Labor and Employment Alert: NLRB Regional Director Holds Northwestern University Football Players Are Employees, And Can Unionize

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Yesterday, the NLRB's regional director for Region 13, Peter Ohr, issued a 24-page ruling in which he held that college football players at Northwestern University were employees entitled to the right to organize. Ohr reasoned that the players met the standard for an employee under the NLRA and common law: a person performing services for another under a contract of hire, subject to the employer's control or right of control, in return for payment.

In the relevant analysis, Ohr determined that the scholarship "tender" made to the players was an employment contract, subjecting the players to the University's control in return for compensation in the form of an academic scholarship and living expenses. Ohr provided an extensive overview of the players' daily schedule throughout the year, and discussed how the players' academic and personal pursuits could sometimes conflict with, and even be dominated by, their athletic commitments. Ohr differentiated between scholarship players and uncompensated "walk-ons," who receive no remuneration at all in return for their play, holding that walk-ons did not meet the definition of employee.

The most obvious hurdle for Ohr was distinguishing the student athletes here from graduate students on scholarship, whom the NLRB determined 10 years ago were not employees. *Brown University*, 342 NLRB 483 (2004). In *Brown*, the NLRB reached its determination after analyzing four factors: (1) the status of graduate assistants as students; (2) the essential role of the graduate student assistantships in graduate education; (3) the graduate student assistants' relationship with the faculty; and (4) the financial support they receive to attend Brown University. Ohr held that the players would be considered employees even under this test. In a section sure to draw fire from the NCAA, Ohr first noted that the players "are not 'Primarily Students.'" Ohr added that playing football was not a core part of the athletes' academic curriculum, they had no supervision by academic faculty, and that their athletic scholarships were distinguishable from financial aid offered to graduate students. Accordingly, Ohr determined that the players were

employees, and directed an immediate election for a bargaining unit consisting of all scholarship players who had remaining eligibility.

Reaction to the decision was swift. The NCAA issued a statement that it was "disappointed" with the decision and that it "strongly disagree[d] with the notion that student-athletes are employees." Northwestern indicated that it would appeal the decision to the full board in Washington, D.C. At least one mainstream press outlet predicted that the ruling would "change college football as we know it."

For the labor professional, the question arises as to whether this decision opens the door to other employment-related claims. If college football players are employees, can they file race or national origin discrimination claims under Title VII, or wage and hour claims under the FLSA, for example? More broadly, will this decision lead to the President Obama-appointed NLRB reconsidering the decision in *Brown University*, and holding that all students on scholarship are employees? This story is still in its infancy, but will surely be followed closely by national sports media as it progresses. It will also be monitored by labor practitioners, as it has the potential to spin off dozens of representation elections if the full board upholds Mr. Ohr's decision.

If you have any questions, please contact your Vorys attorney.