”<sup>90</sup> The players are restricted and must obtain their coaches’ permission before they can: “(1) make living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; (8) and engage in gambling.”<sup>91</sup> Northwestern University also controls the players’ academic education.<sup>92</sup> Scholarship players are sometimes unable to take particular courses in a certain academic quarter if they conflict with practice.<sup>93</sup> It is not uncommon for players to occasionally miss classes to travel for away football games.<sup>94</sup> Unlike other students at the university, freshman football players must attend study hall for six hours per week, and all players are afforded access to certain tutoring and advising services that are unavailable to nonathlete students. Players must also participate in the NU for Life Program each year.<sup>95</sup>

The Regional Director found that the football players earning full grant-in-aid scholarships constituted employees under Section 2(3) of the NLRA but that the walk-on players did not.<sup>96</sup> Unlike the grant-in-aid scholarship players, the walk-on players do not receive compen-

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qualifies for a Bowl game). The CARA total also cannot exceed four hours per day and the players are required to have one day off every week . . . . [T]he fact that the players devote well over 20 actual hours per week on football-related activities does not violate the NCAA’s CARA limitations [because] numerous activities such as travel, mandatory training meetings, voluntary weight conditioning or strength training, medical check-ins, training tape review and required attendance at “training table” are not counted by the NCAA.

*Id.* at 6 n.11. The Northwestern team finds ways around this hour requirement. Willborn, *supra* note 49, at 75, 75 n.69. For example, Northwestern football players “regularly hold 7-on-7 drills” without their coaches being present. *Id.* at 6–7. “[T]hese drills are scheduled by the quarterback and held in the football team’s indoor facility in the evening.” *Id.* at 7. During these drills, “a student athletic trainer is also present . . . to provide medical assistance.” *Id.*

89. *Id.* at 16.

90. *Id.*

91. NLRB, Northwestern Univ., *supra* note 3, at 16.

92. *Id.* at 16–17.

93. *Id.* at 16.

94. *Id.* at 16.

95. *Id.* This program assists student-athletes with their professional development so they can excel once completing their degree. *Id.* at 12. See generally *NU for Life*, NU FOR LIFE, [http://nusports.com/sports/2015/3/18/GEN\\_2014010158.aspx?path=nuforlife](http://nusports.com/sports/2015/3/18/GEN_2014010158.aspx?path=nuforlife) (last visited Aug. 23, 2015) (“NU for Life is a unique program dedicated to the professional development of Northwestern student-athletes.”).

96. *Id.* at 17.

sation for the athletic services they perform, do not sign a tender, and are not subject to as much control from the football coaches.<sup>97</sup>

The Regional Director rejected Northwestern University's arguments that the players were not employees and that their status was more analogous to the graduate students in *Brown University*.<sup>98</sup> "In *Brown University*, the [NLRB] held that graduate students . . . who worked as teaching assistants, research assistants, and proctors, were not 'employees' . . . [because] they were 'primarily students.'"<sup>99</sup> Unlike student-athletes, the *Brown University* students' relationship with the university was primarily educational.<sup>100</sup> The Board found that "the players' football-related duties are unrelated to their academic studies unlike the graduate assistants [in *Brown University*] whose teaching and research duties were inextricably related to their graduate degree requirements."<sup>101</sup> Even though the *Brown University* test was inapplicable in this case, the football players would still be considered employees, if it was applied.<sup>102</sup> The Regional Director also rejected Northwestern University's argument that the football players were temporary employees.<sup>103</sup>

The Regional Director ordered an election to decide whether the eligible voters desired to be represented for collective bargaining purposes by the College Athletes Players Association (CAPA).<sup>104</sup> Eligible voters to the collective bargaining process included all grant-in-aid scholarship football players who had playing eligibility.<sup>105</sup>

This decision was appealed.<sup>106</sup> In its unanimous decision, the Board did not determine whether the Northwestern football players consti-

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97. NLRB, Northwestern Univ., *supra* note 3, at 17.

98. *Id.* at 18 (citing *Brown Univ.*, 342 N.L.R.B. 483 (2004)).

99. Willborn, *supra* note 52, at 72 (citing *Brown Univ.*, 342 N.L.R.B. at 494).

100. *Id.* at 72–73 (quoting *Brown Univ.*, 342 N.L.R.B. at 487). In *Northwestern University* the Board considered: (1) whether the student-athletes were primarily students whose time is dedicated to academia; (2) whether the student-athletes' duties were a core element of their educational degree requirements; (3) whether the University's academic faculty had supervision over the student-athletes' athletic duties; and (4) whether the student-athletes' compensation was considered financial aid or compensation. NLRB, Northwestern Univ., *supra* note 3, at 18–20 (considering the *Brown University* factors)

101. NLRB, Northwestern Univ., *supra* note 3, at 18.

102. *Id.* at 18–20.

103. *Id.* at 20–21.

104. *Id.* at 23.

105. *Id.*

106. *Id.* at 4, 24 (order granting Northwestern's request for review of the decision); Order, Northwestern Univ. & Coll. Athletes Players Ass'n, (No. 13-RC-121359), 2014 WL 1653118 (N.L.R.B. Apr. 24, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-grants-request-review-northwestern-university-athletes-case> (granting Northwestern University's request for review of the decision).

tuted employees under the NLRA.<sup>107</sup> Instead, the Board chose to exercise its discretion not to assert jurisdiction because “it would not effectuate the policies of the Act[,]” nor would it “promote stability in labor relations[,]” particularly within the NCAA and FBS football.<sup>108</sup> Consequently, the petition was dismissed.<sup>109</sup> The Board based its determination that a decision would not promote stability on two primary findings: (1) the nature of NCAA Division I FBS football, namely the control that the leagues exercise over each individual team; and (2) the structure and composition of FBS football (the Board cannot assert jurisdiction over the majority of competitors because they are considered public institutions).<sup>110</sup> Importantly, the NLRB’s decision is limited to grant-in-aid scholarship football players in the Northwestern petition.<sup>111</sup> The Board stated that it “might assert jurisdiction in another case involving grant-in-aid scholarship football players [or other scholarship athletes].”<sup>112</sup>

### C. *The Fair Labor Standards Act*

Congress enacted the FLSA to protect workers from harsh labor conditions and to preserve a certain standard of living.<sup>113</sup> The U.S. Department of Labor (DOL) Wage and Hour Division enforces the FLSA’s minimum wage and hour restrictions.<sup>114</sup> The Wage and Hour Division has certain criteria under the FLSA to assist for-profit private sector employers in determining whether interns must be paid minimum wage and overtime.<sup>115</sup>

The FLSA broadly defines the term “employ” to mean “suffer or permit to work.”<sup>116</sup> If an individual falls under this definition, then she must be compensated for the services that she provides to the employer.<sup>117</sup> Interns are usually deemed to be employees unless they

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107. NLRB, *Northwestern Univ.*, *supra* note 3, at 1.

108. *Id.*

109. *Id.* at 7.

110. *Id.* at 3.

111. *Id.* at 1 nn.2–3.

112. *Id.* at 1.

113. 29 U.S.C. § 202(a)–(b) (2012).

114. *Id.* § 204.

115. U.S. DEP’T OF LABOR, WAGE & HOUR DIVISION, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter FACT SHEET #71]. “Individuals at non-profit firms and government organizations are considered ‘volunteers’ and are therefore [not considered] interns.” Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of “Fact Sheet #71”*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 67–68 (2011).

116. FACT SHEET #71, *supra* note 115.

117. *Id.* For-profit firms must comply with Fact Sheet #71 or they may be prosecuted for labor violations and be “liable for unpaid wages, compensatory damages, and additional liquidated

meet the test for trainees. “Interns in the ‘for-profit’ private sector who qualify as employees rather than trainees typically must be paid at least minimum wage and overtime compensation . . . .”<sup>118</sup> If, however, the interns serve only their own interests or receive training only for their own educational benefit, then they are not deemed employees.<sup>119</sup>

To determine whether an internship or training program meets this trainee exclusion under the FLSA, the court applies six criteria:

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.<sup>120</sup>

If all of these factors are met, there is no employment relationship under the FLSA.<sup>121</sup> Consequently, the Act’s minimum wage and overtime provisions do not apply, and the intern will not receive compensation.<sup>122</sup> The intern exclusion to employment is narrow. Thus, many individuals are considered employees and are therefore subject to the FLSA’s minimum wage and overtime provisions.<sup>123</sup>

#### D. O’Bannon v. NCAA

In 2009, a group of current and former college student-athletes who play or played for an FBS football or Division I men’s basketball

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damages.” Patricia L. Reid, Note, *Fact Sheet #71: Shortchanging the Unpaid Academic Intern*, 66 FLA. L. REV. 1375, 1391 n.120 (2014) (quoting Kristi L. Schoepfer & Mark Dodds, *Internships in Sport Management Curriculum: Should Legal Implications of Experiential Learning Result in the Elimination of the Sport Management Internship*, 21 MARQ. SPORTS. L. REV. 183, 198 (2010)).

118. FACT SHEET #71, *supra* note 115.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

team, brought an antitrust class action against the NCAA challenging its rules that restricted player compensation in men's football and basketball.<sup>124</sup> The plaintiffs specifically challenged the NCAA rules that barred student-athletes from receiving a portion of the revenue that the NCAA and membership institutions earned from the sale of licenses that permitted the use of "student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage."<sup>125</sup> The NCAA currently imposes strict limits on student-athlete compensation from schools by prohibiting any student-athlete from receiving financial aid exceeding the value of the athlete's full grant-in-aid scholarship.<sup>126</sup> The NCAA further restrains this amount by putting a cap on the financial aid that exceeds the cost of attendance.<sup>127</sup> Likewise, the NCAA "prohibits any student-athlete from receiving compensation from outside sources based on his athletic skills or ability."<sup>128</sup>

Plaintiffs argued that the NCAA's cap on financial aid and prohibition of student-athlete compensation violated the Sherman Antitrust Act.<sup>129</sup> The Sherman Antitrust Act's purpose is to protect and secure the competitive process, which requires market participants to reduce their prices and increase the quality of their products to compete.<sup>130</sup> Section 1 states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."<sup>131</sup> The plaintiffs claimed that the NCAA restrained trade in two related national markets: the college education market and the group licensing market.<sup>132</sup>

The college education market refers to the market in which Division I FBS football and basketball schools compete to recruit the most talented high school players.<sup>133</sup> The court concluded that these schools compete to attract elite recruits by selling unique bundles of goods and services. The bundles include scholarships that cover "tuition, fees, room and board, books, certain school supplies, tutoring,

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124. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d at 955, 962–63 (N.D. Cal. 2014), *aff'd in part, vacated in part*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015).

125. *Id.* at 963.

126. *Id.* at 971.

127. *Id.*

128. *Id.* at 972.

129. *Id.* at 963.

130. Rick Nolan, Comment, *NCAA's Call to the Bullpen: Bring in Congress to Save the College Game with an Antitrust Exemption*, 15 FLA. COASTAL L. REV. 447, 450–51 (2014).

131. 15 U.S.C. § 1 (2012).

132. *O'Bannon*, 7 F. Supp. 3d at 965.

133. *Id.*

and academic support services. They also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports.”<sup>134</sup> In exchange for these bundles of goods, recruits are required to provide the university with athletic services and allow the schools to use their names, images, and likenesses for commercial purposes.<sup>135</sup> The court concluded that Division I FBS football and basketball schools were the only suppliers of these unique bundles of goods and services. Once being offered a Division I scholarship, recruits often do not pursue other options at different educational institutions or athletic careers outside of collegiate athletics.<sup>136</sup> Division II and III schools (and other professional football and basketball leagues) are not capable of providing a substitute for this bundle of goods and services and competing for the same top recruits.<sup>137</sup>

In addition to the college educational market, the court also considered the group licensing market.<sup>138</sup> The plaintiffs alleged that in the absence of the NCAA’s restraints, FBS football and Division I basketball players, like professional athletes, would have the ability to sell group licenses, which would grant others the ability to use their names, images, and likenesses in each market.<sup>139</sup> Both FBS football and Division I basketball players could sell joint group licenses to membership institutions, third party licensing companies, and other media companies interested in using and profiting from the use of student-athletes’ names, images, and likenesses.<sup>140</sup> Plaintiffs contended that submarkets within the larger group licensing market exist, including: (1) a submarket to use the group licenses in live game telecasts; (2) a submarket for group licenses in videogames; and (3) a submarket for group licenses “in game re-broadcasts, advertisements, and other archival footage.”<sup>141</sup> The court held that absent the challenged NCAA rules, the student-athletes could create and sell group licenses

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134. *Id.* at 965–66 (citation omitted).

135. *Id.* Revenue from Division I football and basketball comes from a variety of sources: “television networks, . . . ticket and merchandise sales, and . . . donations.” Berry, *supra* note 50, at 805. Schools often choose to put “this profit back into [their revenue-generating sports] . . . to recruit the best high school athletes.” *Id.* Coaches realize that recruiting the best athletes is what makes their programs successful. *Id.* at 805–06.

136. *O’Bannon*, 7 F. Supp. 3d at 966.

137. *Id.* at 967.

138. *Id.* at 968.

139. *Id.*

140. *Id.* at 968.

141. *Id.*

in all of these submarkets because there was a demand to use student-athletes' names, images, and likenesses in each submarket.<sup>142</sup>

The court concluded that the NCAA had the power, and exercised that power, to inhibit competition within the college education market through price fixing.<sup>143</sup> In exchange for the scholarship, the recruit provided his athletic talent and granted the university and the NCAA the ability to use the student-athlete's name, image, and likeness.<sup>144</sup> The schools created an impermissible anticompetitive effect by agreeing not to compete with one another and valuing the recruit's name, image, and likeness at zero.<sup>145</sup> According to the court, the NCAA engaged in a form of price-fixing by restraining the price competition in the market for recruits' athletic services and licensing rights.<sup>146</sup> The NCAA claimed that its student-athlete compensation restrictions were reasonable because they necessarily upheld its tradition of amateurism, maintained a competitive balance, promoted the integration of academics and athletics, and increased the total output of its product.<sup>147</sup> In rejecting these justifications, the court found that the NCAA's goals could be achieved through less restrictive means.<sup>148</sup> No credible evidence existed to prove that the popularity of college sports would decrease or that the NCAA's restrictions significantly contributed to the popularity of the NCAA.<sup>149</sup> Also, the rules had no discernible effect on the level of competitive balance, and they did not enhance academic outcomes for the students.<sup>150</sup> In fact, the court found that the demands of student-athletes' athletic obligations prevented many student-athletes from achieving meaningful academic success.<sup>151</sup>

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142. *O'Bannon*, 7 F. Supp. 3d at 971.

143. *Id.* at 973.

144. *Id.* "Student-athletes are required to sign several documents to participate in intercollegiate athletics, including Form 08-3a." Nolan, *supra* note 130, at 470. Form 08-3a specifically states: "You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs." NCAA, FORM 08-3A: STUDENT ATHLETE STATEMENT – DIVISION I 4 (2010–2011), <http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf>.

145. *O'Bannon*, 7 F. Supp. 3d at 973.

146. *Id.* at 972–73.

147. *Id.* at 973.

148. *Id.* at 982.

149. *Id.* at 977–78.

150. *Id.* at 978–80.

151. *O'Bannon*, 7 F. Supp. 3d at 981. Sixty-nine percent of FBS football players graduated from college in 2010. Michael Marot, *Graduation Rates for NCAA Athletes Improve*, HUFFINGTON POST, [http://www.huffingtonpost.com/2010/10/27/graduation-rates-for-ncaa\\_n\\_774812](http://www.huffingtonpost.com/2010/10/27/graduation-rates-for-ncaa_n_774812).

On appeal, the Ninth Circuit upheld this decision, reiterating that the NCAA is not above antitrust laws.<sup>152</sup> The Ninth Circuit held that the NCAA rules violated antitrust laws because they are more restrictive than necessary to maintain amateurism.<sup>153</sup> Thus, the NCAA is required to provide student-athletes with the full cost of attendance but nothing more.<sup>154</sup>

*E. The Age Discrimination in Employment Act  
and Other Policy Arguments*

The contention that student-athletes should be compensated is well supported by both law and public policy. The Age Discrimination in Employment Act of 1967 (ADEA) was enacted by Congress “to protect employees from adverse employment [actions based on] age-based stereotypes.”<sup>155</sup> The ADEA protects any individual over the age of forty.<sup>156</sup> It also “broadly prohibits discrimination in . . . ‘hiring, discharges, treatment during employment, advertising, and retaliation.’”<sup>157</sup> Student-athletes, and young people generally, are not within the protected age group covered by the ADEA and are therefore left unprotected to any age-based stereotypes. The theory of “reverse age discrimination” or discrimination against the young is not protected under the ADEA but is a rapidly evolving area of law.<sup>158</sup> The focus in this area of law is fairness; Congress enacted this legislation to protect workers against age discrimination and ensure that workers are treated with fairness in the employment context.<sup>159</sup>

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html (last updated May 25, 2011, 6:10 PM). But, in men’s basketball, ten of the top twenty-five teams’ graduation rates were 60% or lower according to NCAA calculations. *Id.*

152. *O’Bannon v. Nat’l Collegiate Ass’n*, No. 14-16601, 2015 WL 5712106, at \*26 (9th Cir. Sept. 30, 2015).

153. *Id.*

154. *Id.*

155. Hartzler, *supra* note 11, at 218.

156. 29 U.S.C. § 631(a) (2012); Hartzler, *supra* note 11, at 218.

157. Hartzler, *supra* note 11, at 224 (quoting H. Lane Dennard, Jr. & Kendall L. Kelly, *Price Waterhouse: Alive and Well Under the Age Discrimination in Employment Act*, 51 *MERCER L. REV.* 721, 724, 726 (2000)). *See generally* 29 U.S.C. § 623 (laying out the prohibitions on employer practices).

158. Hartzler, *supra* note 11, at 219.

159. The enforcement of the ADEA is through the FLSA, which ensures that the fair labor standards of the work place are unaffected by age discrimination. 29 U.S.C. § 626(b); *see also*, *Ensuring Fairness for Older Workers: Hearing on S.1756 Before the S. Comm. on Health, Educ., Labor, & Pensions*, 111th Cong. 1 (2010) (statement of Tom Harkin, Chairman). The hearing was convened to examine age discrimination against older workers to ensure that these workers are “treated with the fairness they deserve.” *Id.* (statement of Tom Harkin, Chairman).

## III. ANALYSIS

The life-cycle model of career employment accurately depicts the relationship between wages and age in the United States.<sup>160</sup> Historically, the average amount of income earned over an employee's work life cycle increases with age.<sup>161</sup> As an employee gets older, his or her earnings increase and are not always a reflection of his or her productivity.<sup>162</sup> The life-cycle model of career employment and earning capacity is in reverse for most athletes, both professional and otherwise. Athletes are unique because their skill set is particularly lucrative at a young age.<sup>163</sup> While professional athletes are at the peak of their career, they will frequently pursue long-term contracts to guarantee continued compensation in the event of an injury and as their skills decline.<sup>164</sup> As athletes get older, their skills deteriorate and are less valuable to their respective job markets.<sup>165</sup> It therefore follows that student-athletes should be permitted to profit off of their unique skill set in their youth. Their careers in this job market are significantly shorter than others, and student-athletes should earn a fair wage for their performance in a profitable industry while their skill set is at a heightened value and while they are subjected to significant physical risk.

Additionally, student-athletes are uniquely vulnerable to reverse age discrimination.<sup>166</sup> Student-athletes ages eighteen through twenty-three are not protected under the ADEA, but they are equally vulnerable to age-based stereotypes.<sup>167</sup> Student-athletes cannot be hired into professional leagues until they are of a certain age—no matter

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160. Issacharoff & Harris, *supra* note 11, at 787.

161. *Id.*

162. *Id.* at 787–88.

163. This is due to the young retirement age of athletes and the increased physical risk that they endure. SCOTT TINLEY, *RACING THE SUNSET: AN ATHLETE'S QUEST FOR LIFE AFTER SPORT* (2015). Although some athletes may make more money as they get older (e.g. Michael Jordan), this is not the case for most athletes; less than 2% of NCAA players move on to the professional league even though they are participating in a lucrative league. *E.g.*, J.G. Joakim Soederbaum, Comment, *Leveling the Playing Field—Balancing Student-Athletes' Short- and Long-Term Financial Interests with Educational Institutions' Interests in Avoiding NCAA Sanctions*, 24 MARO. SPORTS L. REV. 261, 274 (2013).

164. Issacharoff & Harris, *supra* note 11, at 792 n.43.

165. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 76–78 (2006).

166. Reverse age discrimination is a theory asserting that when an employer gives preferential treatment to an older person because of their age to the detriment of a younger worker, discrimination has occurred. Hartzler, *supra* note 11, at 229.

167. In *General Dynamics Land Systems, Inc. v. Cline*, the U.S. Supreme Court held that discrimination against the young is outside of the ADEA's protection and the employer, therefore, did not violate the ADEA's prohibition against discrimination because of age. 540 U.S. 581, 600 (2004).

their athletic ability.<sup>168</sup> They are forced to stay in the collegiate league with no pay while they are essentially providing the same services to an industry that does not recognize them as employees. Like older employees who are protected under the ADEA from age discrimination and unfair labor practices, student-athletes are equally vulnerable and deserving of protection. The principle of fairness as used in the ADEA is equally applicable to young workers, and specifically, student-athletes. They should not suffer adverse employment conditions because of their age. Because they are driving the profits of a lucrative industry, they should not be deprived of employee protections or fair wages for their labor.

In this respect, the three models discussed in this Comment, the NLRA and *Northwestern University*, the FLSA, and antitrust law as used in *O'Bannon*, provide protection for student-athletes who remain uniquely vulnerable under the current laws. This Comment proposes that student-athletes should be compensated as employees. This Part applies *Northwestern University*, the FLSA, and the *O'Bannon* decision, as well as public policy, to support this contention and argues that protection should be provided for student-athletes who have a different life cycle of employment and are left unprotected by the law. Second, this Comment argues that universities and the NCAA can compensate athletes without causing the downfall of the NCAA. To do this, student-athletes should keep their full grant-in-aid scholarships, receive stipends to cover additional costs, and be paid for the use of their images, names, and likenesses through a trust fund.

#### A. Student-Athletes Should Be Considered Employees

The recent challenges to the NCAA are not revolutionary, in fact, student-athletes have sought better treatment and fair shares of revenue for nearly a century.<sup>169</sup> Two major cases, *Northwestern University*

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168. The NFL requires an athlete to either be out of high school for three years or to have finished at least three college football seasons before they are eligible for the draft. Soederbaum, *supra* note 163, at 269. The NBA requires that the player be nineteen years old and at least one year out of high school. *Id.* at 270.

169. William B. Gould IV et al., *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 2 n.1 (2014) (citing Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1005–06 (2012)).

In 1936, . . . the Howard University football team struck for several games, demanding adequate medical supplies for players, nutritional food and access to campus jobs. Two years later, the Louisiana State University football team dismissed a player after 'he dared to 'agitate a union' of players.' . . . After an undefeated 1937 season garnered the squad a Rose Bowl invitation, [University of Pittsburgh football] players demanded \$200 in pocket money for their participation. When university officials balked, the

and *O'Bannon*, give rise to significant alterations to the NCAA model and serve as important precedent for other college athletes seeking the same rights.<sup>170</sup> There is ample support within the law and public policy to establish that student-athletes are employees, and, thus, eligible for collective bargaining rights and additional monetary compensation.

1. *Northwestern University Precedent and the NLRA Lend Support To Establish That Student-Athletes Are Employees*

Using *Northwestern University* and the NLRA, student-athletes could persuasively argue that they are employees and deserve compensation. Football players at Northwestern University successfully petitioned for a union representation election in front of NLRB Regional Director, Peter Sung Ohr.<sup>171</sup> The student-athletes argued that they are employees of the university and are entitled to collective bargaining rights and other protections under the NLRA.<sup>172</sup> Section 2(3) of the Act states that the term employee includes “any employee.”<sup>173</sup> Following U.S. Supreme Court precedent, the Board applied the common law definition of employee to decide that the Northwestern grant-in-aid scholarship players were employees under Section 2(3).<sup>174</sup>

“[A]n employee is a person who performs services for another under a contract of hire, subject to the others’ control or right of control, and in return for payment.”<sup>175</sup> Thus, looking at the common law definition, all student-athletes subjected to programs like Northwestern’s football program should be considered employees. All student-athletes, particularly those in revenue-generating sports,<sup>176</sup> perform

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players voted 17-16 to boycott the game . . . The thirty-odd members of the freshman squad threatened to strike again several months later. Their demands included four-year athletic scholarships, shorter working hours, accommodation for class time missed due to football obligations, and collective bargaining rights.

*Id.* (fourth alteration in original) (quoting Fram & Frampton, *supra* note 169, at 1005–06).

170. *Northwestern University* directed the Northwestern football team to hold an election to vote whether the players desired to be “represented for collective bargaining purposes by College Athletes Players Association (CAPA).” NLRB, *Northwestern Univ.*, *supra* note 3, at 23. Student-athletes at other institutions who wish to be represented by a union would similarly have to file a petition under the NLRA. Arguably, the *O'Bannon* decision is more far-reaching and will affect all student-athletes under the NCAA.

171. *Id.* at 23–24.

172. *Id.* at 2.

173. *Id.* at 13 (second alteration in original).

174. *Id.* (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

175. *Id.* (citing *Brown Univ.*, 342 NLRB 483, 490 N.24 (2004)).

176. Examples of revenue-generating sports programs include men’s Division I Football and Basketball.

services for their universities who profit substantially.<sup>177</sup> To offer these services, student-athletes dedicate a significant amount of time. In a 2011 self-reported survey conducted by the NCAA, Division I men's FBS football and basketball players reported spending on average between 39.2–43.3 hours on athletic activities.<sup>178</sup> The average hours spent per week on academia was 37.3–38.0, indicating that student-athletes dedicate more time to their athletic programs and are therefore primarily athletes rather than students.<sup>179</sup>

The NLRB in *Northwestern University* analogized the tender offer with a contract for hire.<sup>180</sup> The tender provides information to players regarding the duration and conditions under which they remain in the program and receive their scholarship<sup>181</sup> thus resembling an employment contract.<sup>182</sup> This tender is a common form of agreement for athletes wishing to play collegiate sports.<sup>183</sup> Additionally, due to athletic scholarship, courts and scholars already “overwhelmingly recognize the contractual nature of the relationship between student-athletes and their institutions.”<sup>184</sup> The university makes an offer to pay for the student-athletes’ academic expenses.<sup>185</sup> The student-athletes, by accepting the university’s offer, promise to provide the university and the NCAA with their athletic performance for a fixed duration.<sup>186</sup> The student-athletes sign the tender offer, which evidences each “parties’ intent to be bound.”<sup>187</sup> Finally, the monetary value of the scholarship and the student-athletes’ promise to attend only one university

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177. See *supra* notes 44–49 and accompanying text.

178. NCAA SAN ANTONIO CONVENTION, *Examining the Student-Athlete Experience Through the NCAA GOALS and SCORE Studies*, PowerPoint Slides 17 (Jan. 13, 2011), [http://www.ncaa.org/sites/default/files/Goals10\\_score96\\_final\\_convention2011\\_public\\_version\\_01\\_13\\_11.pdf](http://www.ncaa.org/sites/default/files/Goals10_score96_final_convention2011_public_version_01_13_11.pdf).

179. *Id.* at 18.

180. NLRB, *Northwestern Univ.*, *supra* note 3, at 14.

181. *Id.*

182. The elements of a contract include: an offer, acceptance, consideration, and the parties’ intent to be bound. Esquire, *Contracts Outline: The UCC and Restatement Second of Contracts (IL)*, LEGAL THREE (Oct. 22, 2013), <http://legalthree.com/legal-news/contract-generally-the-ucc-and-restatement-second-of-contracts-1/>.

183. “In the NCAA, the National Letter of Intent (NLI) accompanied by a scholarship agreement constitute[ ] the written contract a . . . student-athlete must sign in order to solidify his or her commitment to a particular institution.” M. Alexander Russell, *Leveling the Playing Field: Identifying a Quasi-Fiduciary Relationship Between Coaches and Student-Athletes*, 43 J.L. & EDUC. 289, 292 (2014).

184. Louis Hakim, *The Student-Athlete vs. the Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract*, 2 VA. J. SPORTS & L. 145, 169 (2000).

185. *Id.* at 169–70.

186. *Id.* at 170.

187. *Id.*

shows valuable consideration and demonstrates all elements of a contract.<sup>188</sup>

The relationship between student-athletes and their universities further resembles an employment relationship because the head coach maintains the ability to reduce or cancel student-athlete scholarships for various reasons.<sup>189</sup> Because this action can take place immediately and under a variety of circumstances, the Board in *Northwestern University* found that these scholarships were connected to the performance of athletic services.<sup>190</sup> These scholarships “can be . . . canceled if the player voluntarily withdraws or abuses the team rules.”<sup>191</sup> The NCAA currently prohibits players from receiving compensation or any profit derived from their athletic ability or reputation, making them reliant on their scholarships for income.<sup>192</sup>

Division 1 student-athletes are subject to an extreme amount of control. The NCAA limits players’ athletically-related activities to twenty hours per week during the academic year<sup>193</sup> so that student-athletes can be both students and athletes.<sup>194</sup> The schools, however, find clever ways to surpass this hour requirement.<sup>195</sup> The NCAA does not count certain activities “such as travel, mandatory training meetings, voluntary weight conditioning or strength training, medical check-ins, [and] training tape review” toward the CARA total.<sup>196</sup> Additionally, players must follow the rules of their program or face threat of discipline or loss of their scholarship.<sup>197</sup> The universities control their players’ living arrangements, ability to apply for outside employment, off-campus travel, Internet posts, media access, and other activities.<sup>198</sup> Universities also have considerable control over the student-athletes’ academic education.<sup>199</sup> Often times, players are unable to enlist in certain classes if they conflict with practice or travel

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188. *See id.*

189. NLRB, *Northwestern Univ.*, *supra* note 3, at 15.

190. The scholarship cannot be reduced on the basis of injury. *Id.* at 4 n.8. “If a player has a career ending injury, they are deemed a ‘medical non-counter,’” meaning “that their football scholarship does not count against the NCAA’s scholarship limit.” *Id.* *See generally* NCAA, *supra* note 22, at 195 (outlining the rule on retroactive financial aid).

191. NLRB, *Northwestern Univ.*, *supra* note 3, at 15. *See generally* NCAA, *supra* note 22, at 196 (outlining the rule on reduction and cancellation).

192. NLRB, *Northwestern Univ.*, *supra* note 3, at 14. *See generally* NCAA, *supra* note 22, at 67 (outlining the rule on compensation for student-athletes).

193. NLRB, *Northwestern Univ.*, *supra* note 3, at 6 n.11.

194. NCAA, *supra* note 22, 4 (Article 2.9).

195. NLRB, *Northwestern Univ.*, *supra* note 3, at 15–16.

196. *Id.* at 6 n.11.

197. *Id.* at 15.

198. *Supra* note 91 and accompanying text.

199. NLRB, *Northwestern Univ.*, *supra* note 3, at 16.

for away games.<sup>200</sup> Athletes are subject to a minimum grade point average by their universities and must make certain progress toward obtaining their degree in addition to their athletic duties.<sup>201</sup>

The Northwestern athletes successfully used their grant-in-aid scholarships as evidence of payment,<sup>202</sup> a practice that can be used for all athletes playing revenue-generating sports and who are seeking employee status. This valuable grant-in-aid scholarship, which Division I FBS football and basketball players receive, is directly tied to the student-athletes' athletic ability and serves as payment for their performance.

Northwestern University relied on *Brown University* to argue that student-athletes are not employees and are more akin to graduate students.<sup>203</sup> This argument was not convincing to the Board and can be rebutted in future litigation. The Board reasoned that the student-athletes' duties are "unrelated to their academic studies unlike the graduate assistants whose teaching and research duties [are] inextricably related to their graduate degree requirements."<sup>204</sup> Student-athletes' athletic related activities do not further their education; in fact, their dedication to athletics may work to their education's detriment and often does.<sup>205</sup> Also, unlike the graduate students who are working toward their professions, the majority of athletes never have the opportunity to play professionally.<sup>206</sup> Often times, a student-athlete's superior athletic skills and ability to perform are a means to pay for college and further their education in a different field.<sup>207</sup>

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200. *Id.*

201. *Id.* at 17; Vine, *supra* note 41, at 249. See generally NCAA, *supra* note 22, at 153 (outlining the rules for qualifiers).

202. NLRB, Northwestern Univ., *supra* note 3, at 14.

203. *Id.* at 18.

204. *Id.*

205. See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 981 (N.D. Cal. 2014). However, this is not the case for Northwestern University. "[T]he players have a cumulative grade point average of 3.024 and a 97% graduation rate." NLRB, Northwestern Univ., *supra* note 3, at 13. Their Academic Progress Rate (APR), which refers to a universities retention of its student-athletes and player eligibility, is 996 out of 1000. *Id.* at 13, 13 n.28. "The players' graduation rate and their APR both rank first in the country among football teams." *Id.* at 13. Other universities have a significantly lower graduation rate. E.g., Soederbaum, *supra* note 163, at 274.

206. "[L]ess than 2% of NCAA football and basketball players actually make it from NCAA to professional sports." Soederbaum, *supra* note 163, at 274.

207. Some Northwestern Players have plans to go on to "medical school, law school, and careers in the engineering field after receiving their . . . degree." NLRB, Northwestern Univ., *supra* note 3, at 13.

The *Northwestern University* decision has been attacked by the press,<sup>208</sup> Congress,<sup>209</sup> and nonathlete students;<sup>210</sup> however, others have celebrated this decision.<sup>211</sup> Northwestern University appealed to the NLRB in Washington, D.C.,<sup>212</sup> and on August 17, 2015, the NLRB decided to unanimously decline jurisdiction.<sup>213</sup> Most importantly on appeal, the NLRB did not decide whether student-athletes are considered employees.<sup>214</sup> The Board did not preclude reconsidering the issue of student-athletes' employee status in the future,<sup>215</sup> and it is likely that it will soon be confronted with this issue again.<sup>216</sup>

The Board declined jurisdiction in part because of its concern with the promotion of labor stability.<sup>217</sup> There are roughly 125 collegiate institutions with FBS football programs, seventeen of which are private institutions.<sup>218</sup> As the Board observed, it does not have jurisdic-

208. See, e.g., Douglas Belkin et al., *Northwestern Football Players Get Approval to Unionize*, WALL STREET J., Mar. 26, 2014, <http://wsj.com/articles/>; Patrick T. Harker, Opinion, *Student Athletes Shouldn't Unionize*, N.Y. TIMES, Apr. 1, 2014, [http://www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html?\\_r=1](http://www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html?_r=1).

209. See, e.g., *Press Release, Committee Examine Troubling Consequences of Unionizing Student Athletes*, EDUC. & WORKFORCE (May 8, 2014), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=379328> (quoting *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Educ. & Workforce Comm.*, 113th Cong. 2014 (statement of Rep. John Kline, Chairman, H. Educ. & Workforce Comm.)).

Today's witnesses confirmed classifying student athletes as school 'employees' will hurt their athletic and academic careers. . . . There is no question the legitimate concerns of student athletes must be addressed, but doing so at the collective bargaining table will do more harm than good. It's encouraging to hear from institutions with policies in place that put student athletes first, such as providing continued academic support to students who sustain a sports injury. We need all institutions to step up and follow suit. Instead of treating student athletes as something they are not, let's help ensure the real challenges they face are resolved.

*Id.* (quoting Rep. John Kline).

210. See, e.g., Katie Lobosco, *Students Cry Foul over Athletes Unions*, CNN MONEY (Apr. 23, 2014, 6:15 AM), <http://money.cnn.com/2014/04/23/pf/college/student-athlete-union-survey/>.

211. See, e.g., Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11AM), <http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/>.

212. Alan K. Cabbage, *Statement by Alan K. Cabbage, Vice President for University Relations, in Regard to Decision by NLRB Regional Director*, NW. U. NEWS (Mar. 26, 2014), <http://www.northwestern.edu/newscenter/stories/2014/03/statement-by-alan-k.-cabbage,-vice-president-for-university-relations,-in-regard-to-decision-by-nlr-regional-director.html>.

213. NLRB, *Northwestern Univ. Appeal*, *supra* note 7, at 7.

214. *Id.* at 1.

215. *Id.*

216. See Dave Zirin, *The Absurd, Cowardly, and Morally Bankrupt NLRB Decision Against the Northwestern Football Union*, NATION (Aug. 17, 2015), <http://www.thenation.com/article/the-absurd-cowardly-and-morally-bankrupt-nlr-b-decision-against-the-northwestern-football-union/>.

217. NLRB, *Northwestern Univ. Appeal*, *supra* note 7, at 1.

218. *Id.* at 5.

tion over a majority of the FBS teams because these schools are not considered employers under Section 2(2) of the Act (most of them are public institutions).<sup>219</sup> According to the Board, making a decision regarding Northwestern would promote instability in labor relations.<sup>220</sup> However, student-athletes at state-run institutions can gain employee status and unionize under state labor laws, just as the private institutions can under the NLRA.<sup>221</sup> Although some states have legislation against unionizing, or against considering student-athletes as employees,<sup>222</sup> these laws may be challenged. Student-athletes should be considered employees, and a law depriving employees of wages should not stand.<sup>223</sup> Each team that participates in Division I athletics is unique, and student-athletes at each university may have particular grievances that they wish to address. The ability to do so is available under current state and federal law, and thus, the stability of labor relations within the NCAA is unaffected.

The *Northwestern University* Board left open the possibility for unionization in the future, and because state law mimics NLRA regulations pertaining to employee status,<sup>224</sup> student-athletes at both private and public institutions may petition to be considered employees and able to unionize. The ability to collectively bargain is a start; student-athletes will have certain rights previously not afforded to them, such as the ability to bargain for wages, health coverage, and receive protection from other laws including antidiscrimination statutes and workers' compensation statutes. Ultimately, the NCAA needs to make changes for student-athletes to improve their status and obtain additional compensation.

Although the Board's recent decision is not precisely a win for student-athletes, *Northwestern University* exposed the strenuous athletic programs of Division I schools and the amount of control that stu-

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219. *Id.*

220. *Id.*

221. *Id.* at 1; Zirin, *supra* note 216.

222. NLRB, *Northwestern Univ. Appeal*, *supra* note 7, at 5, 5 nn.18–19 (“Wis. STAT. § 111.91(3)(a) (limiting public sector union collective bargaining to ‘total base wages’); N.C. GEN. STAT. ANN. § 95-98 (declaring public sector collective bargaining illegal and unlawful)[;] . . . OHIO REV. CODE SEC. 3345.56; MICH. COMP. LAWS. SEC. 423.201(1)(e)(iii) (covering Big Ten members Ohio State University, University of Michigan, and Michigan State University). Both states were enacted after [the Northwestern] petition . . . was filed.”).

223. A law depriving an employee of wages could be challenged in numerous ways under state and federal law and possibly under the Thirteenth Amendment. *See, e.g.*, U.S. CONST. amend. XIII § 1 (prohibiting slavery and involuntary servitude).

224. *See generally* *Collective Bargaining and Labor Arbitration: An Overview*, LEGAL INFORMATIONAL INST., [http://www.law.cornell.edu/topics/collective\\_bargaining.html](http://www.law.cornell.edu/topics/collective_bargaining.html) (last visited Aug. 23, 2015) (discussing how collective bargaining is governed by both federal and state statutory laws).

dent-athletes are subjected to, despite the amateurism these schools purportedly stand for. As Kain Colter stated: “It’s definitely not a loss . . . . Since we started this movement, a lot of positive changes have come from this . . . . A lot of the things that we’ve been fighting for have been adopted. But there is still a lot of room to go.”<sup>225</sup> It is obvious that student-athletes want to voice their concerns to those in control of their working conditions, and they should have the right to do so, “even if recognition of that right is inconvenient for, or philosophically disagreeable to, or adverse to the economic interests of their employer.”<sup>226</sup>

## 2. *The Relationship Between Student-Athletes, Universities, and the NCAA Does Not Satisfy the DOL’s Internship Exception*

The Department of Labor’s six-factor test for determining whether an unpaid intern is entitled to minimum wage can be used to show that student-athletes are employees and entitled to compensation.<sup>227</sup> This test regulates unpaid internships for services rendered by college students to for-profit employers.<sup>228</sup> Under the test, the internship must meet all six-factors articulated by the Department of Labor to be considered an internship.<sup>229</sup> If the position is an internship, the employer is not subjected to minimum wage and overtime provisions.<sup>230</sup> However, if one or more of these factors is not met, then the individual is considered an employee and is entitled to compensation.<sup>231</sup> When scrutinized under this test, collegiate institutions cannot meet the fourth factor: “the employer that provides the training derives no immediate advantage from the activities of the intern.”<sup>232</sup> Because the institutions do profit substantially from the activities of college

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225. Tom Farrey, *Northwestern Players Denied Request To Form First Union for Athletes*, ESPN (Aug. 17, 2015), [http://espn.go.com/college-football/story/\\_id/13455477/nlrb-says-northwestern-players-cannot-unionize](http://espn.go.com/college-football/story/_id/13455477/nlrb-says-northwestern-players-cannot-unionize).

226. *Id.* (quoting Reply Brief for Petitioner Coll. Athletes Players Ass’n at 2, NLRB, *Northwestern Univ.*, *supra* note 3 (No. 13-RC-121359)).

227. Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1096 (2012); M. Tyler Brown, Comment, *College Athletics Internships: The Case for Academic Credit in College Athletics*, 63 AM. U. L. REV. 1855, 1874–91 (2014); see Keith L. Hammond, *Former Soccer Player Seeks Minimum Wage for Student-Athletes, Sues NCAA, 352 Division I Schools*, LEXOLOGY (Oct. 30, 2014), <http://www.lexology.com/> (search “Keith L. Hammond”; then follow “Keith L. Hammond” hyperlink under Results; then follow “Former Soccer Player Seeks Minimum Wage for Student-Athletes, Sues NCAA, 352 Division I Schools” hyperlink).

228. FACT SHEET #71, *supra* note 115.

229. *Id.*

230. *Id.*

231. *See id.*

232. *Id.*

athletes, these athletes should be considered employees under the FLSA and entitled to compensation.

Here, the FLSA is applicable to student-athletes because these students provide a service to their universities and the NCAA, and those institutions and organizations profit significantly off of those services.<sup>233</sup> The FLSA is useful in this context because it makes students' work compensable regardless of their status as students.<sup>234</sup> This is particularly persuasive in combating the NCAA's amateurism defense where it claims that student-athletes cannot be both students and workers.<sup>235</sup> In fact, this exception was made for the very purpose of countering that argument.<sup>236</sup> Further, arguing that the FLSA is not applicable would lead to absurdities, such as other student workers<sup>237</sup> not being eligible for compensation. This would be inconsistent with the DOL's purpose in regulating student workers and making sure that they get payment where payment is due.<sup>238</sup>

Under the FLSA, "employ" is defined as "to suffer or permit to work."<sup>239</sup> College sports fall under this definition and can be interpreted under this test because they are structured like professional league apprenticeships.<sup>240</sup> NCAA football provides the equivalent of an unpaid internship because the NFL has no minor league system.<sup>241</sup> "The NFL requires an athlete to be either out of high school for three years or to have finished at least three college football seasons" before they are eligible for the draft.<sup>242</sup> While the NBA only requires that its players "be at least nineteen-years-old and to be at least one year" out of high school before being drafted, the NBA primarily recruits from the NCAA.<sup>243</sup> Both football and basketball programs may be scrutinized under this test because the revenues that schools bring in from

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233. Student-athletes dedicate a substantial amount of time in their athletic programs, which contributes to the profitability of their program. See *supra* notes 44–49, 177–85, and accompanying text.

234. Bacon, *supra* note 115, at 68.

235. See NLRB, Northwestern Univ., *supra* note 3, at 2, 18; see also O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 974–75, 979–980, 999 (N.D. Cal. 2014).

236. "By issuing Fact Sheet #71, the Obama administration suggests that it intends to hold for-profit firms to the DOL's guidelines more strictly than in the past." Bacon, *supra* note 115, at 68.

237. For purposes of this Comment, "student workers" include research assistants and other students who work on campus or for the university.

238. *Id.* at 70–71.

239. 29 U.S.C. § 203(g) (2012).

240. LeRoy, *supra* note 227, at 1096. LeRoy's article only analyzes FBS football and not college basketball. This Comment proposes that like college football, college basketball can be considered an apprenticeship because there is no minor league.

241. *Id.* The same applies to NCAA basketball and the NBA.

242. Soederbaum, *supra* note 163, at 269.

243. *Id.* at 270.

their athletic programs is greater than the cost of those programs, which results in huge profits.<sup>244</sup>

When applying the six factor test to the football program at Northwestern, which resembles the Division I athletic programs across the country, the NCAA and membership institutions would have a difficult time satisfying this test, particularly the fourth factor: “[t]he employer that provides the training derives no immediate advantage from the activities of the intern; . . . .”<sup>245</sup> The Northwestern football program generated approximately \$235 million in revenue from 2003–2012.<sup>246</sup> Both the NCAA and membership institutions receive significant benefits from the activities of their revenue-generating athletes.<sup>247</sup> Often times, as demonstrated in *Northwestern University*, membership institutions are able to use the revenue generated from their athletic program in any way they please.<sup>248</sup> Because the universities would not satisfy this test, student-athletes would be entitled to compensation.

Using the FLSA is beneficial for student-athletes because it applies to all colleges and universities—both private and public.<sup>249</sup> Although, the FLSA’s internship regulation does not apply to educational internships wherein students receive academic credit,<sup>250</sup> this is inconsequential. Student-athletes do not receive academic credit for their participation in athletics, which resembles an unpaid internship,<sup>251</sup> meaning that this test may be applied to student-athletes.

### 3. *O’Bannon Supports the Contention that Student-Athletes Should Be Compensated*

The licensing issues raised in *O’Bannon*, as well as in other contexts,<sup>252</sup> are directly intertwined with the issues of whether student-athletes should receive compensation. *O’Bannon* makes clear that

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244. See *supra* notes 44–49 and accompanying text.

245. *Id.*

246. NLRB, *Northwestern Univ.*, *supra* note 3, at 14.

247. See *supra* notes 46–51 and accompanying text.

248. NLRB, *Northwestern Univ.*, *supra* note 3, at 14.

249. LeRoy, *supra* note 227, at 1096.

250. *Id.* at 1096–97.

251. *Id.*

252. See, e.g., Edward H. Grimmett, Comment, *NCAA Amateurism and Athletics: A Perfect Marriage or a Dysfunctional Relationship?—An Antitrust Approach to Student-Athlete Compensation*, 30 *TOURO L. REV.* 823, 823 (2014). “Johnny Manziel, a [NCAA] Heisman Trophy winner[,] . . . allegedly received improper benefits in exchange for his autograph and was [consequently] suspended for the first half of Texas A&M’s season opener for an ‘inadvertent violation of NCAA rules.’” *Id.* (quoting Tom Fornelli, *Jonny Manziel Suspended for First Half of Rice Game*, CBS SPORTS (Aug. 28, 2013, 3:40 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/23366173/johnny-manziel-suspended-for-first-half-of-rice-game>).

student-athletes should be compensated because the NCAA, its member institutions, and its licensing affiliate (The Collegiate Licensing Company) generate billions of dollars through television revenue and profit substantially from the names and images of student-athletes.<sup>253</sup> In comparison, student-athletes only receive grant-in-aid scholarships for their role in the college sports market.<sup>254</sup> The court in *O'Bannon* held that the rules prohibiting player compensation for use of players' names, images, and likenesses unreasonably restrained trade.<sup>255</sup> The NCAA is now forced to develop a way to compensate players for the use of their names, images, and likenesses, or at least find a less restrictive means.<sup>256</sup> The *O'Bannon* decision is useful because it aids student-athletes in receiving more compensation; however, there are still other issues to consider. As Judge Wilkin stated in her opinion, the challenged restraints and other inequalities in collegiate athletics and higher education "could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress."<sup>257</sup>

Although *O'Bannon* provides authority for athletes to receive compensation, it does not fully resolve the issues surrounding the relationship between student-athletes, membership institutions, and the NCAA. If student-athletes are able to show that they are employees of their institutions through the NLRA model used in *Northwestern University* or through the FLSA, student-athletes will be able to gain additional compensation and other employment rights that will help resolve their grievances.

#### 4. *Public Policy Supports the Contention that Student-Athletes Are Employees and Should Be Compensated*

The status quo of collegiate sports has been heavily criticized.<sup>258</sup> The *New York Times* commented on university spending under the NCAA's old rules, which allowed for heavy spending on the best ath-

253. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 993–94 (N.D. Cal. 2014), *aff'd in part, vacated in part*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015); Grimmett, *supra* note 252, at 823.

254. Grimmett, *supra* note 252, at 823–24.

255. *O'Bannon*, 7 F. Supp. 3d at 1007.

256. *Id.* at 1007–08.

257. *Id.* at 1009.

258. See, e.g., *Players: 0; Colleges: \$10,000,000,000*, *ECONOMIST* (Aug. 16, 2014), <http://www.economist.com/news/united-states/21612160-pressure-grows-let-student-athletes-share-fruits-their-own-labours-players-0> ("For decades, . . . the best coaches earn millions of dollars while the best players live hand to mouth . . . for colleges to make millions from the unpaid labour of mostly black athletes carried 'the whiff of the plantation.'") (quoting Taylor Branch, *The Shame*

letic coaches and extravagant facilities.<sup>259</sup> The head football coach at Alabama makes \$6.9 million a year, while his offensive coordinator earns \$680,000 and his defensive coordinator earns \$1.35 million.<sup>260</sup> The football team at Ohio State has a 10,000 square foot locker room, which is worth \$2.5 million.<sup>261</sup> In addition, conferences may receive money if one of their teams qualifies for the Bowl Championship Series; last year, Florida State and Auburn earned \$18 million for each of their conferences.<sup>262</sup> These lucrative athletic programs have become central to these schools and their ability to function as higher-education institutions.

Knowing this, we must ask: Is the relationship between student-athletes and their membership institutions fair and just? To many people, the current arrangement between student-athletes, their universities, and the NCAA seems like a fair deal.<sup>263</sup> Universities offer full scholarships to students-athletes while many other nonathlete students struggle to pay for college.<sup>264</sup> However, those who make this argument fail to realize the true underpinnings of the relationship between student-athletes, their universities, and the NCAA; it is significantly different from the relationship other students have with their university.

Student-athletes cannot gain professional experience without compromising their scholarships and playing eligibility.<sup>265</sup> Article 12.4 of the NCAA bylaws permits student athletes to obtain employment but limits compensation to “work actually performed” and “at a rate commensurate with the going rate in that locality for similar services.”<sup>266</sup> Other nonathlete students do not face these same employment restrictions.<sup>267</sup> Nonathlete students are free to intern with firms in their field

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of *College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/archive/2011/10/the-shame-of-college-sports/308643/>).

259. Steve Eder, *Fears Rise over Wealth Gap as Top College Conferences Push Overhaul*, N.Y. TIMES, Aug. 6, 2014, [http://www.nytimes.com/2014/08/07/sports/ncaafotball/new-rules-would-further-separate-college-sports-haves-from-have-nots.html?\\_r=1](http://www.nytimes.com/2014/08/07/sports/ncaafotball/new-rules-would-further-separate-college-sports-haves-from-have-nots.html?_r=1).

260. *Id.*

261. *Id.*

262. *Id.*

263. See, e.g., Kieran McCauley, *College Athletes Shouldn't Be Paid*, DAILY LOCAL (Apr. 28, 2015), <http://www.dailylocal.com/sports/20150428/college-athletes-shouldnt-be-paid> (stating “athletic scholarships are their compensation and a fair one at that”); *Players: 0; Colleges: \$10,000,000,000*, *supra* note 258.

264. See, e.g., *Players: 0; Colleges: \$10,000,000,000*, *supra* note 258.

265. Jeffrey Standen, *The Next Labor Market in College Sports*, 92 OR. L. REV. 1093, 1111 (2014).

266. NCAA, *supra* note 22, at 67.

267. Gregory Sconzo, Comment, *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. MIAMI L. REV. 737, 746 (2013).

or profession without penalty or reprisal, but student-athletes are restricted in many respects.<sup>268</sup> Unlike many other students, student-athletes “lack professional experience and have comparatively little knowledge about their chosen fields . . . upon graduation.”<sup>269</sup> For example, Jon Gissinger, former tight-end and a graduate from the University of Missouri, stated: “A football player is not going to get a job over someone who worked and had internships . . . . My résumé right now is football.”<sup>270</sup>

Moreover, student-athletes participating in college basketball and football, “identify . . . more strongly as athletes than as students . . . [and give] more weight in choosing [a] college to athletics than to academics.”<sup>271</sup> After all, the time student-athletes dedicate to their athletic programs takes away from the time dedicated to academics.<sup>272</sup> Consequently, there have been many instances of academic fraud.<sup>273</sup> “In 2011, the graduation rates (given six years to complete the degree) for football and basketball players were 16% and 25% below the college average, respectively.”<sup>274</sup> Because of the rigorous efforts players put into their athletic goals, they graduate or simply leave the university with a subpar academic foundation.<sup>275</sup> The current arrangement adversely affects a majority of student-athletes who do not pursue careers in professional sports.<sup>276</sup>

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268. *Id.*

269. Soederbaum, *supra* note 163, at 275–76.

270. Stephanie Stark, *College Athletes Suffer the Greatest Injustice from NCAA*, USA TODAY: C. (Aug. 28, 2011, 4:01 PM), <http://college.usatoday.com/2011/08/28/college-athletes-suffer-the-greatest-injustice-from-ncaa/>.

271. Soederbaum, *supra* note 163, at 274 (second, third, and fourth alteration in original) (footnote omitted) (quoting Gary Gutting, Opinion, *The Myth of the ‘Student-Athlete’*, N.Y. TIMES: BLOG (Mar. 15, 2012, 8:30 PM), [http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/?_r=0)).

272. *See supra* notes 178–79 and accompanying text.

273. *Players: 0; Colleges: \$10,000,000,000*, *supra* note 258. “[A]n investigation into the University of North Carolina found that athletes were often enrolled in ‘no show classes.’” *Id.* Only “44% of men’s basketball players graduate within six years” from the average member school in the NCAA’s five highest-grossing conferences. *Id.*; *see also* Vine, *supra* note 43, at 259.

To enable student-athletes to devote the maximum time to their respective schools, schools have created specialized academic curricula for them, consisting of undemanding courses and sometimes of questionable practicable value. Kevin Ross, a former Creighton basketball player, complained . . . that he never learned to read in four years at Creighton University. . . . Football players at Ohio State University were able to retake head coach Jim Tressel’s ‘Varsity Football 101’ class up to five times for a total of ten credits.

Vine, *supra* note 41, at 259 (footnotes omitted).

274. Soederbaum, *supra* note 163, at 274 (footnote omitted).

275. *See id.* at 275.

276. *See id.* at 275–76.

College is a “necessary piece of the professional athletics puzzle[,]” but “less than 2% of NCAA football and basketball players actually make it from NCAA to professional sports.”<sup>277</sup> Despite this, it is beneficial for the student-athlete to play college sports to gain exposure and earn a degree, even if it is just a partial degree.<sup>278</sup> The athletes that do play professionally often face short-term and insecure contracts.<sup>279</sup> They run the risk of being released for injury or nonperformance.<sup>280</sup> A degree gives student-athletes a back-up plan in case their professional career is cut short. With the student-athletes’ unique life cycle of employment, it is only fair that they be compensated for the labor they provide to their universities and the NCAA while they are physically able to do so.<sup>281</sup>

College sports are an independent enterprise that is both a popular and lucrative form of entertainment in the United States.<sup>282</sup> Student-athletes are stars that are “watched and cheered on by millions.”<sup>283</sup> Within Johnny Manziel’s<sup>284</sup> first year of playing Division I football for Texas A&M, he generated \$37 million in media exposure; he was not entitled to any of this profit.<sup>285</sup> The NCAA acquired its own fan base without having to compete with the NFL.<sup>286</sup> The March Madness college basketball tournament generated \$1.15 billion in advertising revenue in 2013<sup>287</sup> and “sends workplaces across the [United States] into a frenzy with small-time betting” each year.<sup>288</sup> College athletics generate \$10.5 billion a year from television contracts, exceeding the amount that the NFL generates. Of that amount, less than 30% goes toward student-athletes’ scholarships and financial aid.<sup>289</sup> Contrarily,

277. *Id.* at 274.

278. Standen, *supra* note 265, at 1107–08.

279. Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity*, 42 TEX. TECH. L. REV. 1069, 1106 (2010).

280. *Id.*

281. *See supra* notes 160–68 and accompanying text.

282. *See supra* notes 46–51 and accompanying text.

283. *Players: 0; Colleges: \$10,000,000,000*, *supra* note 258.

284. Also known as “Johnny Football,” he was the first freshman Heisman Trophy winner in 2012. Soederbaum, *supra* note 163, at 261.

285. *Id.* at 261.

286. *See Players: 0; Colleges: \$10,000,000,000*, *supra* note 258. College football games are usually scheduled on Saturdays and the professionals typically play on Sundays.

287. Tom Van Riper, *March Madness Ratings and Revenue Keep Reaching New Heights*, FORBES (Mar. 20, 2014, 10:10 AM), <http://www.forbes.com/sites/tomvanriper/2014/03/20/march-madness-ratings-and-revenue-keep-reaching-new-heights/>.

288. *Players: 0; Colleges: \$10,000,000,000*, *supra* note 258.

289. *Id.*

athletes playing professionally receive around one-half of their respective leagues' turnover in salary and benefits.<sup>290</sup>

Student-athletes should be considered employees and should receive additional compensation. The relationship with their universities and with the NCAA is unique as compared to nonathlete students.<sup>291</sup> Student-athletes' relationship with the NCAA more closely resembles the relationship between professional athletes and the professional leagues.<sup>292</sup> To the extent that they are similarly situated, the NCAA, in effect, engages in a form of age discrimination and violates the underlying purpose of the ADEA.<sup>293</sup> Furthermore, a majority of student-athletes' time is spent on athletically related activities at the expense of their education.<sup>294</sup> Many student-athletes will rely on their education for their livelihood, yet they are unable to fully excel academically because they are busy generating millions of dollars for universities without receiving a fair portion of what they earn. Public policy demands that student-athletes be given employee status and receive additional compensation for equitable purposes.

*B. Proposal for how Employment Rights, Including Compensation, May Be Implemented*

The NCAA was established to protect student-athletes.<sup>295</sup> However, with the upsurge of media exposure, it is becoming increasingly difficult for the NCAA to figure out how to proceed in protecting and monitoring student-athletes.<sup>296</sup> This Comment proposes that student-athletes should keep their full grant-in-aid scholarships, receive stipends to cover additional costs, and be paid for the use of their names, images, and likenesses through a trust fund (distinguishable from the one suggested in *O'Bannon*). Additionally, the NCAA should revise its rules to create a more compatible relationship between the student-athletes and the NCAA.

Student-athletes are currently compensated through full grant-in-aid scholarships.<sup>297</sup> The market value of a college athlete's scholar-

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290. *Id.*

291. See *supra* notes 271–78 and accompanying text.

292. See *supra* notes 279–89 and accompanying text.

293. See *supra* notes 166–68 and accompanying text.

294. See *supra* notes 178–79 and accompanying text.

295. *O'Bannon v. Nat'l Collegiate Athletic Ass'n.*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014), *aff'd in part, vacated in part*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n.*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015); Vine, *supra* note 41, at 23.

296. Sconzo, *supra* note 267, at 762 (noting that the NCAA will still serve an important purpose in monitoring the student-athletes in the employment context.).

297. Standen, *supra* note 265, at 1106.

ship is around “\$200,000 over a college career, all tax-free.”<sup>298</sup> Significantly, even if student-athletes were considered employees, their athletic scholarships would still not be taxed.<sup>299</sup> When compared to the compensation paid to other eighteen to twenty-three year olds, this appears to be a good deal.<sup>300</sup> The next best job opportunity would be a minimum wage job right out of high school.<sup>301</sup> In addition to a free education, student-athletes have an opportunity to obtain a college degree.<sup>302</sup> This may “translate[ ] into a lifetime of superior earnings.”<sup>303</sup>

There is no doubt that the current compensation student-athletes receive has value. Scholarships are “an ideal form of compensation for [both] the school” and the student.<sup>304</sup> For the school, the cost of offering a scholarship is market value and marginal compared to the benefits the school receives from the student-athletes.<sup>305</sup> For the student-athlete, this is a tax-free, valuable education.<sup>306</sup> Student-athletes also receive access to athletic opportunities that they would not otherwise enjoy.<sup>307</sup> For some athletes with average grades who are not drafted to play professionally, their degree represents a significant enhancement to their expected earnings.<sup>308</sup> For the lucky few athletes, the opportunity to play college sports exposes them to the professional league and offers them a chance to be drafted once they qualify.<sup>309</sup> Therefore, student-athletes should continue to receive an education while being compensated through their scholarship.

However, the full cost of attendance is not covered by the scholarships.<sup>310</sup> Student-athletes are prohibited by NCAA regulations from receiving any outside compensation.<sup>311</sup> Even if student-athletes were not prohibited from holding jobs elsewhere, working part-time cannot cover their additional living expenses beyond what is covered by scholarship because of the significant time commitment these student

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298. *Id.* at 1106–07 (footnote omitted).

299. This issue was raised in the Northwestern litigation. Farrey, *supra* note 225. In a letter to Senator Richard Burr, “the IRS clarified that its code allows for the exclusion of tuition, fees, books, supplies and equipment required” for instruction. *Id.*

300. See Standen, *supra* note 265 at 1107.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1116.

305. *Id.*

306. Standen, *supra* note 265, at 1107; see Farrey, *supra* note 225.

307. Standen, *supra* note 265, at 1106–07.

308. *Id.* at 1107.

309. *Id.* at 1107–08.

310. *Id.* at 1108.

311. NCAA, *supra* note 22, at 67.

athletes give to sports and academics.<sup>312</sup> Student-athletes should receive extra compensation in the form of a stipend to cover the true cost of attendance that is not currently covered by the full grant-in-aid scholarship.<sup>313</sup> In January 2015, the NCAA's five wealthiest conferences agreed to increase the value of athletic scholarships to be more reflective of the true cost of attendance, meaning student-athletes may receive stipends.<sup>314</sup> This practice will not violate any current NCAA "pay for play" restrictions because the money will be used for student-athletes' academic education and will not exceed the cost of attendance.<sup>315</sup>

In addition to cost of attendance, student-athletes should also be compensated for the use of their names, images, and likenesses through a trust fund.<sup>316</sup> The NCAA and membership institutions receive significant royalties generated by revenue from merchandise sales.<sup>317</sup> However, that revenue does not go to the student-athletes "whose names and faces . . . drive those sales."<sup>318</sup> The success of the collegiate merchandising industry is attributable to the student-athletes who gain national recognition and often reach celebrity status before they graduate from college or move on to professional leagues.<sup>319</sup> This trust fund is distinguishable from the trust fund proposed in *O'Bannon*, which suggested that student-athletes receive a

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312. See Brian Bennett, *Big Ten Considers Pay Proposal*, ESPN.COM (May 19, 2011, 1:32 PM), <http://sports.espn.go.com/ncaa/news/story?id=6564134> (discussing bridging the gap between scholarship compensation and life expenses).

313. Texas A&M athletic director, Steve Patterson, revealed that the university will soon begin paying stipends to all student-athletes. John Taylor, *Texas Could Pay Student-Athletes \$10K Annually*, NBC SPORTS (Oct. 22, 2014, 4:24 PM), <http://collegefootballtalk.nbcsports.com/2014/10/22/texas-to-pay-student-athletes-10k-annually/>.

314. Jake New, *Colleges Inflate Full Cost of Attendance Numbers, Increasing Stipends for Athletes*, INSIDE HIGHER ED (Aug. 12, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>. The value of these stipends is left to the financial departments of each school to calculate, and some commentators worry that this will be used improperly as a recruiting tool. See *id.* The NCAA needs to be involved with this process to ensure that the stipends are used for the benefit of the student-athlete and not for an improper purpose.

315. "NCAA President Mark Emmert has openly admitted that student athletes should receive some compensation for their performances[.]" offering support for providing an "additional \$2,000 cost-of-attendance stipend to student-athletes." Mathew R. Cali, Comment, *The NCAA's Transfer of Power: An Analysis of the Future Implications the Proposed NCAA Transfer Rules Will Have on the Landscape of College Sports*, 21 JEFFREY S. MOORAD SPORTS L.J. 217, 246-47, 247 n.179 (2014).

316. Wong, *supra* note 279, at 1104.

317. *Id.* at 1070.

318. *Id.*

319. See *id.*

limited, equal share of NCAA revenue after they graduate.<sup>320</sup> Instead, an individual trust fund should be set up for each of the conferences and monitored by the NCAA. A certain percentage of the revenue from the year would be deposited into the trust fund and distributed equally among each student-athlete at the end of the season. Compensation should be split equally amongst the players in each conference and should not be tied to each player's performance. Players should not be paid differential amounts. In basketball and football, wins are attributable to the joint efforts of teammates; a star quarterback is not worth much without his teammates.<sup>321</sup> Compensating the players equally "would not destroy the structure of amateurism in college sports," rather, it would justly compensate the athletes for the revenue they generate for their respected schools.<sup>322</sup>

This Comment further proposes that the NCAA should update its rules so that student-athletes are not restrained from employment opportunities or from receiving compensation. Changes to the NCAA rules will provide student-athletes a sense of agency as well as an opportunity to make "decisions about their careers and capitalize on their successes, while they are physically capable of doing so."<sup>323</sup> The NCAA must be involved in overseeing student-athletes' compensation to make sure that there are no fraudulent transactions or commercial exploitation. With commercialization comes "ample opportunities for unethical behavior that the NCAA's regulation and enforcement committees can address."<sup>324</sup> Now, the NCAA is more important than ever for making sure that student-athletes are protected from exploitation by professional and commercial enterprises.<sup>325</sup> Consistent with *Northwestern University*, student-athletes should be able to form an independent union to protect their everyday needs. It is vital that student-athletes have a voice and a means of raising grievances with the NCAA.

#### IV. IMPACT

Ed O'Bannon, the named Plaintiff in *O'Bannon*, stated: "I'm excited and trying to keep it all together . . . . When we decided to take

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320. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1105–06 (N.D. Cal. 2014), *aff'd in part*, vacated in part, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015).

321. Standen, *supra* note 265, at 1113.

322. Wong, *supra* note 279, at 1102.

323. Soederbaum, *supra* note 163, at 262.

324. Cali, *supra* note 315, at 248–49.

325. A key principle of amateurism is that "student-athletes should be protected from exploitation." NCAA, *supra* note 22, at 4.

on this case [in 2009], we knew it would be a marathon, that it would get people talking—and that hopefully talk would spark change. And here we are.”<sup>326</sup> The recent decisions in *O’Bannon* and *Northwestern University* will undoubtedly change the structure of the NCAA.<sup>327</sup> The decision in *Northwestern University* is just one instance where student-athletes “may have lost the battle, but [will win] the war” because changes are already being made.<sup>328</sup> It is in the best interest of the NCAA to consider implementing some reform in reaction to these lawsuits to better serve the student athletes and prevent future lawsuits that will inevitably follow.<sup>329</sup> The reformation of collegiate athletics presents challenges, but they are not insurmountable.<sup>330</sup> “Courts [and legislatures] must concede that college athletics has evolved into an economically driven industry at the expense of [the] . . . educational values.”<sup>331</sup> Both the NCAA and membership institutions turned a blind eye toward the unbalanced nature of the system while placing utmost importance on the success of their athletic programs and the revenues they generate.<sup>332</sup>

The compensation of student-athletes, although met with opposition, would not cause the downfall of the NCAA or the collegiate sports industry.<sup>333</sup> Student-athletes are already compensated through their grant-in-aid scholarships. Unfortunately, the NCAA and its membership institutions place this fact under the guise that it is

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326. *Judge Rules Against NCAA*, ESPN.COM (Aug. 9, 2014, 6:20 PM), [http://espn.go.com/college-sports/story/\\_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case](http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case) (second alteration in original).

327. *NCAA Decision Could Change College Sports*, CHI. TRIB., Aug. 13, 2014, <http://www.chicagotribune.com/news/opinion/editorials/ct-ncaa-student-athlete-edit-0813-20140813-story.html>; see, e.g., Kevin Trahan, *Everything You Need To Know About NCAA’s Coming Major Changes*, SB NATION (Apr. 21, 2014, 9:19 AM), <http://www.sbnation.com/college-football/2014/4/21/5610872/ncaa-changes-union-lawsuits-obannon-kessler>.

328. Farrey, *supra* note 225 (quoting Nellie Drew, a professor at University of Buffalo who previously served as outside counsel for the NHL).

329. Hammond, *supra* note 227 (example of a lawsuit filed subsequent to *Northwestern* and *O’Bannon* to receive a fair wage for student-athletes); George Schroeder, *Attorney Jeffrey Kessler Files Suit vs. NCAA, Five Richest Conferences*, USA TODAY (Mar. 17, 2014, 7:01 PM), <http://www.usatoday.com/story/sports/college/2014/03/17/attorney-jeffrey-kessler-files-suit-vs-ncaa-five-richest-conferences/6520093/> (describing other lawsuits being filed against the NCAA to receive compensation for student athletes); Trahan, *supra* note 327 (describing reform in the NCAA as a result of recent litigation).

330. Vine, *supra* note 41, at 266.

331. *Id.*

332. *Id.*

333. Mark Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1055 (2014); Standen, *supra* note 265, at 1119.

enough.<sup>334</sup> When compared to the large revenues of both the NCAA and its members, it is clear that it is not enough.<sup>335</sup>

According to the NCAA, “amateurism is a sine qua non of college sports” and its rules against revenue sharing with student-athletes are “necessary for the maintenance of college athletics . . . [to] ‘preserve amateurism and thereby maintain [a] competitive balance.’”<sup>336</sup> Their claims of financial ruin are unpersuasive. The NCAA claimed that its restraints on student athletes’ identities are needed to increase the popularity of NCAA sports and subsequently “increase output, consumer demand, and consumer value.”<sup>337</sup> According to an NCAA self-commissioned survey, fans would be less likely to watch or attend sporting events if players were compensated.<sup>338</sup> However, as noted in *O’Bannon*, the NCAA’s competitive balance is unaffected by providing student athletes with fair compensation and there are less restrictive means available to the NCAA.<sup>339</sup> These claims are dubious because fan attendance and support for collegiate athletics remains strong even with the suggestion of student-athletes receiving some form of payment.<sup>340</sup> The NCAA and member schools may feasibly continue to operate profitably if required to compensate student-athletes beyond their grant-in-aid scholarships despite the NCAA’s contrary claims.<sup>341</sup> To do so, the NCAA would have to first operate as a more efficient organization by paying high-ranking directors and coaches with salaries that better reflect the free market.<sup>342</sup> Although

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334. For example, the Big Ten Commissioner, Jim Delany, stated that “the educational and lifetime economic benefits associated with a university education are the appropriate quid pro quo for its student-athletes.” Matt Hayes, *Mark Emmert, NCAA Dig in with Last Stance: Athletes Privileged To Attend College*, SPORTING NEWS (Jan. 15, 2015, 9:01 AM), <http://www.sportingnews.com/ncaa-football/story/2014-04-18/ncaa-mark-emmert-ed-obannon-case-defense-academic-exceptions-athletes-paying-players-labor-union> (quoting Jim Delaney, Big Ten Commissioner).

335. *Id.*

336. Edelman, *supra* note 333, at 1040 (quoting Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: “Amateurism” in Big-Time College Sports*, ANTITRUST, Spring 2000, at 51).

337. NCAA’s Memorandum of Point & Auths. in Support of Motion for Summary Judgment Motion; Opposition to Antitrust Plaintiff’s Summary Judgment Motion at 18; *In re NCAA Student-Athlete Name & Likeness Licensing Litig.* (2013) (No. 09-CV-1967-CW), 2013 WL 7855025 at \*12 (N.D. Cal. Feb. 20, 2014).

338. NCAA’s Memorandum of Point & Auths. in Support of Motion for Summary Judgment Motion; Opposition to Antitrust Plaintiff’s Summary Judgment Motion, *supra* note 337, at 12–13.

339. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014), *aff’d in part, vacated in part*, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015).

340. Edelman, *supra* note 333, at 1049.

341. *Id.* at 1053.

342. See, e.g., Mark Koba, *Pay for Play: Some College Players Could Score Big Bucks*, NBC NEWS (Apr. 14, 2014, 10:17 AM), <http://www.nbcnews.com/business/careers/pay-play-some-col>

some fear that corruption would result from paying college athletes, it would appear that the corruption already exists.<sup>343</sup>

Some commenters suggest that the NCAA can somehow reform their rules and structure to preserve the amateur model<sup>344</sup> while others suggest that there should be a free market approach to collegiate athletics.<sup>345</sup> These suggestions do not fully counter the current inequalities that exist, or that could occur, if student-athletes were subject to a complete open market. Recognizing student-athletes as employees and compensating them as such is the most beneficial way to reform the NCAA and its relationship with student-athletes. As such, student-athletes will receive the protections that all employees receive under the law and their compensation will result in a more equitable relationship with the NCAA. Further, compensating student-athletes as employees will justly compensate individuals who have a reverse life cycle of employment and counter a sense of age discrimination.

Because student-athletes will receive additional compensation for the services they provide, the NCAA will serve an even greater purpose in the future. The NCAA will continue to be necessary to oversee college athletics and “prevent any illegal or unethical deals from occurring.”<sup>346</sup> Further, commercialization will make legal representation necessary for these student-athletes.<sup>347</sup> Currently, student-athletes are prohibited from utilizing representation throughout their

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lege-players-could-score-big-bucks-n79871 (“Alabama football coach Nick Saban garners a total package of \$5,545,853 a year, making him the highest paid coach in college football.”). See generally Patrick Hruby, *The Free Market Case Against the NCAA Chokehold on College Sports*, WASH. TIMES, Mar. 30 2012, <http://www.washingtontimes.com/news/2012/mar/30/the-free-market-case-against-the-ncaa-chokehold-on/?page=all> (noting the inefficiency of overcompensating coaches without allocating that money towards student-athletes: “in the NFL and NBA, coaching staffs earn about seven percent of team payroll; in college football and basketball, they earn between 200 and 800 percent of team payroll as measured [by] scholarship values”).

343. Koba, *supra* note 342 (quoting Ellen Staurowsky, Professor of sports management at Drexel University).

344. See Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 853–57 (2014) (arguing that the solution to problems with the NCAA is not “professionalization,” but rather, efforts to improve a college athlete’s academic experience); see also, M. Tyler Brown, Comment, *College Athletics Internships: The Case for Academic Credit in College Athletics*, 63 AM. U. L. REV. 1855, 1891–98 (2014) (arguing that student-athletes should receive academic credit for their participation in college athletics, which would exempt them from the payment provisions of the FLSA).

345. See, e.g., Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the N.C.A.A.*, N.Y. TIMES, Aug. 27, 2014, [http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html?\\_r=0](http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html?_r=0).

346. Cali, *supra* note 315, at 248.

347. Frank Battaglia, *An Evolving NCAA Leading to an Expanding Client List*, 13 J. MARSHALL REV. INTELL. PROP. L. 463, 485–86 (2014).

collegiate careers.<sup>348</sup> Now, law firms are anticipating emerging cases and forming their own college sports practice groups.<sup>349</sup> Student-athletes will need representation for contract negotiations, potentially union representation, and general counseling matters.<sup>350</sup>

## V. CONCLUSION

“[S]ports are a big business, and college sports are no exception.”<sup>351</sup> The question posed at this point is one of fairness. The NCAA and membership institutions rely on the participation of young student-athletes to maintain the wealth that goes into their own pockets. In its current state, the NCAA only allows a select few to profit significantly without acknowledging the unfair compensation that the very players who drive the industry receive.<sup>352</sup> These student-athletes deserve the chance to profit off of their own abilities while they are able to do so.

This Comment proposed that the NCAA should take initiative in reacting to the recent litigation regarding student-athletes. The NCAA should compensate student-athletes not only through their full grant-in-aid scholarships but also through stipends and an equal share of a trust fund distributed by each conference. The NCAA and universities have profited off the relatively cheap labor of student-athletes for far too long.<sup>353</sup> The time for change is now. With the advent of this new compensation model, a new and more equitable relationship will form where student-athletes are left with something, as opposed to nothing, once their eligibility is over. It is important for student-athletes to receive some compensation for their hard work in making college sports what it is today. The “free” education they receive is simply not enough compared to the time and work these ath-

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348. See NCAA, *supra* note 22, at 66 (arguing that further commercialization will lead to a need for more sports management).

349. Battaglia, *supra* note 347, at 485. Notably “Winston & Strawn LLP announced the launch of the firm’s college sports practice group.” *Id.* The goal is to “provide comprehensive legal services to clients involved in . . . college and amateur athletics.” *Winston & Strawn Launches College Sports Practice Group*, WINSTON & STRAWN (Oct. 2, 2013), <http://www.winston.com/en/thought-leadership/winston-strawn-launches-college-sports-practice-group.html>. Numerous other firms also anticipated this new clientele with the reformation of the NCAA. See, e.g., BOND, SCHOENECK & KING, <http://www.bsk.com/practices/4-collegiate-sports> (last visited July 26, 2015); BRYAN CAVE, <https://www.bryancave.com/en/practices/sports-and-entertainment-group/>.

350. *Practice Areas, Sports Law*, BARLOW GARSEK & SIMON, LLP, <http://www.bgsfirm.com/practice-areas/sports-law> (last visited October 23, 2015); *Preparing Your Student-Athlete for College (NCAA Regulation and Legal Issues to Consider)*, USLEGAL.COM, <http://sportslaw.uslegal.com/preparing-your-athlete-for-college/> (last visited Oct. 23, 2015).

351. Wong, *supra* note 279, at 1070.

352. *Id.*

353. Standen, *supra* note 265, at 1125.

letes put in as well as the disproportionate amount of profit that the NCAA and member institutions take in yearly. The bottom line is if your job is to play sports, you should be considered an employee and are entitled to “[a] fair day’s wages, for a fair day’s work.”<sup>354</sup>

*Caroline K. Kane\**

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354. THOMAS CARLYLE, PAST AND PRESENT 16 (3d ed. 1844).

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