FIRST & GOAL FOR LABOR: HOW THE DEPARTMENT OF LABOR CAN CAPITALIZE ON A RECENT WIN FOR COLLEGE ATHLETES

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[Myles Brand:] They can't be paid.
[Michael Rosenberg:] Why?
[Brand:] Because they're amateurs.
[Rosenberg:] What makes them amateurs?
[Brand:] Well, they can't be paid.
[Rosenberg:] Why not?
[Brand:] Because they're amateurs.
[Rosenberg:] Who decided they are amateurs?
[Brand:] We did.
[Rosenberg:] Why?
[Brand:] Because we don't pay them.

—*Interview between Michael Rosenberg and then-NCAA President Myles Brand*[1]

I. KICKOFF

In recent years, college athletes have sought to recoup the value of their labor by filing claims under the Fair Labor Standards Act (FLSA), asserting that they are entitled to minimum wage because they are "employees" as understood by the statute.[2] FLSA claims are the latest form of legal challenge brought by the movement to compensate college athletes for the revenue generated by their labor.[3] If courts determine that college athletes are covered by the FLSA, each athlete classified as an employee will be entitled to hourly wages from their college, regardless of their sport, position, or where they are on the depth chart.[4]

In assessing this influx of FLSA claims, courts had not, prior to 2024, crafted a multifactor test specifically tailored to assessing the "economic

1. Michael Rosenberg, *Change Is Long Overdue: College Football Players Should Be Paid*, SPORTS ILLUSTRATED (Aug. 26, 2010), https://www.si.com/more-sports/2010/08/26/pay-college [https://perma.cc/5YYX-YGYB].

2. *See* Dawson v. NCAA, 932 F.3d 905, 907–08 (9th Cir. 2019) (citing 29 U.S.C. § 203(e)(1) which defines employee as "any individual employed by an employer"); Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016); Livers v. NCAA, No. 17-4271, 2018 LEXIS 124780, at *1–2 (E.D. Pa. July 25, 2018).

3. *Infra* Section II.C.

4. *See generally* Danielle L. Kennebrew, *The Employment Status of the Twenty-First Century NCAA Collegiate Athlete: An Evaluation of the Fair Labor Standards Act and the National Labor Relations Act*, 18 DEPAUL J. SPORTS L., Spring 2022, at 7 ("If collegiate athletes were recognized as employees of their institutions the athlete would be afforded specific rights under federal law. More specifically, the athlete would acquire benefits under the Fair Labor Standards Act (e.g., minimum wage and overtime) . . . .").

reality"[5] of the relationship between college athletes and their educational institutions, athletics conferences, or the National Collegiate Athletics Association (NCAA).[6] Instead, both the Seventh and the Ninth Circuit Courts of Appeals dismissed college athletes' FLSA claims at the summary judgment stage, finding either that college athletes were not employees of their colleges,[7] or their athletic conferences and the NCAA.[8] Despite the same result in the Seventh and Ninth Circuits, the courts employed very different legal standards to arrive at their conclusions.[9]

On July 11, 2024, the Third Circuit issued a groundbreaking decision in *Johnson v. NCAA*.[10] For the first time, a federal appellate court allowed college athletes' claims that they were employees under the FLSA to progress past the summary judgment stage.[11] In doing so, the Third Circuit created a new four-factor test for analyzing college athletes' claims to FLSA employee status.[12] The case has now been remanded for proceedings to assess the plaintiffs' status as employees under the new *Johnson* test.[13] Following differing results in the Third, Seventh, and Ninth Circuits, the proper analytical framework for assessing college athletes' FLSA claims remains an open question.[14]

Despite the uncertainty of college athletes FLSA eligibility, the Department of Labor (DOL) and its Wage and Hour Division (WHD) have not provided clarity on the employee status of college athletes. WHD's only formal guidance on the issue has not been updated since at least 1993,[15] and seems to employ a framework that federal courts of appeals have rejected for analyzing college athletes' employee status.[16]

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5. The "economic reality" of the relationship between a purported employee and employer is the standard for assessing whether the Fair Labor Standards Act (FLSA) applies. *Infra* Section III.A.

6. *Infra* Section III.C.

7. *Berger*, 843 F.3d at 293 (Seventh Circuit decision).

8. Dawson v. NCAA, 932 F.3d 905, 913 (9th Cir. 2019). The Ninth Circuit explicitly declined to consider whether college athletes are employees of their academic institutions: "We need not, and do not, reach any other issue urged by the parties, nor do we express an opinion about student-athletes' employment status in any other context." *Id.* at 913–14.

9. *See id.* at 908 n.2 ("We do not adopt *Berger*'s analytical premises nor its rationales.").

10. 108 F.4th 163 (3d Cir. 2024).

11. *See Dawson*, 932 F.3d at 913; *Berger*, 843 F.3d at 294.

12. *See Johnson*, 108 F.4th at 180. According to the *Johnson* test, college athletes "may be employees under FLSA when they (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'" *Id.* (internal citations omitted).

13. *Id.* at 182.

14. *Infra* Section III.C.

15. *Infra* Section IV.A.

16. *Infra* Section IV.A.

This comment details the significance of the *Johnson* decision and calls upon WHD to issue interpretative guidance adopting the new *Johnson* test as a specified means of analyzing college athletes' FLSA claims to employee status under the FLSA. Part II provides an overview of the intersection of college athletics and labor, including the business of top-tier college athletics; recent developments in higher education labor law jurisprudence; and the designation of "amateur" that has been used to classify college athletes. Part III contains analysis of employee status under the FLSA; the role of WHD in enforcing the FLSA; how college athletes have, to date, been denied employee status; and how *Johnson* changed the game. Part IV calls upon WHD to amend its current guidance and issue an administrator interpretation adopting the four-factor *Johnson* test to analyze the status of college athletes under the FLSA, and details how such a change would impact future FLSA claims from college athletes.

II. THE PLAYING FIELD

A. The Business of College Athletics

In recent years there has been increased attention on the business of top-tier college athletics. Much of the heightened scrutiny is a response to the tremendous amount of revenue athletics generate for higher education institutions across NCAA Division I.[17] Forty-nine colleges reported total revenues exceeding $100 million in 2022, with five schools exceeding $200 million in total revenue.[18] The Ohio State University, the top earner in 2022, has brought in more than $200 million in revenue every year from 2017 to 2022, with the exception of 2020, which was hampered by the COVID-19 pandemic.[19]

Revenue for college athletics comes from many different sources, including ticket sales, broadcast rights, and donations made directly to the athletic department.[20] Colleges are either public or non-profit entities subject to Internal

17. *See NCAA Finances: Revenue and Expenses by School*, USA TODAY, https://sports.usatoday.com/ncaa/finances [https://perma.cc/C2L9-TK3T] (Mar. 14, 2024, 2:05 PM) (displaying total revenue, expenses, and budget allocation percentages for 232 schools in the NCAA's Division I).

18. *Id.* (Ohio State University, University of Texas, University of Alabama, University of Michigan, and University of Georgia).

19. *Ohio State Revenue & Finances*, USA TODAY, https://sportsdata.usatoday.com/ncaa/finances/204796 [https://perma.cc/8F9Z-PKDX] (Mar. 14, 2024, 2:05 PM).

20. *Methodology for 2022 NCAA Athletics Department Revenue-and-Expense Database*, USA TODAY, https://www.usatoday.com/story/sports/2023/04/14/college-sports-finances-ncaa-revenue-expense-database-methodology/11664404002 [https://perma.cc/L3UR-5WCP] (June 12, 2023, 4:46 PM).

Revenue Code § 501(c)(3),[21] which means that the revenue generated by athletic departments cannot be turned into profit.[22] The requirement that colleges' economic output must largely match their input, combined with NCAA rules prohibiting direct payments to athletes,[23] leads schools to spend massively[24] on coaches' salaries[25] and luxurious athletic facilities[26] rather than paying players directly.

Much of the revenue brought in by college athletics comes from lucrative television contracts[27] and donations to athletic programs.[28] In 2024, the NCAA

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21. 26 U.S.C. § 501(c)(3).

22. A college is only eligible for § 501(c)(3) tax-exempt status if "no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual . . . ." *Id.*

23. *Infra* text accompanying note 143.

24. *See generally* Kevin Blue, *Rising Expenses in College Athletics and the Non-Profit Paradox*, ATHLETIC DIR. U, https://athleticdirectoru.com/articles/kevin-blue-rising-expenses-in-college-athletics-and-the-non-profit-paradox [https://perma.cc/CF4R-4H2F] (last visited Apr. 13, 2025).

25. The twenty-five highest paid football coaches all earn over $7 million per year in salary, with the University of Georgia's Kirby Smart being the highest paid coach at $13 million. Amanda Christovich, Doug Greenberg & Rodney Reeves, *Who Is Highest-Paid Coach in College Football?*, FRONT OFF. SPORTS, https://frontofficesports.com/who-are-highest-paid-college-football-coaches [https://perma.cc/67NP-RB3V] (Feb. 6, 2025, 07:58 PM).

26. The University of Georgia's $80 million football complex includes a sports bar, kitchen, and barbershop, among the athletics-related amenities. Meredith Cash, *Take a Tour of Georgia's $80 Million Football Center, Which Was Built to Be a 'One-Stop Shop' for College Football's Top Stars*, BUS. INSIDER (Dec. 30, 2023, 7:34 AM), https://www.businessinsider.com/georgia-football-facility-locker-room-photos-2023-12 [https://perma.cc/BV9W-AB5W]. In 2019, Louisiana State University spent $28 million to upgrade its football locker room. James Parks, *Photos Comparing LSU Football Lockers and School Library Going Viral*, SPORTS ILLUSTRATED (May 4, 2023), https://www.si.com/fannation/college/cfb-hq/ncaa-football/lsu-football-locker-room-library-comparison-going-viral [https://perma.cc/ADM9-75RX]. Many of these astronomical expenditures on athletic facilities are financed by donations to athletic departments. *See, e.g.*, Angelique S. Chengelis, *Michigan Shows Off $168M Update of Athletics Facilities*, THE DET. NEWS, https://www.detroitnews.com/story/sports/college/university-michigan/2018/01/09/michigan-shows-update/109315954 [https://perma.cc/35L2-RZXA] (Jan. 9, 2018, 10:54 PM) (reporting that University of Michigan's $168 million upgrade of its non-football and basketball athletic facility was financed by private donations).

27. *See, e.g.*, David Cobb & Dennis Dodd, *College Football Playoff Finalizes TV Deal Beginning in 2026 as FBS Leaders Settle on Revenue Distribution*, CBS SPORTS (Mar. 15, 2024, 2:57 PM), https://www.cbssports.com/college-basketball/news/college-football-playoff-finalizes-tv-deal-beginning-in-2026-as-fbs-leaders-settle-on-revenue-distribution [https://perma.cc/5M7T-K5A4] (detailing a 2024 college football playoff contract for the 2026 season).

28. For example, athletic donations accounted for approximately 62% of the almost $217 million raised by Clemson University in fiscal year 2023. Paula Powers, *Clemson University*

signed two television contracts set to take effect in 2026, totaling over $2 billion.[29] Two of the NCAA's current broadcasting rights agreements, totaling $2.2 billion, are just for the playoffs in men's basketball and football.[30] In the 2026 college football playoff deal, payouts for individual schools are structured by conference: the Big Ten and Southeastern Conference will receive approximately $22 million per school, the Atlantic Coast Conference will receive approximately $13–$14 million per school, and the Big 12 will receive approximately $12 million per school.[31] Under the new deal, all power conference schools[32] will receive a 140% to 340% raise from the $5 million that they received under the previous contract, regardless of on-field performance.[33]

College athletics have additional downstream benefits for colleges beyond revenue generated from television contracts and ticket sales. Athletic success has been shown to increase undergraduate admissions,[34] a phenomenon known as the "Flutie Effect."[35] The phenomenon is named for Doug Flutie's

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Shatters Fundraising Record with Unprecedented Philanthropic Support, CLEMSON NEWS (July 20, 2023), https://news.clemson.edu/clemson-university-shatters-fundraising-record-with-unprecedented-philanthropic-support [https://perma.cc/YC3A-JRBH].

29. *See* Cobb & Dodd, *supra* note 27; Steve McCaskill, *NCAA and ESPN Agree US$920m Eight-Year Deal for 40 College Sports Championships*, SPORTS PRO MEDIA (Jan. 5, 2024), https://www.sportspromedia.com/news/ncaa-espn-march-madness-basketball-college [https://perma.cc/8FLW-6PWX] (detailing a 2024 contract for NCAA playoffs in sports other than football and men's basketball).

30. *See* Cobb & Dodd, *supra* note 27; McCaskill, *supra* note 29 ("The men's [Division I basketball] tournament is already sold separately, with CBS and Warner Bros Discovery (WBD) sharing the rights for US$900 million a year until 2032.").

31. Cobb & Dodd, *supra* note 27. *See generally College Football Conferences*, ESPN, https://www.espn.com/college-football/conferences [https://perma.cc/X6U4-B9VN] (last visited Apr. 15, 2025) (listing schools for each conference under "Standings").

32. Power conference schools are the members of the four power conferences in Division I football: the Southeastern Conference, the Big Ten, the Big 12, and the Atlantic Coast Conference. *See generally* Pat Forde, *Welcome to the New College Landscape: How Each Power Four Conference Stacks Up*, SPORTS ILLUSTRATED (July 1, 2024), https://www.si.com/college/welcome-to-the-new-college-landscape-how-each-power-four-conference-stacks-up [https://perma.cc/25Q6-NWWE] (explaining the current qualities and recent history of each conference following a recent reorganization).

33. Cobb & Dodd, *supra* note 27.

34. *See* Doug J. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, 32 MKTG. SCI. 679, 681 (2013) ("[W]hen a school goes from being mediocre to performing well on the football field, applications increase by 17.7%.").

35. *See* Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications [https://perma.cc/586T-YEHT].

1984 game-winning Hail Mary pass, which led, in part, to an approximate 30% increase in undergraduate applications to Boston College the following two years.[36] The increase in applications caused by on-field success leads to positive outcomes in the classroom, as it allows institutions to be more selective when admitting students.[37]

B. Life as a Division I College Athlete

The NCAA and its member institutions exert a significant amount of control over the lives of college athletes. The NCAA strictly regulates the hours students may devote to athletics,[38] and athletic programs limit the periods which athletes may devote to their studies.[39] The NCAA prohibits players from exceeding four hours per day and twenty hours per week of mandatory athletic participation,[40] known as Countable Athletically Related Activity (CARA).[41] The NCAA requires colleges to log their athletes' CARA daily.[42]

Athletic activities restrict players' ability to study in their desired fields.[43] Athletic programs make their mandatory practice schedule and then

36. Chung, *supra* note 34, at 679. The Flutie Effect not only affects football. Other examples include Florida Gulf Coast University, which saw a 41% increase in out-of-state applications following its men's basketball team surprise run to the Sweet Sixteen in 2013, and Wichita State, which experienced an 81% increase in overall applications after its men's basketball team shocked the nation by reaching the Final Four. Jordan Ritter Conn, *Life After Dunk City*, GRANTLAND (Feb. 19, 2014), https://grantland.com/features/fgcu-eagles-ncaa-basketball-dunk-city-no-more [https://perma.cc/9KRR-E9FG]; Ryan McGee, *Coastal Championship Brings Rivals Together to Celebrate History*, EPSN (July 2, 2016, 11:39 AM), https://www.espn.com/college-sports/story/_/id/16702550/coastal-carolina-championship-brought-clemson-south-carolina-fans-together [https://perma.cc/SPU9-9W6V].

37. Chung, *supra* note 34, at 681 ("[S]chools become more selective with athletic success. For the mid-level school, in terms of average SAT scores, the admissions rate would decline by 4.8% with high-level athletic success.").

38. *See* Decision & Direction of Election at 4–5, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (2024) https://www.nlrb.gov/case/01-RC-325633 [https://perma.cc/PDL6-V6DK].

39. *See id.* at 8–11.

40. *See id.* at 5.

41. *See id.* at 4.

42. NCAA, 2021–22 NCAA DIV. I MANUAL § 17.1.7.3.4 (2021), https://ncaaorg.s3.amazonaws.com/compliance/sar/d1/2021-22D1_NCAA-Manual.pdf [https://perma.cc/YU92-FW66] [hereinafter 2021–22 NCAA DIV. I MANUAL].

43. *See* Complaint ¶¶ 90–91, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2019) (No. 19-5230) (providing results from the 2015 NCAA Growth, Opportunities, Aspirations, and Learning of Students in College (GOALS) Study).

encourage athletes not to take classes that conflict with that schedule.[44] In a 2015 study, almost half of Division I athletes reported that their participation in sports prevented them from enrolling in the classes they wanted to take.[45] Additionally, about one-quarter to one-third of Division I athletes reported that they were unable to pursue their desired major because of their participation in athletics.[46] The limits that athletic participation place on an athlete's ability to pursue their desired course of study highlight the amount of control Division I athletics have over an athlete's college experience.

C. Name, Image, and Likeness (NIL) and Other Developing Compensation Schemes

The marquee development in the movement to compensate college athletes is the legalization of NIL payments.[47] Prior to 2021, the NCAA barred college athletes from making any money from their NIL.[48] NCAA rules prohibited college athletes from entering into contracts or commercial

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44. *E.g.*, Decision & Direction of Election at 8, *Trs. of Dartmouth Coll.*, 373 N.L.R.B. No. 34. When planning for the Fall 2023 semester, Dartmouth men's basketball players were asked to "please do your best to AVOID" enrolling in classes during the team's mandatory practices, which took place Monday through Friday from 2:00 PM to 5:00 PM. *Id.* The NCAA prohibits athletes from missing class for practice activities, excluding travel for competition. *See id.* at 10. While the Dartmouth men's basketball coach claimed to permit players to miss both practices and away games for academic commitments, one of the Dartmouth players testified that missing practice is likely to decrease playing time. *Id.* at 11. *But see* Complaint at ¶ 89, *Johnson*, 556 F. Supp. 491 (No. 19-5230) (*Johnson* plaintiff alleging: "If a Student Athlete fails to attend squad or individual meetings and participate in athletic practice sessions and scheduled contests as specified by the sport coach, [they] can be disciplined, including suspension or dismissal from the team.").

45. *See* Complaint at ¶ 90, *Johnson*, 556 F. Supp. 491 (No. 19-5230). The NCAA's GOALS study found that 50% of top-tier football players, 34% of men's basketball players, 51% of women's basketball players, 41% of baseball players, 48% of all other male athletes, and 53% of all other female athletes reported that their participation in Division I sports prevented them from taking their desired classes.

46. *See id.* ¶ 91. Top-tier football players (36%), women's basketball players (32%), baseball players (32%), and men's basketball players (29%) were the most likely to report that their participation in athletics prevented them from majoring in what they wanted to. *Id.*

47. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/GE8D-RVM4].

48. John Niemeyer, Comment, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 887 (2015) (Under the 2015 NCAA Division I manual, "Student athletes [were] not allowed to use or be compensated for their images, names, or likeness.").

agreements to sell their NIL.[49] Colleges, on the other hand, were permitted to use their athletes' NIL for their own financial benefit, but forbidden from providing any compensation to the athletes.[50] The NCAA lifted the ban on NIL payments in 2021[51] as the result of increased pressure from state legislatures[52] and federal courts,[53] culminating in the Supreme Court's ruling in *NCAA v. Alston*.[54] While the financial terms of NIL deals are largely unreported,[55] attempts to document the value of NIL deals portray a lucrative landscape for top athletes.[56] Although the advent of legalized NIL has paid dividends for top athletes, the current system does not adequately compensate most Division I athletes.[57] In 2022, the first full year of NIL, only about 17% of Division I athletes participated in NIL, and the median NIL deal was

49. *Id.* at 887 n.26.

50. *See id.*

51. *See* Brutlag Hosick, *supra* note 47.

52. *See, e.g.*, Fair Pay to Play Act, CAL. EDUC. CODE § 67456 (West 2021).

53. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1052–53 (9th Cir. 2015).

54. 141 S. Ct. 2141, 2162–63 (2021) (affirming the Northern District of California's decision to enjoin the NCAA for Sherman Antitrust Act violations, based on limitations to athletes' education-related benefits, which they received for their athletic services). The *Alston* Court did not address name, image, and likeness (NIL) directly, but it provided a spark that, in part, led to the NCAA's decision to legalize NIL. *See* Austin Taylor, Note, NCAA v. Alston*: The Future of College Sports in the Name, Image, and Likeness Era*, 75 RUTGERS U. L. REV. 363, 372–74 (2022).

55. *See NIL Deal Tracker*, ON3, https://www.on3.com/nil/deals [https://perma.cc/5HM8-XYK9] (last visited Feb. 28, 2025) ("On3 does NOT disclose deal financial terms. Financial data is undisclosed and private to the athlete.").

56. *See On3 NIL 100*, ON3, https://www.on3.com/nil/rankings/player/nil-100 [https://perma.cc/6FTV-ZK7Z] (Feb. 27, 2025, 7:00 PM). On3, a media and technology company that tracks college and high school NIL deals, calculates "NIL Valuation" using a formula that considers "Roster Value" ("a calculation of an athlete's respective value to their team") and "NIL Value" (NIL deals only make up a portion of On3's NIL Value figure, which also considers social media presence and other ways that athletes "create awareness on a regional and national scale"). Shannon Terry, *About On3 NIL Valuation and Roster Value*, ON3 (July 29, 2022), https://www.on3.com/nil/news/about-on3-nil-valuation-per-post-value [https://perma.cc/2XJA-27QX]. The top forty-eight athletes on On3's list have NIL Valuations exceeding $1.5 million with the highest valuation listed at $6.6 million going to University of Texas Quarterback Arch Manning. *See On3 NIL 100*, *supra* note 56.

57. *See* Bill Carter, *Seven Data Points that Will Tell the Story of NIL in 2023*, SPORTS BUS. J. (Jan. 17, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/17-Carter.aspx [https://perma.cc/TJ8F-TN8J]; Noah Henderson, *The College Football NIL Pay Gap Is Real*, SPORTS ILLUSTRATED (Feb. 9, 2024), https://www.si.com/fannation/name-image-likeness/football/the-college-football-nil-pay-gap-is-real-noah9 [https://perma.cc/VUJ3-36AW].

worth $65.[58] Of the athletes who receive NIL deals, compensation varies greatly based on the athletes' sport and gender.[59]

The NCAA recently reached a settlement in three antitrust lawsuits[60] that promises to overhaul the NIL landscape once more.[61] If finalized, the agreement would allow for power conference colleges to pay athletes directly through NIL deals for the first time.[62] Schools will be permitted to pay players "up to 22% of the average revenue that power conference schools generate from media rights, ticket sales, and sponsorships—a sum that is expected to be . . . [upwards of] $22 million per school when the settlement goes into effect at the start of the 2025–26 academic year."[63] Under the proposed agreement, "[f]ootball and men's college basketball players from power conference schools will be eligible to receive an average of $135,000," while "[w]omen's basketball players from power conference schools could receive an average of $35,000."[64] If enacted, the NIL settlement promises to introduce a new compensation scheme for athletes in the most profitable sports and fundamentally shift the relationship between athletes and their colleges.[65] After an initial setback,[66] the settlement received preliminary

58. Carter, *supra* note 57.

59. Ninety-six of the one hundred athletes in On3's NIL Valuation list are male players in either college or high school football or basketball. *On3 NIL 100*, *supra* note 56. *See generally* Susan M. Shaw, *NIL Exacerbates Inequities for Women Athletes Even as It Provides Opportunities*, FORBES (May 23, 2023, 1:36 PM), https://www.forbes.com/sites/susanmshaw/2023/05/23/nil-exacerbates-inequities-for-women-athletes-even-as-it-provides-opportunities [https://perma.cc/Y2JN-XKJB].

60. Joint Stipulation and Order Staying Action Pending Settlement Approval, Hubbard v. NCAA, No. 4-23-cv-01593 (N.D. Cal. May 30, 2024); Order Granting Motion for Limited Intervention and Denying Motion to Transfer, Dismiss, or Stay, No. 23-cv-06325-RS, 2024 WL 1861010 (Apr. 29, 2024); House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021).

61. *See* Dan Murphy & Peter Thamel, *NCAA, Power 5 Agree to Deal That Will Let Schools Pay Players*, ESPN (May 23, 2024, 7:34 PM), https://www.espn.com/college-sports/story/_/id/40206364/ncaa-power-conferences-agree-allow-schools-pay-players [https://perma.cc/ST3A-LHRE].

62. *See id.*

63. *See* Dan Murphy, *Court Filing Reveals Terms of NCAA Antitrust Lawsuits Settlement*, SPORTS ILLUSTRATED (July 26, 2024, 6:13 PM), https://www.espn.com/college-sports/story/_/id/40649389/ncaa-antitrust-lawsuits-settlement-filed-federal-court [https://perma.cc/4ZFK-E5VK].

64. *Id.*

65. *See id.*

66. *See* Jesse Dougherty, *NCAA's Landmark Deal to Pay College Athletes on Hold After Hearing*, WASH. POST (Sept. 6, 2024), https://washingtonpost.com/sports/2024/09/06/house-v-ncaa-settlement-on-hold [https://perma.cc/G4Q7-XU88] (explaining that during settlement

approval from Judge Claudia Wilken of the Northern District of California on October 7, 2024.[67]

If the settlement is adopted, the agreement's permissive, rather than mandatory, compensation scheme[68] is unlikely to provide direct payment to all power conference athletes covered by the agreement. As currently constituted, the decision to pay specific athletes, or pay athletes at all, is at the school's discretion; the settlement does nothing to require colleges to pay their athletes.[69] The agreement essentially creates a salary cap without instituting a floor that requires institutions to pay any of their athletes—let alone all of their athletes—for their labor.[70] Any agreement that allows athletes to receive direct compensation from their schools will make a significant shift towards valuing athletes' labor, but the FLSA's minimum wage provisions are essential for ensuring that every athlete receives adequate compensation.

Despite optimism surrounding the advent of direct compensation for college athletes, the proposed settlement agreement is not without its critics, even among those who favor college athlete compensation. The law firm that represented the plaintiffs in *O'Bannon v. NCAA*,[71]—one of the first cases to claim that the NCAA violated antitrust laws by preventing athletes from monetizing their NIL—opposed the proposed settlement. In a filing in the Northern District of California, the attorneys for O'Bannon argued that the damage awards were insufficient and the cap limiting how much schools may pay their athletes is unlawful.[72]

D. Trends in Higher Education Labor

The recognition of the value created by college athletes' labor is part of a recent legal trend which recognizes the value college students generate for their colleges, generally. Prior to 2016, students employed by their colleges

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discussions in *House v. NCAA*, the parties did not agree on "language regarding third-party [NIL] payments from booster-funded groups known as collectives").

67. *See* Dan Murphy, *Settlement Designed to Pay College Athletes Gets Preliminary Approval*, ESPN (Oct. 7, 2024, 3:00 PM), https://www.espn.com/college-sports/story/_/id/41665307/settlement-designed-pay-college-athletes-gets-preliminary-approval [https://perma.cc/AWM6-JYSS].

68. *See* Murphy & Thamel, *supra* note 61.

69. *See* Murphy, *supra* note 63.

70. *See id.*

71. 802 F.3d 1049 (9th Cir. 2015).

72. *See* Ralph Russo, O'Bannon *Lawyer Challenges NCAA Antitrust Settlement over Revenue-Sharing System, NIL Restrictions*, N.Y. TIMES: THE ATHLETIC (Oct. 3, 2024), nytimes.com/athletic/5815367/2024/10/03/ncaa-power-conference-antitrust-opposition [https://perma.cc/P2ML-8TKU].

were not recognized as employees under the National Labor Relations Act (NLRA), and, as such, did not have the right to unionize.[73] This changed when the National Labor Relations Board (NLRB) recognized Columbia University graduate student workers as employees who have the right to join a union.[74]

In 2024, the NLRB Region 1[75] expanded the right to unionize to college athletes, when it recognized the Dartmouth Men's Basketball team's election to join the local chapter of Service Employees International Union (SEIU Local 560).[76] In recognizing their election to unionize, the NLRB Region 1 determined that the athletes are employees under the NLRA.[77] The regional office's decision was set to be reviewed by the Board,[78] and then-NLRB General Counsel Jennifer Abruzzo's support for college athlete unionization led to optimism that the Board would uphold the regional decision.[79] However, Donald Trump's election caused a complete change in course. Acting

73. Graduate students were briefly recognized as employees under the National Labor Relations Act (NLRA) from 2000 to 2004. *See generally* Jon Levitan, *NLRB Abandons Rulemaking that Would Have Stripped Graduate Students Workers of Right to Unionize*, ONLABOR (Mar. 12, 2021), https://onlabor.org/nlrb-abandons-rulemaking-that-would-have-stripped-graduate-students-workers-of-right-to-unionize [https://perma.cc/2HEK-EX3Z] (detailing the NLRB's back-and-forth jurisprudence on the employee status of graduate students between 2000 and 2016).

74. Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1080–81 (2016). In *Brown University*, the Board ruled that graduate assistants were primarily students and thus could not be considered employees under the NLRA. Brown Univ., 342 N.L.R.B. 483, 483 (2004). The *Columbia* Board rejected this argument, ruling that the existence of one kind of relationship does not foreclose an employment relationship. *Trs. of Columbia Univ.*, 364 N.L.R.B. at 1080.

75. NLRB Regional Offices oversee union representation elections and issues Decision & Direction of Election orders addressing any issues arising ahead of elections. *The NLRB Process*, NLRB, https://www.nlrb.gov/resources/nlrb-process [https://perma.cc/MK9G-NS5M] (last visited Apr. 9, 2025). Parties may appeal a Regional Office's order to the Board. *Id.* Region 1 has jurisdiction over New England. *Region 01 – Boston*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices/region-01-boston [https://perma.cc/J9QP-Q62G] (last visited Apr. 9, 2025).

76. Decision & Direction of Election at 2, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (2024).

77. *Id.*

78. Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (2024).

79. Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd., Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act (Sept. 29, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458356ec26 [https://perma.cc/U9XB-FN7C].

General Counsel William Cowen rescinded Abruzzo's memorandum[80] and SEIU Local 560 withdrew its petition for representation to prepare for the Trump Administration's impending changes to the Board's composition.[81]

The NLRA and the FLSA have very similar definitions of employee,[82] and courts have used the statutory language of one as a guide for interpreting the other.[83] If a definitive rule is established on the NLRA status of college athletes, it will prove highly instructive to the FLSA inquiry, and vice versa.[84]

E. "Revered Tradition of Amateurism" – Historic Jurisprudence on the Nature of College Athletics

From the founding of the NCAA, college sports have been defined by the overarching principle of "amateurism."[85] Until the 1950s, the NCAA's amateurism rules prohibited colleges from providing any kind of monetary compensation to their athletes, including athletic scholarships.[86] Prior to the

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80. Memorandum from William B. Cowen, Acting Gen. Couns., Nat'l Lab. Rels. Bd., Recission of Certain General Counsel Memoranda (Feb. 14, 2025), https://apps.nlrb.gov/link/document.aspx/09031d4583f3f58c [https://perma.cc/CM2K-X2R7]. *See generally* OFF. PUB. AFFS., *GC 25-05 Rescission of Certain General Counsel Memoranda*, Nat'l Lab. Rels. Bd. (Feb. 14, 2025), https://www.nlrb.gov/news-outreach/news-story/gc-25-05-rescission-of-certain-general-counsel-memoranda [https://perma.cc/V32X-C5XU].

81. *See* Letter from Nelson Carrasco, Assoc. Exec. Sec'y, Nat'l Lab. Rels. Bd., to Joseph P. McConnell, Ryan Jaziri, Damien M. DiGiovanni, Richard Marks, Philip A. Miscimarra, Adam C. Abrahms, Neresa A. De Biasi & Nichole A. Buffalano, Couns., Morgan, Lewis & Bockius LLP; and Thomas E. Quigley, Reg'l Att'y, NLRB Region 1 (Jan. 15, 2025), https://apps.nlrb.gov/link/document.aspx/09031d4583f09056 [https://perma.cc/S3EE-ERXN].

82. *Compare* 29 U.S.C. § 152(3) (NLRA providing that the term employee "shall include any employee, and shall not be limited to the employees of a particular employer," subject to express limitations), *with* 29 U.S.C. § 203(e)(1) (FLSA defining employee as "any individual employed by an employer," subject to expressed limitations).

83. *See* Johnson v. NCAA, 108 F.4th 163, 178–79 (3d. Cir. 2024) ("We recognize that the NLRA and FLSA have distinct policy goals, but their shared history often inspires courts to draw interchangeably from each statute's caselaw to answer fundamental questions related to the equitable regulation of the American workplace.") (citing Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 13 (2011)).

84. *See id.*

85. *See generally* Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 259–63 (2003).

86. *See* Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1013 (2012). The 1916 NCAA bylaws defined an "amateur" as "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom." ALLEN L.

legalization of NIL payments, NCAA bylaws permitted athletes to be compensated for tuition and fees, room and board, textbooks, medical and life insurance, and a stipend of up to $2,000 for some athletes.[87]

College football saw an influx of revenue in the early-1980s, largely due to lucrative and new exclusive television deals.[88] The value of broadcast agreements led to antitrust challenges by NCAA member colleges, who argued that the NCAA prevented them from making independent contracts with broadcast networks.[89] Sherman Act[90] suits by the University of Oklahoma and the University of Georgia made their way up to the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma*.[91] The Court ruled that the NCAA must operate in accordance with the Sherman Act and that it failed to do so by restricting television contracting.[92] In the final paragraph of its decision, the Court offered a powerful declaration of the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports."[93] Despite the Court's application of antitrust law to the NCAA, it recognized that the NCAA "needs ample latitude" to preserve the "revered tradition of amateurism."[94]

The Supreme Court next considered an antitrust challenge against the NCAA in the 2021 case *NCAA v. Alston*.[95] This time, the plaintiffs were then-current and former Division I athletes alleging that the NCAA violated the Sherman Act by limiting the compensation students may receive in exchange for their participation in athletics.[96] At the trial stage, the Northern District

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SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEURISM MYTH 34–35 (1998).

87. *See* Fram & Frampton, *supra* note 86, at 1021.

88. In 1981, ABC and CBS reached an agreement with the NCAA to broadcast fourteen live games per network in exchange for payment of a "specified 'minimum aggregate compensation to the participating NCAA member institutions' during the 4-year period in an amount that totaled $131,750,000." NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 92–93 (1984).

89. *Id.* at 94–95.

90. The Sherman Antitrust Act made illegal any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1.

91. 468 U.S. 85 (1984).

92. *Id.* at 120 ("[C]onsistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.").

93. *Id.*

94. *Id.*

95. 141 S. Ct. 2141 (2021).

96. *Id.* at 2151.

of California upheld NCAA bylaws which prevented direct compensation of athletes for their athletic services,[97] but found that limitations on education-related benefits were anticompetitive.[98] On review, the Supreme Court unanimously affirmed the district court's ruling,[99] and, in doing so, rejected the argument that college athletics' "revered tradition of amateurism" bars "*all* challenges to NCAA's compensation restrictions."[100]

In a sweeping concurrence, Justice Brett Kavanaugh questions the legality of the NCAA's amateurism model, beyond just its limits on education-related benefits.[101] Kavanaugh portrays the majority opinion as essentially removing all meaning from the *Board of Regents of Oklahoma* Court's "revered tradition of amateurism" doctrine.[102] Kavanaugh articulates his own opinion on college athletics' tradition of amateurism by writing, "traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated."[103] Throughout his concurrence, Kavanaugh continuously indicates his belief that amateurism in college sports lacks legal justification.[104]

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97. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1103–04 (N.D. Cal. 2019) ("The procompetitive effect of these caps is preventing unlimited, professional-level cash payments, unrelated to education, that could blur the distinction between college sports and professional sports . . . .").

98. *Id.* at 1104 ("Defendants have not shown a procompetitive effect for NCAA rules that restrict inherently limited, non-cash, education-related benefits provided on top of a grant-in-aid.").

99. *Alston*, 141 S. Ct. at 2166 (2021).

100. *Id.* at 2157–58, 2167 ("[T]he Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.").

101. *Id.* at 2166–67 (Kavanaugh, J., concurring).

102. *Id.* at 2167 (Kavanaugh, J., concurring) ("The Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [*Board of Regents of Oklahoma*] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.") (internal citations omitted).

103. *Id.* at 2169 (Kavanaugh, J., concurring).

104. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. . . . The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. . . . [I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.

Id. at 2168 (Kavanaugh, J., concurring).

III. COLOR COMMENTARY

A. The FLSA, Employees, and WHD

In the immediate aftermath of contentious political and legal battles over responses to the Great Depression, Congress passed the FLSA to provide groundbreaking legal protections for many workers.[105] Among the most significant workers' protections established by the FLSA were a federal minimum wage,[106] mandatory overtime compensation,[107] and prohibitions on dealing in goods created by "oppressive child labor."[108]

Crucially, the FLSA only applies to employers and employees.[109] For a worker to be entitled to minimum wage and overtime compensation, they must be an employee that is employed by an employer, according to their respective statutory definitions.[110] The FLSA defines both employer and employee broadly. According to the statute, an "'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."[111] The FLSA's definition of "employ" is similarly broad; it "includes to suffer or permit to work."[112] The Supreme Court has described the statutory definition of employ as having "striking breadth."[113] Generally, the FLSA then defines employee as "any individual employed by an employer."[114] The Supreme Court has

105. *See generally* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22 (1978); Harry S. Kantor, *Two Decades of The Fair Labor Standards Act*, 81 MONTHLY LAB. REV. 1097 (1958).

106. 29 U.S.C. § 206(a)(1). "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages," of at least $7.25 per hour. *Id.*

107. *Id.* § 207.

108. *Id.* § 212.

109. *See* Dawson v. NCAA, 932 F.3d 905, 907–08 (9th Cir. 2019); Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016); Livers v. NCAA, No. 17-4271, 2018 LEXIS 124780, at *1–2 (E.D. Pa. July 25, 2018). For the FLSA to apply, a plaintiff must establish that the worker is employed by an "[e]nterprise engaged in commerce or in the production of goods for commerce" and that the workers is an employee. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 295 (1985) (internal citations omitted).

110. 29 U.S.C. § 206(a).

111. *Id.* § 203(d).

112. *Id.* § 203(g).

113. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

114. 29 U.S.C. § 203(e)(1).

established that the FLSA's definition of employee is quite broad,[115] based, in part, on Congress' intent to protect as many workers as possible.[116]

While the FLSA's definitions of employee and employ are expansive, the Supreme Court has imposed limits.[117] The standard test for determining whether a worker may be classified as an employee under the FLSA is one of economic reality.[118] A key determinant of whether a worker is an employee under the FLSA is whether they work with the expectation of some form of compensation, not limited to wages.[119]

To enforce its new promises and protections for employees, the FLSA created WHD within the DOL.[120] The statute grants the WHD Administrator broad investigatory authority, as necessary to enforce the FLSA.[121] In conducting its investigation and enforcement operations, the DOL and WHD

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115. *See* United States v. Rosenwasser, 323 U.S. 360, 362 (1945) ("A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.").

116. *See id.* at 363 n.3 ("Senator Black said on the floor of the Senate that the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'") (quoting 81 CONG. REC. 7657 (1937)).

117. The Court has found that the FLSA's definition of employee does not cover those who work for their own benefit on the premises of another without an express or implied compensation agreement, Rutherford Food Corp. v. McComb, 331 U.S. 722, 728–29 (1947), or those who work exclusively for their own "personal purpose or pleasure," Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

118. *See* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) ("[T]he 'economic reality' rather than 'technical concepts' is to be the test of employment . . . .").

119. *See* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985) (holding that a religious non-profit's commercial business staff are employees because they work under the expectation of receiving in-kind benefits such as foods, clothing, and shelter); *see also* Williams v. Strickland, 87 F.3d 1064, 1067 (9th Cir. 1996) (ruling that the plaintiff was not an employee because he performed work "to give him a sense of self-worth, accomplishment, and enabled him to overcome his drinking problems and reenter the economic marketplace" rather than for defined in-kind benefits).

120. 29 U.S.C. § 204(a). The statute designates that the Wage and Hour Division (WHD) is under the direction of its Administrator, who is appointed by the President and confirmed by the Senate.

121. 29 U.S.C. § 211(a). The statute authorizes WHD to,

> gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter[;] . . . enter and inspect such places and such records[; and] . . . question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.

Id.

mandate that employers strictly comply with the FLSA.[122] Many of these investigations are initiated by worker or third party complaints.[123] Following an investigation, the Secretary of Labor may file a complaint for injunctive relief in a United States District Court to restrain the employer from further withholding minimum wage or overtime payments.[124]

In addition to its statutory enforcement duties, federal regulation permits WHD to issue advisory interpretations to interpret the breadth of the FLSA and notify the public of the interpretation that guides their investigations.[125] WHD publishes a variety of guidance materials, including opinion letters and administrator interpretations.[126] Opinion letters may be written by the WHD Administrator or other agency staff members at the request of interested parties, and provide "a means by which the public can develop a clearer understanding of what FLSA and [Family Medical Leave Act] compliance entails."[127] Administrator interpretations are published at the Administrator's discretion and "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision at issue."[128] WHD has published one opinion letter on an FLSA issue since 2021,[129] and has not published an administrator interpretation on an FLSA issue since 2016.[130]

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122. 29 C.F.R. § 755.0(b) (1989).

123. WAGE & HOUR DIV., *How to File a Complaint*, DEP'T OF LAB. (DOL), https://www.dol.gov/agencies/whd/contact/complaints [https://perma.cc/SU23-VLCR] (last visited Feb. 27, 2025); WAGE & HOUR DIV., *Third-Party Complaints*, DOL, https://www.dol.gov/agencies/whd/contact/complaints/third-party [https://perma.cc/V6DE-SDUN] (last visited Feb. 27, 2025).

124. 29 U.S.C. § 216(b); 29 U.S.C. § 217.

125. 29 C.F.R. § 775.1 ("Advisory interpretations announced by the Administrator serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by the authoritative ruling of the courts, or unless he shall subsequently decide that his prior interpretation is incorrect.").

126. WAGE & HOUR DIV., *Final Rulings and Opinion Letters*, DOL, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance [https://perma.cc/H4K2-U4CN] [hereinafter *Final Rulings and Opinion Letters*] (last visited Feb. 27, 2025).

127. *Id.*

128. *Id.* WHD describes administrator interpretations as "useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees." *Id.*

129. WAGE & HOUR DIV., *Opinion Letter Search*, DOL, https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA [https://perma.cc/3KH6-47Q4] (last visited Feb. 27, 2025). At the time of publication, WHD has only published two opinion letters since 2021, both on Family Medical Leave Act issues. *Id.*

130. WAGE & HOUR DIV., *Administrator Interpretation Letter – Fair Labor Standards Act*, DOL, https://www.dol.gov/agencies/whd/opinion-letters/administrator-interpretation/flsa#2010 [https://perma.cc/BF8N-RJ8J] (last visited Feb. 27, 2025).

WHD opinion letters and administrator interpretations can have significant practical effects for FLSA litigants. An employer's good faith reliance on any formal guidance from WHD constitutes an affirmative defense to a FLSA charge.[131]

In addition to opinion letters and administrator interpretations, WHD publishes its Field Operations Handbook (FOH), which provides its "investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance."[132] The FOH also provides the public with information on how WHD investigates cases and interprets the FLSA, "reflect[ing] policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator."[133]

WHD has also shared multiple tests to determine whether certain kinds of workers are qualified as employees under the FLSA.[134] Perhaps the most commonly cited test, the "[e]conomic reality test to determine economic dependence," has been codified in the Code of Federal Regulations to distinguish between employees and independent contractors.[135] A fact sheet,[136] issued by WHD, describes the components of the "primary beneficiary test"—also referred to as the *Glatt* test[137]—which determines whether a worker is an employee or an intern.[138]

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131. 29 U.S.C. § 259 ("[N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of WHD of the DOL], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged."); *Final Rulings and Opinion Letters*, *supra* note 126 ("Opinion letters issued by the Administrator may be relied upon, pursuant to Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259, as a good faith defense to wage claims arising under the FLSA.").

132. WAGE & HOUR DIV., *Field Operations Handbook*, DOL, https://www.dol.gov/agencies/whd/field-operations-handbook [https://perma.cc/RYE9-CW8Z] [hereinafter *FOH Information Page*] (last visited Feb. 27, 2025).

133. *Id.*

134. *See, e.g.*, 29 C.F.R. § 795.110 (2024); *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships [https://perma.cc/N7EM-AAM8] [hereinafter *Fact Sheet #71*] (last visited Feb. 27, 2025).

135. 29 C.F.R. § 795.110 (2024).

136. *Fact Sheet #71*, *supra* note 134.

137. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016). The *Glatt* test is also commonly known as the primary beneficiary test. *Id.* at 535.

138. *Fact Sheet #71*, *supra* note 134.

Despite WHD codifying or otherwise adopting these different FLSA tests, there is currently no binding regulatory authority explicitly granting or denying employee status to college athletes under the FLSA. The only WHD guidance on the matter can be found in its FOH, which explicitly excludes all college athletes from FLSA coverage.[139] FOH § 10b03(e) forecloses FLSA employee status to a variety of participants in enumerated college and university activities by declaring:

> As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with . . . interscholastic athletics . . . . Activities of students in such programs, conducted primarily for the benefit of the participants as the part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution.[140]

FOH § 10b24(a) solidifies WHD's exclusion of any participant in an activity listed in FOH § 10b03(e) from FLSA protections: "University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the Act. In addition to the examples listed in FOH § 10b03(e) residence hall assistants . . . are not employees under the Act."[141] Because guidance on college athletes' coverage under the FLSA is only found in the FOH, WHD has not provided a formal justification as to why it does not consider college athletes to be employees.[142]

While athletes are forbidden from receiving compensation for their labor under NCAA bylaws,[143] colleges and universities are required to pay wages to students who work at athletic events as part of work study programs.[144]

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139. WAGE & HOUR DIV., DEP'T OF LAB., FIELD OPERATIONS HANDBOOK § 10b03(e) (2016) [hereinafter FIELD OPERATIONS HANDBOOK].

140. *Id.* "[D]ramatics," "debating teams," "radio stations," and "intramural" athletics are among the other excluded activities listed in Field Operations Handbook (FOH) § 10b03(e).

141. *Id.* § 10b24(a).

142. Chapter 10 of the FOH "contains interpretations regarding the employment relationship required for the [FLSA] to apply, the geographical limits of the Act's applicability, and employment which is specifically excluded from coverage under the Act," but does not provide WHD's justification for any interpretation. *Id.* § 10a00.

143. 2021–22 NCAA DIV. I MANUAL, *supra* note 42, § 12.1.2(a).

144. *See* Complaint ¶ 2, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2019) (No. 19-5230) ("[S]tudent ticket takers, seating attendants, and food concession workers at NCAA are paid on a minimum wage scale averaging $10.53 to $13.36 per hour under Work Study.").

Colleges are required to pay wages to these students because they are recognized as employees under the FLSA, as detailed in FOH § 10b24(b).[145]

Though WHD has not expounded on its rationale for excluding college athletes from FLSA employee status, the wording of FOH § 10b03(e) indicates that the agency believed (as of 1993) that intercollegiate athletics are conducted "primarily for the benefit of the participants."[146] This language is similar to that of the *Glatt* test, that is used to distinguish between student interns and employees.[147] Based on the language in FOH § 10b03(e), some legal commentators have assessed college athletes' FLSA claims using the *Glatt* test,[148] but courts have largely found the test inapplicable to college athletes' FLSA claims.[149]

Absent binding administrative authority on the subject, the FOH has been used as persuasive authority in support of the conclusion that college athletes are not employees under the FLSA.[150] The NCAA and other interested parties have repeatedly cited the FOH to courts considering college athletes' FLSA claims.[151]

B. Existing Frameworks for Analyzing FLSA Employee Status

The FLSA was enacted in 1938 to ensure that all employees, as defined by the statute,[152] are afforded a minimum hourly wage[153] and overtime pay.[154] Plaintiffs who prove their FLSA claims are owed backpay for unpaid

145. FIELD OPERATIONS HANDBOOK, *supra* note 139, § 10b24(b) ("[S]tudents who work at food service counters or sell programs or usher at athletic events . . . in anticipation of some compensation (money, meals, etc.) are generally considered employees under the Act.").

146. *Id.* § 10b03(e).

147. *See* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016); *Fact Sheet #71*, *supra* note 134.

148. *See* Kennebrew, *supra* note 4, at 32–40; Tyler J. Murray, Note, *The Path to Employee Status for College Athletes Post-*Alston, 24 VAND. J. ENT. & TECH. L. 787, 812–14 (2022).

149. *Infra* Section IV.A.

150. *See* Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) ("Because NCAA-regulated sports are 'extracurricular,' 'interscholastic athletic' activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes. We find the FOH's interpretation of the student-athlete experience to be persuasive.").

151. *See* Livers v. NCAA, No. 17-4271, 2018 LEXIS 124780, at *7 (E.D. Pa. July 25, 2018); Appellant's Opening Brief at 67–68, Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024) (No. 19-cv-05230), 2022 WL 1985595; Brief for Southeastern Conference at 2, *Johnson*, 108 F.4th 163.

152. 29 U.S.C. § 203(e).

153. *Id.* § 206.

154. *Id.* § 207.

minimum wages and overtime compensation.[155] Plaintiffs are required to bring their claims within two years of the FLSA violation, but this statute of limitations is extended to three years for "willful" violations.[156]

Only employees qualify for the protections provided by the FLSA[157] and, accordingly, several tests have emerged to determine whether certain kinds of workers are employees under the FLSA.[158] All tests used to determine who is covered by the FLSA are tailored for the purpose of assessing the economic reality of the relationship between the purported employee and employer.[159] Prior to 2024, the *Glatt* test[160] was the economic reality factor test most relevant to college athletes' FLSA claims.[161] Through its seven factors, the *Glatt* test primarily serves to determine whether the employment relationship is integrated into the purported employee's academics.[162]

However, not every labor relationship lends itself to a straightforward factor analysis. Infamously, the Seventh Circuit rejected the application of factor tests for analyzing whether incarcerated laborers are employees under the

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155. *Id.* § 216(b).

156. *Id.* § 255.

157. *Supra* Section III.A.

158. *See, e.g.*, 29 C.F.R. § 795.110 (2024) (codifying the "economic dependence" test for determining if a worker is an employee or an independent contractor).

159. *See* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) ("[T]he 'economic reality' rather than 'technical concepts' is to be the test of employment.").

160. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016). The *Glatt* test requires that courts weigh several, non-exhaustive factors:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa. 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions. 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. 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 of 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.

Id.

161. *See, e.g.*, Kennebrew, *supra* note 4, at 7–8.

162. *See Glatt*, 811 F.3d at 536–37; *see also* Kennebrew, *supra* note 4, at 13–14 (showing that five of the seven "primary beneficiary" factors assess the educational benefit of the internship to the student and whether the internship fits within the student's academic program).

FLSA.[163] The court ruled that the plaintiff's status as a prisoner, rather than the satisfaction of a factor test, defined the economic reality of the relationship between the plaintiff and the prison.[164]

*C. Pre-*Johnson *Jurisprudence on College Athletes as Employees*

Since the establishment of the NCAA, college athletics have been purposefully defined by amateurism.[165] While the Supreme Court has held the business of college athletics up to some scrutiny,[166] it has written approvingly of the tradition of amateurism in college athletics.[167]

That tradition of amateurism has been challenged in recent years by a series of FLSA claims filed in various federal courts across the country, to mixed results. Two federal circuit courts have dismissed FLSA suits against the NCAA and its member schools.[168] In *Berger v. NCAA*,[169] the Seventh Circuit ruled that college athletes are not employees under the FLSA.[170] The court relied largely on the tradition of amateurism[171] and WHD's exclusion of college athletes from FLSA employee status in FOH § 10b03(e).[172] In *Dawson v. NCAA*, [173] the Ninth Circuit did not consider whether the plaintiff was an employee of his university (University of Southern California), but whether he was an employee of the NCAA and his athletic conference (PAC-12).[174] The court ruled that the NCAA and the PAC-12 were not the

163. Vanskike v. Peters, 974 F.2d 806, 810 (7th Cir. 1992).

164. *Id.* ("Because Vanskike's allegations reveal that he worked in the prison and for the [Department of Corrections] pursuant to penological work assignments, the economic reality is that he was not an 'employee' under the FLSA.").

165. *See* Muenzen, *supra* note 85, at 261.

166. *Supra* Section II.E.

167. *See* NCAA v. Bd. of Regents of Univ. of Okla., 486 U.S. 85, 120 (1984) ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.").

168. Dawson v. NCAA, 932 F.3d 905, 913 (9th Cir. 2019); Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016).

169. 843 F.3d 285 (7th Cir. 2016).

170. *Id.* at 293.

171. *Id.* at 291 ("That long-standing tradition [of amateurism] defines the economic reality of the relationship between student athletes and their schools.").

172. *Id.* at 292–93 ("Because NCAA-regulated sports are 'extracurricular,' 'interscholastic athletic' activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes. We find the FOH's interpretation of the student-athlete experience to be persuasive.").

173. 932 F.3d 905 (9th Cir. 2019).

174. *Id.* at 907 ("[T]he only issue before us is whether the NCAA and PAC-12 were his employers under federal and state law.").

plaintiff's employer, based on their lack of hire and fire power over him[175] and because it found no design by the NCAA to purposefully evade the law.[176]

Despite setbacks in federal circuit courts, college athletes seeking FLSA protections made headway in the Eastern District of Pennsylvania by surviving the NCAA's motions to dismiss on two occasions. In *Livers v. NCAA*,[177] the Eastern District of Pennsylvania denied the NCAA's motion to dismiss a college athlete's FLSA claim based on the lack of case law foreclosing FLSA employee status to college athletes.[178] Despite this initial victory for athletes, the viability of Livers' claim rests on the question of whether the NCAA willfully violated the FLSA.[179] Before *Johnson v. NCAA* made its way to the Third Circuit, the Eastern District of Pennsylvania once again denied the NCAA's motion to dismiss a college athlete's FLSA claim.[180] In *Johnson*, the court analyzed the plaintiffs' FLSA claim under the *Glatt* test to determine the economic reality of the relationship between the plaintiffs and their colleges.[181] The court determined that the plaintiffs had plausibly pleaded that the NCAA and the defendant colleges had violated the FLSA.[182] In its application of the *Glatt* test, the court rejected the NCAA's argument that the history of amateurism[183] and the FOH's exclusion of college athletes from FLSA coverage[184] define the economic reality of the relationship between college athletes and their academic institutions.

175. *Id.* at 909–10 (applying Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961)).

176. *Id.* (applying Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947)).

177. No. 17-4271, 2018 LEXIS 124780, at *1 (E.D. Pa. July 25, 2018).

178. *Id.* at *16–17 ("In the absence of any controlling law conclusively precluding the possibility that a student athlete can be covered as an FLSA employee, this Court cannot at this stage say that Plaintiff was not an FLSA employee as a matter of law during his football career as a Scholarship Athlete at Villanova.").

179. *Id.* at *10. The plaintiffs must prove a "willful" FLSA violation for statute of limitations purposes. *See* 29 U.S.C. § 255. In this case, the question of whether the NCAA and its member schools willfully violated the FLSA is based on whether they relied on WHD's FOH in coming to the determination that their athletes are not employees. *Livers*, 2018 LEXIS 124780, at *12–13.

180. Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

181. *Id.* at 509–12.

182. *Id.* at 509.

183. *Id.* at 501.

184. *Id.* at 506 ("FOH § 10b03(e) does not require us to find, as a matter of law, that Plaintiffs cannot be employees of the [Attended Schools Defendants].").

D. How Johnson *Changed the Game*

After the Eastern District of Pennsylvania allowed Johnson's claim to move forward, the NCAA and its co-defendants appealed to the Third Circuit.[185] In its brief to the court, the NCAA relied on the Seventh Circuit's ruling in *Berger* that the tradition of amateurism in college athletics "defines the economic reality of the relationship between student-athletes and their schools."[186] The NCAA also argued that college athletes' "'play' is not 'work'" under the FLSA,[187] that students' participation in athletics without an expectation of direct monetary compensation forecloses them from employee status,[188] that the district court erred by applying the *Glatt* test to college athletes' FLSA claims,[189] and that "[a]s long as the DOL leaves pertinent sections of the FOH unchanged, neither the Schools, nor the NCAA, are liable under the FLSA as a matter of law."[190]

Affirming in part the lower court's denial of the NCAA's motion to dismiss,[191] the Third Circuit rejected the NCAA's arguments that athletes' "play" is definitionally excluded from "work."[192] Further, the Third Circuit rejected the NCAA's and the Seventh Circuit's reliance on the history of amateurism as outdated Supreme Court dicta.[193] Despite the NCAA's

185. Johnson v. NCAA, 108 F.4th 163, 167 (3d Cir. 2024).

186. Appellant's Opening Brief at 35, Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024) (No. 19-cv-05230), 2022 WL 1985595 (quoting Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016)).

187. *See id.* at 65 (quoting *Berger*, 843 F.3d at 293). The FLSA does not contain a definition of "work." Rather, the term work is used to define "employ." 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit or work."). The Supreme Court has defined work, as used in the FLSA, to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944).

188. Appellant's Opening Brief at 43, 45–46, *Johnson*, 108 F.4th 163.

189. *Id.* at 52 (highlighting that the Seventh Circuit ruled the *Glatt* test to be inapplicable to college athletes in *Berger* because the history of amateurism in college athletics controlled the economic reality of the relationship between athletes and their colleges).

190. *Id.* at 75 (arguing that WHD's guidance provided in the FOH bars FLSA claims under 29 U.S.C. § 259).

191. *Johnson*, 108 F.4th at 167.

192. *Id.* at 177–78 ("[I]ntuitively, with professional athletes as the clearest indicators, playing sports can certainly constitute compensable work. Any test to determine college athlete employee status under the FLSA must therefore be able to identify athletes whose play is *also* work.").

193. *Id.* at 181. The court relied on Justice Kavanaugh's concurrence in *NCAA v. Alston*,

argument that WHD's FOH provides a "complete statutory defense" to the plaintiffs' FLSA claims,[194] the court declined to address that question at the summary judgment stage.[195]

While the Third Circuit partially affirmed the lower court's ruling, it held that the district court erred by applying the *Glatt* test.[196] The court ruled that the working conditions of interns in *Glatt* and the plaintiffs in *Johnson* were not sufficiently analogous to warrant application of the *Glatt* test to college athletes' FLSA claims.[197] In determining the *Glatt* test to be inapplicable to college athletes, the Third Circuit relied on two main distinguishing factors between interns and college athletes. First, interns perform work with the expectation of "educational or vocational benefits" that are not standard benefits of employment,[198] while purported benefits to college athletes are exactly the kinds of skills one would typically acquire in a work environment.[199] Second, work performed by interns is closely related to, if not entirely integrated with, a student's academic curriculum,[200] while labor performed by college athletes is completely divorced from their studies.[201] After dismissing the tradition of amateurism as controlling the economic reality between college athletes and their colleges and determining the *Glatt* test to

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in which he writes, "The Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [*Board of Regents of University of Oklahoma*] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful." NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

194. Appellant's Opening Brief at 74–75, *Johnson*, 108 F.4th 163.

195. *Johnson*, 108 F.4th at 177 n.58.

196. *Id.* at 167.

197. *Id.* at 180.

198. *Id.* (quoting Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016)).

199. *Id.* To demonstrate the benefit to college athletes, the NCAA highlighted specific skills allegedly developed by participation in intercollegiate athletics: "increased discipline, a stronger work ethic, improved strategic thinking, time management, leadership, and goal setting skills, and a greater ability to work collaboratively." *Id.*

200. *Id.* *Glatt* factors two through six consider, to varying degrees, the relationship between the student's internship and their formal academic program. *See* case cited *supra* note 160 and accompanying text (enumerating the *Glatt* factors).

201. *Johnson*, 108 F.4th at 180. The *Johnson* plaintiffs allege their participation in college athletics was disruptive to their academic commitments. *Id.* at 174 ("During the football season at Villanova University, for example, Mr. Johnson was allegedly required to spend weekdays from 5:45 AM to 11:30 AM practicing or engaging in other activities related to athletics. This commitment locked him out of hundreds of available classes, including prerequisites for certain academic degrees. In addition to Mr. Johnson's personal experiences, the athletes cite to studies showing that NCAA requirements frequently prevent athletes from pursuing their preferred majors.").

be inapplicable to the condition of college athletes,[202] the Third Circuit was tasked with charting a new way forward to analyze college athletes' FLSA claims.

The Third Circuit developed a new four-factor test specifically tailored to analyzing the economic realities of the relationship between college athletes and their colleges.[203] The Third Circuit found that a multifactor test was necessary to assess college athletes' status under the FLSA, despite the protests of the NCAA, which argued that the history of amateurism, rather than any form of multifactor analysis, best captures the economic reality at play.[204] Under the court's new test, college athletes "may be employees under FLSA when they (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'"[205] According to the Third Circuit, if these conditions are met, "the athlete in question may plainly fall within the meaning of 'employee' as defined in 29 U.S.C. § 203(e)(1)."[206]

The case has been remanded to the Eastern District of Pennsylvania for an application of the new *Johnson* test.[207] The lead plaintiffs' attorney in *Johnson* has expressed optimism for the plaintiffs' case on remand, stating, "with this test as articulated, I don't see a difficulty in establishing that all the athletes are employees."[208]

IV. THE GAMEPLAN

In establishing a first-of-its-kind legal test for assessing college athletes' status under the FLSA, the Third Circuit could spark a chain reaction of

202. While the court rejected the application of the *Glatt* test to assess the plaintiffs' FLSA claims, it agreed with an overarching principle found in *Glatt*: "an employment relationship is not created when the tangible and intangible benefits provided to [a worker] are greater than [a worker]'s contribution to the employer's operation." *Id.* at 179 (alterations in original) (quoting *Glatt*, 811 F.3d at 535). This general equation should serve as a basis for assessing the economic reality of the employment relationship between FLSA plaintiffs and their alleged employers.

203. *Id.* at 180.

204. Appellant's Opening Brief at 38–39, *Johnson*, 108 F.4th 163.

205. *Johnson*, 108 F.4th at 180 (alteration in original) (first quoting Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944); and then Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985)).

206. *Id.*

207. *Id.* at 182.

208. SportsWise: A Podcast About Sports and the Law, *The Lead Plaintiff's Lawyer in* Johnson v. NCAA *Joins to Discuss* Johnson v. NCAA*!*, at 50:19 (July 15, 2024), https://www.sportswisepod.com/episode-66-the-lead-plaintiffs-lawyer-in-johnson-v-ncaa-joins-to-discuss-johnson-v-ncaa [https://perma.cc/UV9M-BB5U].

administrative guidance promulgated by WHD. To provide the most relevant and specialized guidance for determining the status of college athletes, WHD should issue an administrator interpretation rejecting the use of the *Glatt* test for analyzing college athletes' FLSA claims and amend its FOH to remove its categorical exclusion of college athletes from FLSA employee status. WHD should then issue a second administrator interpretation adopting the *Johnson* test as its means of analyzing college athletes' FLSA claims.

A. Rejecting the Glatt *Test & Amending FOH*

In response to the Third Circuit's ruling in *Johnson* and, to a lesser extent, the Seventh Circuit's ruling in *Berger*, the WHD Administrator[209] should issue an administrator interpretation to reject the application of the *Glatt* test to college athletes' FLSA claims. The Administrator has the authority to issue such an interpretation that will "indicate the construction of the law which will guide the Administrator in the performance of [their] administrative duties."[210] While several college athlete plaintiffs have argued for analysis of their claim under the *Glatt* test,[211] no federal court has adopted the *Glatt* test as the appropriate framework for evaluating college athletes' FLSA status.[212] Rather, the Third[213] and Seventh Circuits[214] have expressly rejected *Glatt* as inapplicable to assess the economic reality of the relationship between college athlete plaintiffs and their colleges. While the courts rejected that application

209. While previously vacant, Donald Harrison was recently named Acting Administrator. WAGE & HOUR DIV., *Organization Chart*, DOL, https://www.dol.gov/agencies/whd/about/organizational-chart [https://perma.cc/UT95-E2DW] (last visited May 2, 2025).

210. 29 C.F.R. § 775.1 (1989).

211. *See* Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 124780, at *16 (E.D. Pa. July 25, 2018); Complaint ¶¶ 34–126, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2019) (No. 19-5230); Plaintiffs' Memorandum in Opposition to Defendants.' Motions. to Dismiss and Strike, Anderson v. NCAA, 162 F. Supp. 845 (S.D. Ind. 2016) (No. 1:14-CV1710 WTL-MJD), 2015 WL 13091755.

212. *But see Livers*, 2018 LEXIS 124780, at *16 n.2 ("In some circumstances courts have used specific multifactor tests to evaluate whether the economic reality of a particular relationship indicates that a worker is an FLSA employee.") (citing Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2015)).

213. *Johnson*, 108 F.4th at 180.

214. Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016) (rejecting multifactor analyses, specifically the *Glatt* test, because they "do[] not take into account this tradition of amateurism or the reality of the student-athlete experience."). In rejecting multifactor analyses, the Seventh Circuit relied, in part, on *Vanskike v. Peters*, in which the court ruled that multifactor tests cannot be used to assess the economic realities of the relationship between inmates and prisons. 974 F.2d 806, 809–10 (7th Cir. 1992).

of the *Glatt* test for practically opposite reasons,[215] these are the only federal cases that definitively address the use of the *Glatt* test for analyzing college athletes' FLSA claims.

Despite the lack of federal courts that have applied the *Glatt* test to analyze college athletes' FLSA eligibility, WHD continues to use the *Glatt* test's "primary beneficiary" language in FOH § 10b03(e) to justify its exclusion of college athletes from FLSA protections.[216] To align WHD's guidance with existing case law, the WHD Administrator should issue an administrator interpretation publicizing that WHD will not use the *Glatt* test to analyze college athletes' FLSA claims because, as the Third and Seventh Circuits have determined, the circumstances of student interns and college athletes are dissimilar.[217]

An administrator interpretation documenting WHD's aversion to the *Glatt* test for analyzing college athletes' FLSA claims would provide significant clarity in this evolving legal landscape. Such an administrator interpretation would give strong persuasive guidance to the growing number of courts deciding these FLSA cases.[218] While administrator interpretations are not binding on any court, they are "entitled to respect" under *Skidmore* deference.[219] Under *Skidmore* deference, an agency's interpretations of its governing statute do not control courts' assessments of the statute, but they have the "power to persuade."[220] Combined with the Third and Seventh Circuits rulings, an administrator interpretation on the inapplicability of the *Glatt* test to analyze college athletes' FLSA claim would likely be highly persuasive under *Skidmore* deference. In addition to providing guidance to courts, an administrator interpretation would clarify the appropriate legal standard to a growing number of parties involved in FLSA litigation.

Based on recent rejections of the *Glatt* test for assessing college athletes' FLSA claims, WHD should amend FOH § 10b03(e) and § 10b24(a) to remove any mention of "interscholastic athletics" from its list of extracurricular

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215. *Compare Johnson*, 108 F.4th at 180, *with Berger*, 843 F.3d at 291.

216. *Supra* Section III.A.

217. *Supra* Section III.D.

218. *Cf. Berger*, 843 F.3d at 292–94 (accepting WHD's FOH § 10b03(e) as persuasive for denying FLSA employee status to college athletes).

219. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* . . . but only to the extent that those interpretations have the 'power to persuade.'") (internal citation omitted) (quoting *Skidmore*, 323 U.S. at 140).

220. *Skidmore*, 323 U.S. at 140. The Court reasoned that the influence an agency interpretation may have on a court depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Id.*

activities that "do not result in an employer-employee relationship."[221] Despite a lack of written justification for the exclusion, the language in FOH § 10b03(e) closely mirrors that of the *Glatt* test.[222] FOH § 10 has not been substantively amended since 2002,[223] predating the *Glatt* test (2016) and WHD's adoption thereof.[224] As it becomes clearer that the *Glatt* test is an inappropriate framework for analyzing college athletes' FLSA claims, WHD should amend its FOH to reflect recent developments.

Removing "interscholastic athletics" from the FOH list of activities that do not establish an employer-employee relationship serves two essential functions. First, doing so would prevent the erroneous application of the *Glatt* test to college athletes' FLSA claims, in conflict with *Johnson* and *Berger*.[225] FLSA plaintiffs have argued that FOH § 10b03(e) does not foreclose employee status to NCAA athletes because their participation primarily benefits their colleges, rather than themselves.[226] WHD opens the door for the errant application of the *Glatt* test by including "interscholastic athletics" as a student activity that is not covered by FLSA and by justifying that exclusion using the "primarily for the benefit" language in FOH § 10b03(e). Second, removing "interscholastic athletics" from FOH would prevent WHD from making a sweeping legal conclusion about a highly disputed issue. The FOH's broad declaration about college athletes' FLSA ineligibility perhaps made sense when they were last amended in 2002, but increased legal challenges to the NCAA's status quo have reopened the question.[227] Rather than providing guidance on how to assess the recent development of FLSA claims filed by college athletes, WHD's current FOH seems to foreclose these claims outright,[228] without providing explanation beyond referencing an improper legal framework.[229]

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221. FIELD OPERATIONS HANDBOOK, *supra* note 139, § 10b03(e).

222. *Id.* ("Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act . . . .").

223. *FOH Information Page*, *supra* note 132.

224. *Fact Sheet #71*, *supra* note 134.

225. Johnson v. NCAA, 108 F.4th 163, 179–80 (3d Cir. 2024); Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016).

226. *See* Complaint ¶ 244, *Johnson*, 556 F. Supp. 3d 491 ("By contrast to student-run groups . . . at all relevant times, Defendants understood that NCAA sports are *not* 'conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students.'") (citing FOH § 10b03(e)).

227. *Supra* Section III.C.

228. *See, e.g.*, Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 204–05 (2020).

229. *See Johnson*, 108 F.4th at 179–80 (rejecting the *Glatt* test as a framework for analyzing college athletes' FLSA claims).

Amending WHD's FOH would have a tremendous impact for would-be FLSA plaintiffs. The NCAA continues to rely on the argument that, under 29 U.S.C. § 259, FOH § 10b03(e) provides a "complete statutory defense" to college athletes' FLSA claims.[230] This remains an open legal question, as the Third Circuit did not address the issue in *Johnson*.[231] While it would not impact *Johnson* plaintiffs on remand, amending FOH § 10b03(e) would prevent the NCAA from arguing reliance on the WHD guidance in any future FLSA litigation.[232] *Johnson*'s college-athlete-specific FLSA test may further increase the number of FLSA claims filed by college athletes across the country. By amending FOH § 10b03(e), WHD can ensure that future plaintiffs' claims are decided on the merits of the athletes' FLSA eligibility, rather than leaving plaintiffs vulnerable to the NCAA's 29 U.S.C. § 259 affirmative defense.

Beyond the strictly practical effects, amending FOH § 10b03(e) would better acknowledge the economic reality of the relationship between college athletes and their colleges.[233] Despite economic reality being the ultimate guidepost for determining the nature of an employment relationship under the FLSA,[234] WHD's current FOH ignores the true nature of a relationship in which athletes' unpaid labor annually generates hundreds of millions of dollars for their colleges and billions of dollars for the NCAA.[235] Amending WHD's FOH to prevent the outright denial of FLSA employee status to college athletes is necessary to recognize the monetary value athletes create through their labor and provide athletes with the legal protections to which their labor entitles them.

B. Adopting the Johnson *Test*

To replace the *Glatt* test, the WHD Administrator should issue an administrator interpretation adopting the new four-factor *Johnson* test as the appropriate framework for assessing college athletes' FLSA claims.[236] WHD may issue administrative guidance to notify the public of jurisprudential developments on a variety of issues, including legal tests for determining employee

230. *Supra* Section III.D.

231. The Court did not address whether WHD's FOH provides a "complete statutory defense" because "an affirmative defense may not be used to dismiss a plaintiff's complaint under [Federal Civil Procedure] Rule 12(b)(6)." *Johnson*, 108 F.4th at 177 n.58 (quoting *In re* Adams Golf, Inc. Sec. Litig., 381 F.3d 267, 277 (3d Cir. 2004)).

232. WHD's FOH is the sole basis for the NCAA's § 259 affirmative defense. Appellant's Opening Brief at 66–75, *Johnson*, 108 F.4th 163.

233. *See* Corrada, *supra* note 228, at 206.

234. *See* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961).

235. *Supra* Section II.A.

236. *Johnson*, 108 F.4th at 180.

status under the FLSA.[237] With the Third Circuit creating a first-of-its-kind test specifically tailored to addressing FLSA claims by college athletes, administrative guidance is needed to notify the public about how the new test will impact WHD's enforcement activities. WHD should adopt the *Johnson* test as the most precise and relevant legal framework developed to assess the economic reality of the relationship between college athletes and their colleges.

By issuing administrative guidance adopting the *Johnson* test, WHD can provide direction for courts, which are sure to face their own FLSA claims in short order. Just like WHD's FOH, an administrator interpretation is nonbinding but can be highly persuasive[238] and is "entitled to respect" under *Skidmore* deference.[239] WHD's adoption of the *Johnson* test can reinforce the Third Circuit's ruling to encourage courts to utilize the test for analyzing the economic reality of the relationship between college athletes and their colleges.

V. TWO-MINUTE DRILL

In the closing moments of a competitive game, the losing team will shift into their two-minute drill—an aggressive, strategic push to overcome their current deficit and secure victory before time expires. College athletes fighting for fair compensation have been competing against entrenched ideals of amateurism and legal frameworks that have long denied them employee status. The labor movement has been losing this fight for decades, but the momentum has shifted. With the advent of the Third Circuit's new *Johnson* test for analyzing college athlete's FLSA claims, employee status for college athletes is closer than ever. Now is the time for WHD to capitalize on this momentum by adopting the *Johnson* test as the appropriate framework for assessing college athletes' FLSA claims and updating its internal guidance in accordance with recent legal developments. By issuing administrator interpretations and amending the FOH in accordance with recent developments, WHD can provide much needed guidance to courts, ensure that athletes' FLSA claims are decided on their merits, and endorse an analytical framework that truly assesses the economic reality of the relationship between athletes and their colleges.

237. *See, e.g.*, *Fact Sheet #71*, *supra* note 134.

238. *See* Berger v. NCAA, 843 F.3d 285, 292 (7th Cir. 2016).

239. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).