Timeout: Tracing the History of College Athletes' Fight for Compensation in the United States[1]

In the Summer of 2021 while we were homebound because of the pandemic, two landmark decisions completely changed the landscape of college sports. For the first time, student-athletes can earn benefits and income based on their athletic prowess and celebrity status with fans. First, the Supreme Court's *NCAA v. Alston* decision—the first case involving the NCAA in two decades and the first case where the NCAA's amateurism rules were under the legal microscope—ruled that the NCAA rules related to restricting academic benefits for student athletes violated anti-trust laws. Second, the NCAA decided to change court and allow member institutions to self-govern how they will incorporate Name, Image, and Likeness (NIL) policies on their campuses for student-athletes to follow. Both decisions have created a new level of excitement around collegiate sports and curiosity of where we go from here.

In fact, after the *Alston* decision, media reports identified collegiate athletes with million-dollar NIL deals including, Alabama quarterback Bryce Young's nearly $1 million made off his NIL[2] and Tennessee State University basketball player Hercy Miller's $2 million endorsement deal with technology company Web Apps America.[3] This appears to be a whole new ball game and leaves many wondering – is the next play to try to classify college athletes as employees?

Replay of Cases before the Alston Decision.

Before the *Alston* decision, college athletes were prohibited from monetizing their athletic success through the use, sale, or licensing of their name, image, or likeness.[4] For decades, the argument against paying student-athletes was that they were amateurs who were already being compensated through their scholarships to go to college and play the sport they love. Over the years, that argument lost its impact as universities began inking multi-million dollar deals with college coaches and administrators and to improve their athletic facilities. Simply, with media reports swirling of coaches' extreme salaries and the millions of dollars universities were receiving from television contracts, the argument that collegiate athletics was an amateur league and student-athletes should not be paid for the athletic successes became a farce.

This mentality was buttressed by the 1984 decision, *NCAA v. Board of Regents*, which empowered the NCAA to limit student-athlete compensation.[5] However, the *Board of Regents* case was not about student-athlete compensation but rather it was an anti-trust case that involved the number of times a university could appear on television on Saturdays, which the NCAA was trying to limit.[6]

---

[1] Authors for this article are Amy M. Stewart, Keisha Crane, Andrew Rhoden, and Kershena Queenan of Stewart Law Group.

[2] Elizabeth Karpen, *Alabama QB Bryce Young making 'ungodly' income from NIL deals*, NY Post, (Jul. 20, 2021), Alabama QB is making 'ungodly' amounts from NIL deals (nypost.com).

[3] Abigal Gentrup, *NIL Earnings Make Some College Athletes Millionaires*, FRONT OFFICE SPORTS, (Jul. 27, 2021), https://frontofficesports.com/nil-earnings-make-some-college-athletes-millionaires/.

[4] https://www.ncaa.org/about/taking-action

[5] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)

[6] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2144, 210 L. Ed. 2d 314 (2021).

Although the Court did not rule in the NCAA's favor, other dicta favorable to the NCAA was drawn from Justice Stevens' observation that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."[7] In prior suits brought against the NCAA for student-athlete compensation, it contended that "[t]he Court's decision in *Board of Regents* expressly approved the NCAA's ability to limit student-athlete compensation." However, the *Alston* decision obliterated the NCAA's power to regulate student-athlete's benefits and compensation.

Alston Changes the Game.

Shaun Alston, a former football player at West Virginia University, and other student-athletes brought an antitrust suit against the NCAA. The suit sought the ability for student-athletes to receive academic benefits, such as paid internships, laptops, science equipment, study abroad programs, and other necessities for academic advancement. The student-athletes argued that NCAA violated federal antitrust law by limiting the compensation they could receive for their services as a student-athlete.[8] The NCAA contended that they had the right to limit student athlete compensation because of the Court's 1984 decision in *Board of Regents*.[9] The lower courts ruled that the NCAA failed to establish a connection between its amateurism rules and these restrictions to education-related benefits.

On June 21, 2021, in a unanimous 9-0 decision, the U.S. Supreme Court upheld the lower courts' decisions and ruled that the NCAA's restrictions on student-athlete compensation violated anti-trust laws. The Court made a distinction with the decades old *Board of Regents* case. It set the record straight that language buried in the *Board of Regents'* opinion seemingly legitimizing the NCAA's amateurism initiative to "market a particular brand of [sports]" where "athletes must not be paid, must be required to attend class, and the like," was not, in fact, legal support of the NCAA's practice. The Justices were clear that it did not consider the *Board of Regents* opinion controlling:

> The Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [Board of Regents] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.[10]

Also, Justice Gorsuch focused on other distinctions between the two cases to establish that *Board of Regents* was not controlling. First, *Board of Regents* was about television rights, not student-athlete compensation. Second, he acknowledged what any sports fan sees every brisk Saturday in the Fall and the madness of March in the Spring—college athletics is a lucrative business which has evolved immensely since the 1984 *Board of Regents*' decision. Indeed, the Court cited the massive coaching contracts and revenues for football and basketball programs across the country

[7] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 120, 104 S. Ct. 2948, 2970, 82 L. Ed. 2d 70 (1984)
[8] *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021).
[9] *Id*. at 2144.
[10] *Id*. at 2167.

to support its position that *Board of Regents* has no connection to the reality of the college athletic landscape in 2021.

In regard to the anti-trust issues, *Alston* included two issues Justice Kavanaugh mentioned that appear will be the basis of future litigation involving college athletics. First, Justice Kavanaugh stated that the "[N]CAA's business model would be flatly illegal in almost any other industry in America."[11] Second, he stated that "[p]rice-fixing labor is ordinarily a textbook anti-trust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."[12]

Further, the Supreme Court pointed out that the NCAA has been inconsistent in its application of its "amateurism" definition. From the beginning of organized sports in the 1800s until the 2000s, when more restrictions were imposed on student-athlete pay, until the present, the Court found that the NCAA's application of amateurism rules has continually "evolved" with the times. As a result, the Court refused to blindly accept what the NCAA itself defines as amateurism in its efforts protect its unique product of college athletics.[13]

Alston's Impact on NIL and College Athletics

It should be noted that the *Alston* decision was narrowly tailored, and its intent was not to overhaul college athletics and amateurism on campuses.[14] However, nine days later on June 30, 2021, NCAA President Mark Emmert made a monumental announcement that rocked college athletics forever. President Emmert advised that the NCAA would allow member institutions to govern and implement their own NIL policies regarding college athletes under the following guidelines:[15]

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.
- Colleges and universities may be a resource for state law questions.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.
- Individuals can use a professional services provider for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

Some immediately argued that the NCAA's shocking about face with its NIL decision was influenced by the *Alston* case.[16] Specifically, legal commentators foreshadowed that if the NCAA did not pass a policy favorable to college student-athletes, *Alston* would open the door to future lawsuits against the NCAA. Luke Fedlam leads the sports practice at Porter Wright and is the

[11] *Id.*
[12] *Id.*
[13] Glenn M. Wong and Cameron C. Miller, *Supreme Change? What Alston c. NCAA Means for the Present and Future of College Athletics*, Athletics Administration, October 2021, Vol. 56, Issue 3, p. 20-22.
[14] *Id.*
[15] *NCAA adopts interim name, image, and likeness policy*, (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy
[16] Andrew Brandt, *Business of Football: The Supreme Court Sends a Message to the NCAA*, (June 29, 2021), https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling

founder of Anomaly Sports Group perfectly summed up *Alston*'s rippling effect on college sports: "The Supreme Court's decision in *Alston* was a direct hit to the foundational belief of the NCAA that it could control benefits and opportunities for student-athletes. The Court's decision, and Justice Kavanaugh's scathing rebuke of the NCAA in his concurring opinion, forced an immediate about-face by the NCAA and it's member institutions regarding any belief that the NCAA could oversee changes to name, image and likeness."

The Trickledown Effect of the NCAA's NIL Decision

Florida's decision to pass legislation to allow college athletes in its state to begin monetizing off NIL prompted the NCAA to direct its attention to NIL.[17] Other states around the country realized this NIL decision would be a recruitment game-changer if some states permitted student-athlete compensation versus those that do not permit it.[18] To date, 28 states have passed NIL laws.[19] The common denominators within those 28 states include the following: (1) student-athletes can have representation for NIL opportunities whether it be an attorney, agent, or marketing company; (2) any NIL deals obtained by student-athletes must be reported to the institution for compliance; and (3) NIL opportunities given to student-athletes cannot conflict with institution rules or team contracts.

Many people think NIL will take away the true sense of amateurism from college athletics. However, through the fall college football and basketball seasons, we have learned that only a small percentage of college athletes received NIL deals.[20] In most cases, many of the deals are small with a very small exception for some elite players who are making more than a million dollars.[21] NIL compensation varied by each NCAA division for student-athletes with the following averages:

Division I NIL deals averaged $471;
Division II NIL deals averaged $81; and
Division III NIL deals averaged $47.[22]

One such exception was high school standout Quinn Ewers who was expected to suit up as a rising senior football player at Southlake Carroll High School in Southlake, Texas, a suburb of Dallas. However, this summer he received an opportunity to participate in a cash plus equity deal with Holy Kombucha. So, Ewers reclassified as a graduating senior, chose to start school at Ohio State University, and cashed in on the opportunity.[23] A few weeks later, Ewers signed a second NIL deal

[17] https://www.flsenate.gov/Committees/billsummaries/2020/html/2187
[18] Dan Murphy, *NIL laws add new variable to recruiting decisions*, (October 21, 2021), https://www.espn.com/college-sports/story/_/id/32445468/nil-laws-add-new-variable-recruiting-decisions
[19] *What states have signed NIL laws,* (December 3, 2021), https://www.ncsasports.org/name-image-likeness#what-states
[20] Maria Carrasco, *Some College Athletes Cash In While Others Lose Out*, (October 12, 2021), https://www.insidehighered.com/news/2021/10/12/while-some-ncaa-athletes-cash-nil-others-lose-out
[21] *Id.*
[22] *Id.*
[23] Dan Hope, *Quinn Ewers Officially Announces His First Endorsement Deal with Holy Kombucha,* Eleven Warriors, (Aug. 9, 2021), Quinn Ewers Officially Announces His First Endorsement Deal with Holy Kombucha | Eleven Warriors.

with an autograph company reportedly for $1.4 million dollars.[24] If Ewers accepted the NIL deals and stayed in high school, he would have been ineligible to play his senior year because, like many states, the Texas University Interscholastic League (UIL) does not allow athletes to profit from their NIL.

The trickledown effect did not stop at Ewers. North Carolina high school basketball star, Mikey Williams from Vertical Academy, became the youngest athlete to sign an endorsement deal with a major shoe company for an undisclosed amount. The deal with Puma is estimated to be valued in the high multi-million-dollar range that is usually given to high profile rookie basketball players in the NBA.[25] High schools will likely change their NIL rules, similar to the NCAA, or likely face an exodus of student athletes choosing to sit out their senior years or move to states that allow student-athlete compensation.

Alston's Impact on the Classification of College Athletes as Employees

The *Alston* decision reignited the conversation about whether an employer-employee relationship develops from participation in interscholastic activities within an educational program. Prior to *Alston*, the National Labor Relations Board (NLRB) tangentially addressed the issue in 2015 in its *Northwestern University* decision[26].

In January 2014, the Northwestern football team, backed by the United Steelworkers (USW), attempted to unionize the football players. Leo W. Gerard, the USW International President at the time, explained USW's support for the unionization of the Northwestern football team: "Too many athletes who generate huge sums of money for their universities still struggle to pay for basic necessities, and too many live in fear of losing their scholarships due to injury or accident."[27] He further explained that the Northwestern football team "deserve[d] some assurance that when they devote weeks, months and years of their lives to an academic institution, that they will not be left out to dry, without the same basic protections that we all expect from the institutions we serve."[28]

Almost all of the players on the Northwestern football team at the time signed union cards. They sought legal recognition as employees and the right to collective bargain through a labor union. Two players led the efforts—Ramogi Huma, a former UCLA linebacker and president of the National College Players Association, and Kain Colter, a former quarterback at Northwestern. At the press conference announcing their decision, Colter said, "[r]ight now the NCAA is like a

[24] Tom VanHaaren, *Ohio State Buckeyes QB Quinn Ewers has NIL deal for $1.4 million, source says*, ESPN, (Aug. 31, 2021), Ohio State Buckeyes QB Quinn Ewers has NIL deal for $1.4 million, source says (espn.com).
[25] Ben Pickman, *High School Star Mikey Williams Signs Endorsement Deal With Puma*, Sports Illustrated, (Oct. 28, 2021), High school star Mikey Williams signs shoe deal with Puma - Sports Illustrated.
[26] 362 NLRB 1350 (2015).
[27] Tim Waters & R.J. Hufnagel, *USW Expresses Support for College Athletes Players Association (CAPA)*, (Jan. 28, 2014), https://www.usw.org/news/media-center/releases/2014/usw-expresses-support-for-college-athletes-players-association-capa.
[28] *Id.*

dictatorship. No one represents us in negotiations. The only way things are going to change is if players have a union."[29]

Although only Northwestern football players were involved, CAPA would allow Division I FBS football and men's basketball players to join because it believed these players provided the best case for demonstrating that they are employees.[30] The players demanded the following, *inter alia*: (1) financial coverage for sports-related medical expenses, (2) independent concussion experts on the sidelines during games, (3) an educational trust fund to help former players graduate, (4) "due process" before taking a player's scholarship because of a rules violation, (5) "cost of attendance" stipends, and (6) the ability for players to receive compensation for commercial sponsorship "consistent with evolving NCAA regulations."[31]

Donald Remy, former NCAA Chief Legal Officer, responded to the players' announcement and said, "student-athletes are not employees within any definition of the National Labor Relations Act."[32] He clarified that an employment relationship does not exist between the "NCAA, its affiliated institutions or student-athletes."[33] He further explained the NCAA's position and stated:

> This union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education. . . Student-athletes are not employees, and their participation in college sports is voluntary. We stand for all student-athletes, not just those the unions want to professionalize.[34]

Jim Philips, former Northwestern athletic director, explained that while he agreed "that the health and academic issues being raised by our student-athletes and others are important ones that deserve further consideration. . . Northwestern believes that our student-athletes are not employees and collective bargaining is therefore not the appropriate method to address these concerns."[35]

Northwestern denied the players' request and the issue went before the Chicago Regional NLRB. The Chicago Regional NLRB addressed whether the football players receiving scholarship from Northwestern University are employees under the NLRA and entitled to choose representation for the purposes of collective bargaining or more like the graduate students in *Brown University*[36] who were found not to be employees under the NLRA.[37] Northwestern University contended that the

---

[29] Tom Farrey, *Kain Colter Starts Union Movement*, (Jan. 28, 2014), https://www.espn.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.
[30] Teddy Greenstein and Tribune Reporter, *Northwestern Football Players Seek to Join Labor Union*, CHICAGO TRIBUNE, Jan. 28, 2014, https://www.chicagotribune.com/sports/college/chi-northwestern-football-players-labor-union-20140128-story.html.
[31] *Id.*
[32] Farrey, *supra* note 4.
[33] *Id.*
[34] *Id.*
[35] Greenstein and Tribune Reporter, *supra* note 5.
[36] 342 NLRB 483 (2004) (finding graduate students are not "employees" under the NLRA).
[37] *Northwestern University and College Athletes Players Association (CAPA)*, Case 13-RC-121359, NLRB-Region 13, (Mar. 26, 2014).

players are temporary employees who are not eligible for collective bargaining and the CAPA is arbitrary and not appropriate for bargaining.[38]

The Chicago NLRB Regional Director decided in the players' favor and found that they are "employees" under Section 2(3) of the NLRA.[39] He made the following determinations:

1. Grant-in-aid scholarship football players perform services for the benefit of the employer for which they receive compensation.
2. Grant-in-aid scholarship football players are subject to the employer's control in the performance of their duties as football players.
3. The employer's grant-in-aid scholarship players are employees under the common law definition.[40]

The NLRB granted Northwestern's request for review.[41] In a unanimous ruling, the NLRB declined to assert jurisdiction over the scholarship football players and did not decide whether the scholarship players are statutory employees.[42]

On January 31, 2017, in response to the *Northwestern University* decision, the Office of the General Counsel (OGC) of the NLRB issued GC 17-01, a memorandum communicating its position that scholarship football players at private NCAA Division I Football Subdivision Schools (FBS) are employees under the National Labor Relations Act (NLRA).[43] However, on December 1, 2017, the OGC issued GC 18-02, which rescinded GC 17-01.[44]

While the *Northwestern University* case initially provided hope for the scholarship football players who hoped to be considered employees so that they may form a union and take a seat at the table to negotiate the benefits and services they received in exchange for their performance and participation on the school's football team, it only reiterated the longstanding belief that student athletes are not employees.

Congress Gets Involved in the Classification of Student-Athletes as Employees

Then, the Supreme Court issued its *Alston* decision and sparked three reactions. First, on May 27, 2021, Senator Christopher Murphy (D-CT), introduced A. 1929 - College Athlete Right to Organize Act.[45] The bill "establishes collective bargaining rights for college athletes" by amending the NLRA to "(1) define *college athlete employee* as an employee of an institution of higher education if the individual receives direct compensation from the institution and such

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Northwestern*, 362 NLRB at 1350.
[42] *Id.* at 1355-56.
[43] OFFICE OF THE GEN. COUNSEL, NATIONAL LABOR RELATIONS BOARD, MEMORANDUM GC 17-01, GENERAL COUNSEL'S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT, (Jan. 31, 2017).
[44] OFFICE OF THE GEN. COUNSEL, NATIONAL LABOR RELATIONS BOARD, MEMORANDUM GC 18-02, MANDATORY SUBMISSIONS TO ADVICE, (Dec. 1, 2017).
[45] College Athlete Right to Organize Act, S. 1929, 117th Cong. (2021).

compensation requires participation in intercollegiate sports, and (2) include public institutions as employers within the context of intercollegiate sports."[46] It further requires the NLRB to "consider the colleges within an athletic conference as part of a bargaining unit with which college athletes can negotiate"; establishes the NLRB's "jurisdiction over all institutions of higher education within the context of intercollegiate athletics regarding collective bargaining and representation matters and labor disputes"; and "prohibits any agreements, such as scholarship agreements, that waive the right of athletes to collectively bargain."[47]

Second, on September 29, 2021, the OGC issued GC 21-08 which doubles down on its position in GC 17-01 that the scholarship football players in *Northwestern University*, and other similarly situated college athletes, are employees under the NLRA.[48] While this memorandum is merely advisory and has no binding or determinative effect, the OGC makes it very clear that it "will allege that misclassifying such employees as mere 'student-athletes', and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1)."[49] Also, the OGC will consider pursuing a joint employer theory of liability because "Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university."[50]

And third, on November 10, 2021, the College Basketball Players Association filed an NLRB Charge against the NCAA asserting that "[w]ithin the last 6 months" the NCAA "has violated section 8(a)(1) by classifying college athletes as 'student-athletes'."[51] This charge provides the OGC with the first opportunity to move forward with advancing the position taken in GC 21-08. It will likely go through the same process as the *Northwestern University* case—specifically, the Indianapolis NLRB Regional Office will investigate the charge and determine whether probable cause exists to issue a complaint. If a complaint is issued, a hearing will take place before an administrative law judge, and the administrative law judge's ruling may be appealed before the NLRB.

However, the OGC's position is not an easy win to designating college athletes as employees. First, it relies on the *Alston* decision, which did not grant any new employment rights because the additional benefits discussed in the case are not tied to education.[52] Second, because the majority of Division I FBS institutions are public universities and the NLRA only applies to private employers, any NLRB decision would have a limited impact to the very group of athletes the OGC seeks to protect—athletes within high-profile athletic programs.[53]

Moving Forward - Best Practices and Points to Consider

---

[46] *Id.*
[47] *Id.*
[48] OFFICE OF THE GEN. COUNSEL, NATIONAL LABOR RELATIONS BOARD, MEMORANDUM GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT, (Sep. 29, 2021).
[49] *Id.*
[50] *Id.*
[51] Charge Against Employer, National Labor Relations Board, Case 25-CA-286101, filed Nov. 10, 2021.
[52] Tyrone P. Thomas, *Student Athletes Face Hurdles to Becoming Employees*, BLOOMBERG LAW NEWS, (Nov. 4, 2021), https://news.bloomberglaw.com/us-law-week/student-athletes-face-hurdles-to-becoming-employees.
[53] *Id.*

Many colleges and universities want to know how to protect themselves from litigation and other consequences stemming from NIL or student employment status. Here are a few tips that will assist in navigating these issues:

- Institutions should have a law firm provide best practices on NCAA compliance.
- Student handbooks should be updated to reflect the new mandates.
- A university clearinghouse should provide procedures and education in NIL for staff and student-athletes.
- Avoid hiring marketing firms or companies to locate NIL opportunities on behalf of the student-athletes. Any contract disputes between the college athlete and a third-party vendor brought in by the university can lead to the institution being named as a defendant in future litigation.
- Provide annual training conducted by a third party to ensure college athletes know their rights and staff are educated on how to avoid appearing on ESPN for the wrong reasons.
- Monitor advertisements of companies using your college athletes to verify there is no unauthorized usage of university trademarks and logos.
- Take caution when contemplating any potentially adverse action against scholarship athletes in response to anything that could be construed as "protected activity."[54]

[54] Joshua Nadreau, *College Basketball Players Group Tips-Off Battle Over Student-Athlete Employment Status*, JDSUPRA, (Nov. 16, 2021), https://www.jdsupra.com/legalnews/college-basketball-players-group-tips-1761649/.