THE NEXT DOMINO TO FALL—COLLEGE ATHLETES AS EMPLOYEES?

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OVERVIEW

- Introduction & Background
- College Athletes as Employees
  - *Johnson v. NCAA*
  - NLRB
- Implications: Athletes, Institutions, NCAA, Title IX, Non-Revenue Sports

NCAA & AMATEURISM

Historical Position:

- Athletes cannot be paid to play.
- Athletes are not employees of the schools for whom they play.

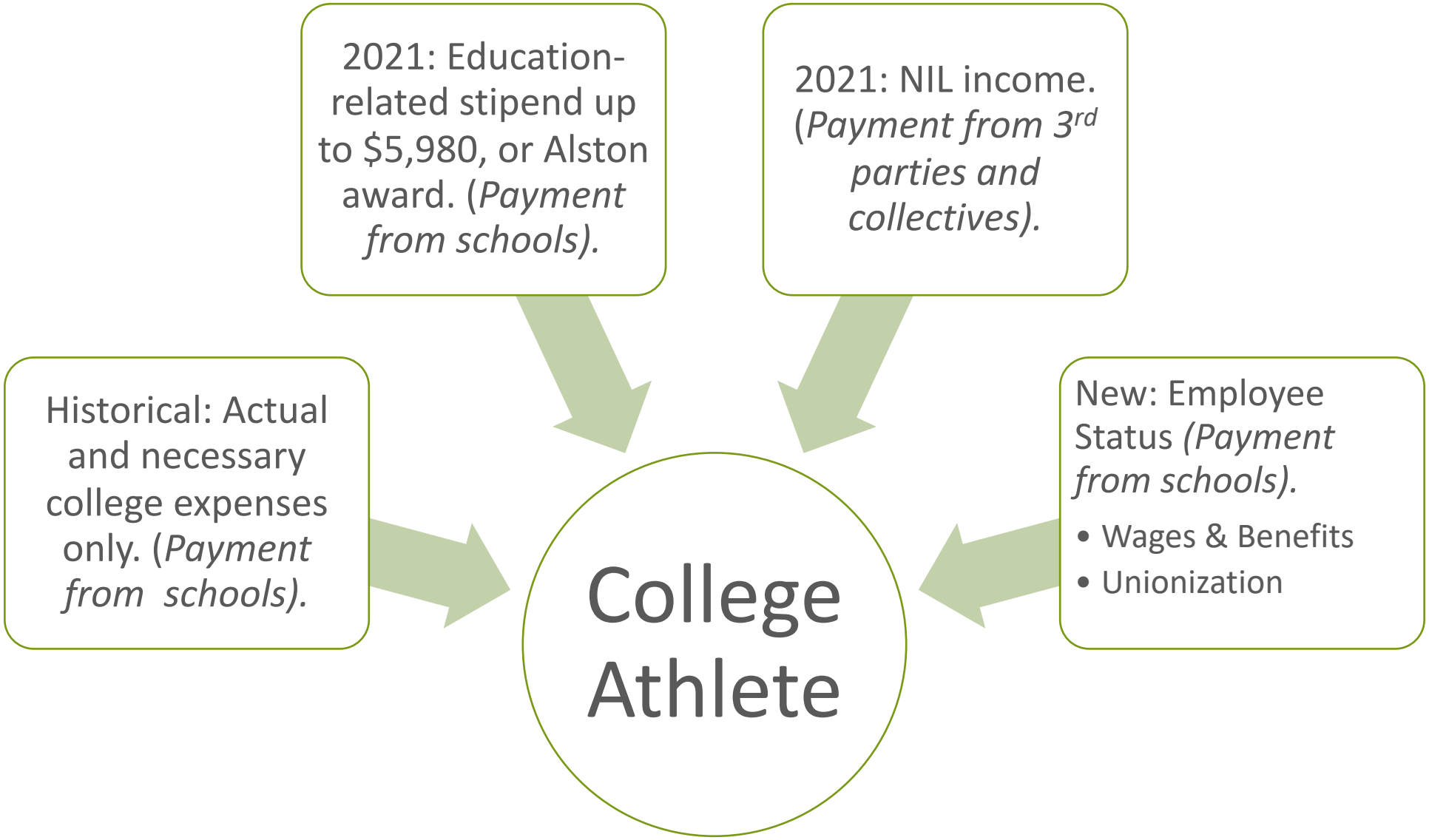
RECENT DEVELOPMENTS IN ATHLETE PAYMENTS

NCAA v. Alston, 594 U.S. ___ (2021)

- Schools can pay athletes up to $5,980 annually

Name, Image, Likeness (NIL) Legislation:

- Athletes can profit from outside sources


2021: Education-related stipend up to $5,980, or Alston award. (*Payment from schools).*
2021: NIL income. (*Payment from 3rd parties and collectives).*
Historical: Actual and necessary college expenses only. (*Payment from schools).*
New: Employee Status *(Payment from schools).*
• Wages & Benefits
• Unionization
College Athlete

THE CASE TO WATCH: *JOHNSON V. NCAA*

V.

Case No. 19-cv-05230, 2019

- Parties: Trey Johnson, former Villanova football player and lead plaintiff, files class action lawsuit against the NCAA + member schools.
- Claim: College athletes (in PA, NY, and CT) be deemed employees subject to the Fair Labor Standards Act (FLSA) solely by virtue of their participation in interscholastic athletics + NCAA is a joint employer.

JOHNSON V NCAA: WHAT PLAINTIFFS WANT

- This case is primarily about compensation--not athlete unionization.
- Plaintiffs argue they are no different than students who work at games or in the library.
- FLSA requires covered employees be paid minimum wage and overtime pay.
- Universities would need to consider state and federal employment laws and compliance obligations.

JOHNSON V NCAA: ARGUMENTS

NCAA

1. Student athletes are amateurs
2. DOL had already determined that student-athletes do not qualify under FSLA
3. Economic realities of the relationship are not that of employer/employee

JOHNSON

1. Circular argument + Recent SC precedent in *Alston* case
2. DOL reasoning (interscholastic athletics was "primarily for the benefit of the participants") was outdated. Primary benefit is financial for NCAA and institutions
3. College athletes are integral to the "billion dollar Big Business of NCAA sports" and that under multi-factor FLSA test to assess (*Glatt* test*) they are employees

FSLA: PRIMARY BENEFICIARY TEST (1-3 OF 7)

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment.

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

FSLA: PRIMARY BENEFICIARY TEST (4-7 OF 7)

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

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

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

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

JOHNSON V. NCAA: STATUS

- 2021: U.S. District Court Judge denies motion to dismiss, finding that the student-athletes "plausibly alleged a claim that they are employees of their universities"
- Feb, 2022: 3rd Circuit grants NCAA's interlocutory appeal that college athletes can't be employees*
- Feb. 15, 2023: Oral arguments held (pending, court observers thought panel was unsympathetic to NCAA)
- Case may set up Circuit Court split

*Due to contra rulings in *Berger v. NCAA (*7th Circuit, 2016) and *Dawson v NCAA*, 2019).

BACKGROUND: NLRA AND NLRB

- National Labor Relations Act (NLRA) grants employees:
  - The right to form or join unions;
  - To engage (or refrain from engaging in) protected, concerted activities to address or improve working conditions.
- NLRA applies to most **private** sector employers (not government)
- The National Labor Relations Board (NLRB) is a bifurcated federal agency headed by 5-person Board and a General Counsel

NLRB AND COLLEGE ATHLETE UNIONIZATION

- 2014: Northwestern University football players – Unionization Effort
- 2021: NLRB General Counsel, Jennifer Abruzzo, issued a memo (GC 21-08) declaring that some college athletes should be considered employees
- Feb, 2022: National College Players Association (NCPA) filed unfair labor practice charge with NLRB against USC, Pac-12, and NCAA (will now focus on USC)
- Dec, 2022: LA office of NLRB ruled that USC football and basketball players should be considered "employees" of the university, the Pac-12, and the NCAA.

NLRB GC 21-08 MEMO: FACTORS

1. Perform services that generate profits for their colleges and the NCAA;
2. Receive scholarships and education-related benefits in exchange for their performance;
3. Are subject to the NCAA's control over the terms and conditions of their "employment"; and
4. Are monitored by their colleges to ensure NCAA compliance.

See Matthew Ehrhardt, The Money Game: Student-Athletes' Battle for Employee Status, 67 N.Y.L. Sch.L.Rev. 61 (2023) (summarizing GC 21-08).

COLLEGE ATHLETES AS EMPLOYEES: ISSUES

Uncertainty: Which athletes/sports?

Institutional Cost: Wages (FLSA) + Compliance

Impact on Women in Sport (Title IX)

Employment Non-Discrimination (Title VII)

Other: OSHA, WARN, Immigration Law

COLLEGE ATHLETES AS EMPLOYEES: OTHER

- States Laws
  - College Athlete Protection Act (CA, 2023)
- NCAA is actively seeking Congressional relief
  - Want federal legislators to create a new law that would codify that college athletes aren't employees and grant anti-trust protections
  - Hired former MA Gov. Charlie Baker (R), who has experience building bipartisan coalitions, to lobby