NLRB General Counsel Opines That College Athletes Are Employees: Ramifications in Athletics and Beyond

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Overview

NLRB General Counsel Opines That College Athletes Are Employees: Ramifications in Athletics and Beyond

- General Counsel's Abruzzo's Memorandum
- Impact on Private and Public Sector Institutions
- Reading the Tea Leaves – Where will the Board go with students as employees and other groups at IHE's
- Panel Discussion – What does this mean and what to do now to prepare

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General Counsel's Role

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- Chief prosecutor for the Board
- Frames enforcement provisions
- Determines which cases will be prosecuted
- De facto, this frames Board precedent and the "swings" in the NLRB doctrine
- Statements are not law
- General Counsel Memoranda are public statements of enforcement positions

Northwestern University Decision

Peter Jones
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- In August 2015, the Board declined to exercise its jurisdiction over a representation petition filed by a union seeking to represent Northwestern University's football players who receive grant-in-aid scholarships
- Expressly declined to decide the employee question
- The Board reasoned that, even if the football players are employees for the purposes of collective bargaining, "such bargaining has never involved a bargaining unit consisting of a single team's players, where the players for competing teams were unrepresented or entirely outside the Board's jurisdiction."
- The Board went on to note that "we are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board's approach might be to a petition for all FBS scholarship football players (at least those at private colleges and universities)."

General Counsel Memorandum

Peter Jones
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- "Certain Players at Academic Institutions" -- are employees under the Act
- Which student athletes? -- the scholarship football players at Northwestern described in the 2017 GC Memorandum and "other similarly situated Players at Academic Institutions"
- Similarly situated -- the GC Memo discusses the evidence from the Northwestern University case (scholarship dollar value, the requirement to follow compliance rules, and team rules among them)
- The protections include the right to speak out about their terms and conditions of employment and to self-organize, regardless of whether the Board would process or ultimately certify a bargaining unit under the *Northwestern University* decision.
- The GC Memo states that the Board is not precluded by its decision in *Northwestern University* – the decision to not exercise its jurisdiction and to not process a petition for union representation – from processing such a petition now.
- Does not address applicability to partial scholarship or non-scholarship athletes.

General Counsel Memorandum

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- For those "Certain Players at Academic Institutions" that are deemed employees under the Act, "misclassifying" them as "student athletes" and leading them to believe that they are not entitled to the Act's protections has a chilling effect on protected activity under the Act and is itself a violation of the Act
- The Memo also takes the position that the NCAA and the athletic conferences could both be liable for violations of the Act under joint employer theory
- The GC Memo notes that this would hold true even for conferences where some of the member institutions are public institutions

General Counsel Memorandum

Peter Jones
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In sum, it is my position that the scholarship football players at issue in Northwestern University, and similarly situated Players at Academic Institutions, are employees under the Act. I fully expect that this memo will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that I will be taking that legal position in future investigations and litigation under the Act. In addition, it notifies them that I will also consider pursuing a misclassification violation.

Thoughts on the Changing Environment

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- GC Abruzzo is on record stating that revenue or profits are not dispositive of a claim.
- Title IX effects (is Title IX even applicable under this model)
- No mention of partial scholarship or non-scholarship athletes and how this memo would apply to them
- But there is reference to the NLRB's Columbia University decision from 2017, which she says "correctly recognize[s] that the Supreme Court has endorsed the Board's expansive interpretation of 'employee'" under the NLRA and that exceptions to the Act's definition of "employee" do not include students.
- Reality of a conference having "day to day" control over an institution's student-athlete
- Review of basic independent contractor v. employee test

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SPEAKER

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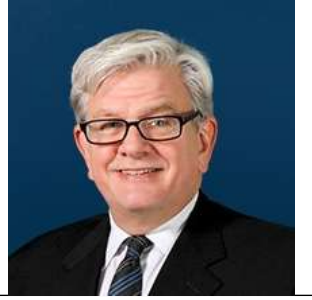
Public Entities



Robert Zielinski
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Michigan (Illinois Office)

- The Board does not have jurisdiction over states and political subdivisions.
- Public universities and their employees are not subject to direct regulation by the Board.
- BUT the Abruzzo Memo suggests that joint employer theory may lead to indirect regulation.

Joint Employers

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- Currently requires that two employers exercise direct and immediate control of key employment terms of a group of employees subdivisions.
- Obama era precedent allowed joint employer status where right to control was more indirect or abstract.
- Application of looser standard could make conferences, which are not political subdivision joint employers of public university students leading to de facto bargaining/collective rights.

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Columbia University:

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- 2016: NLRB reversed Brown University (2004)
- In Brown the NLRB had held that graduate students have a predominantly academic relationship with their institutions and are therefore not “employees”
- Columbia NLRB held that graduate student assistants who have a common-law employment relationship with their university are employees covered under the Act with Section 7 rights
  - Including the right to form a union and demand collective bargaining under the Act
- Reasoned that student assistants have both educational and economic relationships with their universities
  - Students’ academic relationship does not foreclose a finding that they are employees

Columbia University:

Mark Mathison
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- NLRB focused on responding to schools' criticism: collective bargaining at odds with educational decision-making
- NLRB reasoned based on public sector bargaining history:
  - Successful student assistant bargaining
  - "64,000 graduate student employees organized at 28 institutions"
  - CBA's w/ retained management rights over:
    - "course content, course assignments, exams, class size, grading policies, and methods of instruction, as well as graduate students' progress on their own degrees."
  - NYU CBA subjects: stipends, discipline and discharge, job postings, and health insurance

Columbia University:

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Miscimarra's Vigorous Dissent:

- Lack of distinction between different categories of student assistants
- Act intended to deal with "industrial life," not academia
- Concerns over use of economic weapons in higher ed
  - Loss, suspension, or delay of academic credit
  - Suspension of tuition waivers
  - Potential replacement
  - Loss of tuition previously paid
  - Misconduct, potential discharge, academic suspension and expulsion.

Columbia University:

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Miscimarra's Dissent:

- Irrational policy changes institutions would have to make and conduct institutions would now have to allow in academia per NLRB PCA decisions:
- Non-confidential investigations
- Disclosure of witness statements
- Rules promoting civility
- Invalidating rules barring profanity and abuse
- Outrageous and confrontational conduct by student assistants
- Outrageous and profane social media postings by student assistants
- Disrespect and profanity directed toward supervisors

Columbia University:

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Columbia Opened the Floodgates When First Decided

- Yale/Unite HERE: Ten Microunits: DDE
- Harvard/UAW: One expansive unit: Stipulated
  - Graduate and undergraduate Teaching Fellows, teaching and course assistants, and graduate student research assistants
  - 314 Ballot Challenges pending
- Duke/SEIU: PhD. and Masters students: DDE
- Loyola/SEIU: DDE: Union win
  - All graduate Teaching Assistants, Research Assistants, Program Assistants, and Fellowship Teachers (excluding Theology department
- Columbia election: Union win 1602-623.

Columbia University:

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- Nine universities, including Brown University, filed an amicus brief in 2016 in a challenge to the Columbia decision opposing graduate student unionization and the classification of graduate students as employees
- 2017: Student Organizing Petitions withdrawn at Duke, Yale, Harvard, Grinnell, others after Trump NLRB appointments
- Organizing in Student Units Has Lain Dormant; but now . . .

Potential Concerns re: Student Organizing

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- Disruption in Obtaining Degrees
- Interplay with Other Higher Education Laws
- Transient Bargaining Units
  - Voter Eligibility Issues &
    Questions re: Unit Membership & CBA coverage.
  - Contours of a permissive vs. mandatory subjects of bargaining
  - NLRB Certification likely not to address
- Turning Academia Adversarial

Panelists

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Where Does This End?

Thank You!

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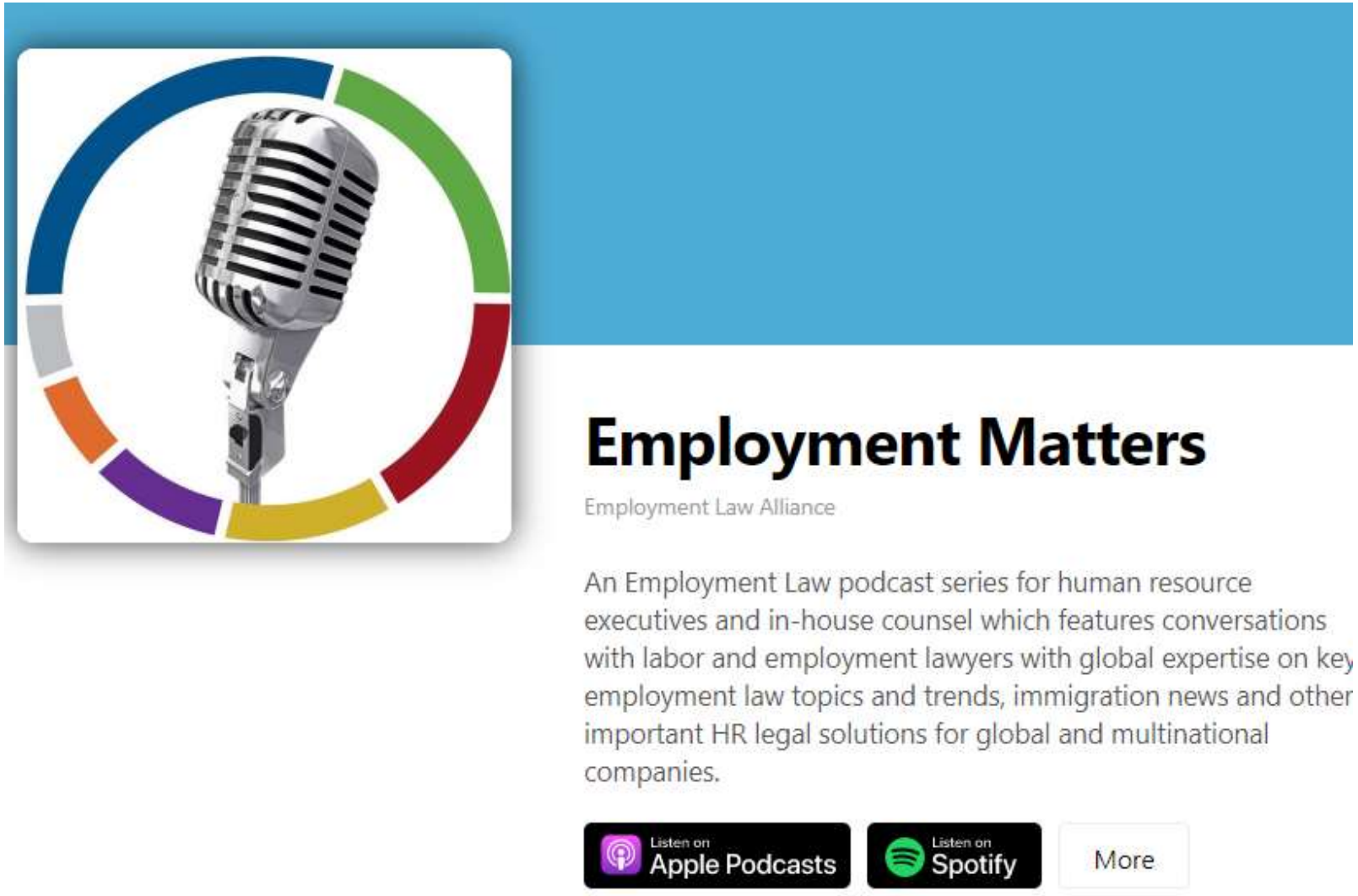

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