Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student Athletes in Private Institutions

Roger M. Groves

Repository Citation
Roger M. Groves, Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student Athletes in Private Institutions, 78 La. L. Rev. (2018)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol78/iss1/7
Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student-Athletes in Private Institutions

Roger M. Groves

TABLE OF CONTENTS

Introduction ............................................................................................................. 71

I. The State of the NLRB Law on Student-Athlete Regulation ........... 77
   A. Preliminary Decision Granting Employee Status to Student-Athletes ................................................................. 79
   B. Full Board Decision: The Jurisdictional Wink and Nod........... 79

II. The General Counsel Memorandum .......................................................... 83
   A. Background and the Return to Established Precedent .......... 83
   B. Scope and Breadth ......................................................................................... 84
   C. Substantive Guidance on Treatment of Student-Athletes as Employees Under the Act ............................................. 85
      1. Foundational Cases ..................................................................................... 86
      2. Rejection of the Educational Exclusion ................................................... 89
      3. Finding the Relationship More Economic than Educational .......................................................... 90
   D. Application of Precedent to Student-Athletes ..................... 91

III. GCM Rationale for why Guidance on Student-Athlete Status Is Authorized Despite Prior Board Denial of Jurisdiction in Northwestern University ................................................................. 92
   A. The GCM Policy Rebuttal ........................................................................... 92
   B. Changed Circumstances ............................................................................. 93
      1. Multi-School Context ................................................................................ 93
      2. Distinction Between a Single Representation Case and Unfair Labor Practices ............................................. 95
      3. Erosion of NCAA Dominance ................................................................. 97
      4. Analogous Legal Principles from Antitrust Law .................... 100

IV. What We Can Learn from a Student Handbook: Section 7 Rights for Student-Athletes ................................................................. 102
   A. Social Media Policy ................................................................................. 103
1. “Inappropriate” and “Embarrassing”—Overbroad Language with a Chilling Effect on Protected Section 7 Activity .......................................................... 105
2. “Family” and “Team” Protection—Inadequate Purpose .................................................. 106

B. Corroboration from NLRB Case Law ................................................................. 106
   1. Appropriate Tests for Section 7 Determinations ............................................. 107
   2. Application of the Multi-Test Standard ......................................................... 107
   3. Narrowly Tailored Curative Provisions ......................................................... 110
   4. Inadequacy of Image and Reputation Rationale ............................................ 111
   5. Inadequacy of Monitoring Functions ............................................................ 112
   6. Safe Haven Provisions Prohibiting Illegal Activity ....................................... 113

C. The Sports Medicine and Player Communications Rule: The Link Between Injury Complaints and Section 7 Activity ......................................................... 114

D. Student-Athlete Rights and Responsibilities—Dispute Resolution Procedure .......................................................... 118

E. Athletic Communications—Media Relations ....................................................... 119

V. Social Protests as Protected Section 7 Activity ..................................................... 121

VI. Modeling Best Practices .................................................................................... 127
   A. The Horrors of Ambiguity .............................................................................. 128
   B. Mixed Messages and Potential for Predominant Use Tests .......................... 129
   C. Severability ..................................................................................................... 132
   D. Media Freedom for Student-Athletes ............................................................ 132
   E. Policy Considerations and Institutional Strategies to Overcome Them ............ 134

F. Analytical Construct for Drafting Provisions: Incorporating Competing Interests from Multiple Legal Subject Areas ............................................................................. 136
   1. Multiple Legal Subject Sources for Protected Rights and Liabilities ............. 137
   2. Student-Athlete Publicity Rights .................................................................... 138
   3. Antitrust Limitations on the NCAA and Member Institutions ....................... 139

VII. Application Beyond Student-Athletes .............................................................. 140

Conclusion ............................................................................................................... 143
MEMORANDUM FROM STUDENT-ATHLETES TO SCHOOLS

INTRODUCTION

It is possible for university coaches, staff, and administration to have done nothing wrong, even in light of an appearance of impropriety or allegations from student-athletes. It also is possible for university personnel to err, causing grievances by student-athletes to be valid. A university may have harbored transgressions that, once discovered, inspire student-athletes to band together to assert their common grievances. There are actual and rumored fake classes for student-athletes, child endangerment or abuse scandals occurring in university children’s programs, and alleged prostitution schemes under the guise of athletic recruitment. In all of those circumstances there is smoke—and sometimes fire.
Thousands of former scholarship athletes already have joined together in a common grievance against the National Collegiate Athletic Association ("NCAA"), the titular overseers of college sports. The former scholarship athletes claimed that student-athletes should have received the actual cost of attendance as part of their scholarship, not just tuition and room and board. On February 3, 2017, the NCAA agreed to a proposed settlement of $208.7 million.

This Article does not focus on lawsuits, but on their precursors—the self-organizing activities by student-athletes. A few additional examples will illustrate the likelihood of future self-organizing activities by student-athletes. Between 2011 and 2016, former college football players filed 11 different lawsuits with concussion-related complaints, culminating in a settlement with the NCAA. Under the settlement, the NCAA will pay $70 million—none of which compensates players for actual injuries. Future claims likely would be for compensation to student-athletes. Current scholarship athletes in one of those programs could advocate that players join forces to advocate for better concussion protocols on Facebook. Student-athletes also could attempt to broadcast on social media that the school ignored concussion protocols or that practices occurred in extreme


3. See In re Nat'l Collegiate Athletic Ass'n Grant-In-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. 2015).

4. See id. at 537.


7. Groves, supra note 6 ("Under the settlement, the NCAA will pay $70 million to create a medical monitoring fund to screen current and former collegiate athletes for brain trauma. But no money was awarded to the former players. That is certainly the request this time.").
weather conditions. These are additional examples of self-organizing activities.

The mood of discontent goes beyond college football. Basketball players are aware and increasingly vocal about perceived revenue-sharing inequities. The University of Wisconsin made a deep run in the 2016 NCAA Division I ("D-1") Men’s Basketball Tournament—also known as March Madness. Nigel Hayes, the team’s most visible star, created a poster stating, “Broke College Athlete—Anything Helps.” He then directed donors to a Venmo account for contributions. In the 2017 NCAA D-1 Men’s Basketball Tournament, even after a thrilling Elite Eight victory against the University of Kentucky en route to winning the National Championship, Theo Pinson, University of North Carolina’s most charismatic player, said in a postgame interview, “Hell of a game. We made a lot money for the NCAA today.” Both the University of North Carolina and the University of Wisconsin are public institutions, but student-athletes at private institutions at the D-1 level are likely to be as concerned about revenue-sharing and as likely to mobilize in the future to address any commonly viewed disparity.

Therefore, it is not beyond the realm of possibility that after next year’s March Madness, teams in the Final Four will form another type of team. Representative players could team up with some of Spotify’s top music artists like Drake, U2, the Weeknd, and Lady Gaga to create a song demanding a share of the $750 million paid to the NCAA from the NCAA D-1 Men’s Basketball Tournament. Perhaps those players will learn that


10. *Id.*


12. This Article focuses on labor laws and evolving regulations that impact the legal rights of student-athletes at private institutions.

13. For the fiscal year ending on August 31, 2016, the audited financial statements of the NCAA revealed that it accrued revenue from television and marketing rights fees of $797,918,223 from a total revenue of $989,113,084. The bulk of the media fees were from the single event—the NCAA D-1 Men’s
the single event has earned over 80% of the total NCAA revenue every year since 2006.\footnote{See Revenue, NAT’L COLLEGIATE ATHLETIC ASS’N, http://www.ncaac.org/about/resources/finance (last visited Apr. 15, 2016) [https://perma.cc/YU2N-E3Z7]; see also Roger M. Groves, A Solution for the Pay for Play Dilemma of College Athletes: A Novel Compensation Structure Tethered to Amateurism and Education, 17 TEX. REV. ENT. & SPORTS L. 101, 112 (2016).}

In consideration of the litany of student-athlete trepidations, a concern arises as to whether the school can promulgate social media rules in its handbook to prevent players from making comments on social media sites that could embarrass or tarnish the reputation of the NCAA or the schools from which they receive scholarships. This Article is an attempt to answer that concern, albeit through the lens of an unusual confluence of documents unique to sports law jurisprudence. Under new proclamations from the General Counsel’s Office of the National Labor Relations Board (“NLRB” or “the Board”), private institutions with scholarship athletes now will have a difficult time lawfully prohibiting those activities, requiring a new analytical construct to navigate applicable labor laws as applied to student-athletes. The underlying cause for the conversion is that student-athletes are transformed from being just students to being students and employees when they are required to devote more than typical full-time employee hours under the control of the coaches without direct links to education.\footnote{The question of university control and volume of student hours in the sport is relevant to whether labor laws apply to those student-athletes. That question was addressed by an NLRB hearing officer in Nw. Univ. and Coll. Athletics Players Ass’n, 2014-15 N.L.R.B. Dec. (CCH) ¶ 15781 (Mar. 26, 2014). The hearing officer found that the players spent 50–60 hours a week on football duties during the football season, “while only spending about 20 hours per week attending classes.” Id. at 18. The full Board reviewed the hearing officer’s decision in making its final decision but declined to decide the case on the merits. The Board’s decision included the hearing officer’s decision in its appendix. Nw. Univ. and Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167 (Aug. 17, 2015).}

The Article also resolves any issue regarding whether student-athletes engaging in social activism are protected under the National Labor
The question percolates into a ripe legal issue when private colleges promulgate rules that prohibit or interfere with a student-athlete’s speech. Stated differently, the question asks whether there are circumstances in which social activism overlaps so significantly with self-organizing activities for mutual protection that the protections of Section 7 of the NLRA extend to the social activism. If the scholarship athletes are students in private D-1 institutions, the answer, surprisingly, is “yes” in some circumstances, and rules restricting players’ speech are unfair labor practices.

There is a “New Age Athlete” in our midst, with increased business acumen and the audacity to display it through the lens of sports. Some athletes focus on pecuniary aspects of the sports industry that give rise to the revenue-sharing issues noted above. Others feel a social responsibility to use sports as a platform to communicate issues deemed far more important than their points on the court or the field. The latter form of activism has its tradeoffs. An athlete choosing to use his relative fame to publicize social issues faces a public scrutiny likely not faced by those who remain silent. Yet, the failure to act on a strongly held belief can create a sense of isolation. Those athletes face an internal struggle akin to others who have a platform derived from something other than sports, such as a political figure. The excerpt below is the extemporaneous response of pre-presidential Barack Obama to a question about whether being biracial and bicultural gives him a “lingering sense” of isolation:

What I discovered . . . is that . . . the solution for me to that sense of isolation was to throw myself into a community to basically decide . . . that my individual fate had to be tied to something larger than myself. That my individual salvation would only come

---


17. Section 7 of the Act authorizes the right of employees to “self-organiz[e], to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” § 157. This Article asserts that self-organizing activities can include joint social media posts in addition to other actions designed for their mutual aid or protection.


19. See supra notes 13–15 and accompanying text.
from a collective salvation of some sort; that my true sense of self would only come if I had some sense of community. And so what I internally . . . did was to reach back into that period of . . . the civil rights movement and . . . I internalized a sense that this . . . nation had in the early 60’s, that we could transform community, that we could break isolation.20

Many current student-athletes likely experience a different sort of isolation. To the extent student-athletes are viewed and defined solely through sports, they live in a cocoon, seemingly and unwittingly precluded from intelligent public articulation on any other subject. Athletes who participate in social activism choose to defy that convention. They choose instead to tie their fate to a group experiencing some hardship or injustice. Their sense of “community” extends to athletic teammates and beyond. This mindset is the root of self-organizing activity protected by Section 7 of the Act. Risking the loss of their athletic scholarships to band together against a perceived inequity at the university speaks to their willingness to give up the athlete-only tag.

Regardless of the cause championed by players, social media is a growing platform for expression. The NLRB operates with a broad definition of social media.21 The Board’s recent pronouncements have

20. After publishing Dreams from My Father in 1995, Barack Obama commented on his book at a Cambridge, Massachusetts library event. See 22-CityView-Cambridge, MA, From the Vault – Barack Obama September 1995, YouTube (Mar. 12, 2015), https://www.youtube.com/watch?v=w5JqDnoqIo [https://perma.cc /534P-QPNL]. After President Obama stated the above quotation, he further discussed his isolation theme, stating that both his black, African-born father and his Caucasian, American-born mother subconsciously strove to break the cultural isolation by forging a relationship that defied convention. Timer: 56:42. Similarly, he said that freedom riders going south for voter registration in a region beyond their prior experience is an exercise in breaking through isolation. He ends by stating, “I remain optimistic about America. I believe that we can appeal to the better angels of our nature.” Timer 34:46. He articulated that same optimism in his last press conference as President of the United States.

21. The NLRB has stated that social media includes “various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications.” LAFE E. SOLOMON, ACTING GENERAL COUNSEL, MEMORANDUM OM 11-74, at 1 (Aug. 18, 2011). The memorandum analyzed Facebook posts, tweets, and other platforms. Id. Presumably, social media includes blogs, forums, wikis, social and professional networks, virtual worlds, and user-generated video or audio.
added a legal minefield to social media policies—raising issues about the ability of private colleges and universities to prohibit certain social media expressions and activities by the scholarship student-athletes. This Article examines those issues and offers conceptual models and practical guidance on what schools can prohibit and, conversely, when the United States’ labor laws protect self-organizing activities of student-athletes.

Litigation analyzed below leads to the following conclusion: student-athletes are “employees” of their university “employer.” Therefore, the NLRA limits the ability of schools to prohibit or interfere with self-organizing speech and activities of student-athletes.

Part I of this Article provides an overview of applicable NLRB authorities relevant to how private schools at the highest level, D-1, can regulate the speech and activities of their athletes. Part I also examines a line of cases that take a tortured route to a pronouncement from the NLRB Office of the General Counsel. Part II analyzes the General Counsel Memorandum (“GCM”) and its application to student-athletes. Part III is devoted to fascinating legal distinctions and nuances articulated by the Board and General Counsel. In Part IV, the Article explores how an Advice Memorandum from an NLRB Regional Director can invalidate entire sections of a university’s policies regarding student-athletes. Part V sets out various hypotheticals that expand on existing circumstances to illustrate when social protests and activism are a protected activity under the Act. Part VI of the Article provides a best practices model for affected universities to respond to the newly established relationship between institutions and student-athletes. The Article concludes in Part VII with the futuristic application of employee status to categories of students beyond athletes and the repercussions rippling through academia’s private institutions.

I. THE STATE OF THE NLRB LAW ON STUDENT-ATHLETE REGULATION

There are three stages to the NLRB decisions on the issue of employee status for scholarship student-athletes at private D-1 institutions. The issue

22. The scope of this article is limited to scholarship athletes because only scholarship athletes challenged Northwestern University’s policies. See supra note 15.

23. The NCAA generally describes D-1 schools as those with “the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships.” Division I, Nat’l Collegiate Athletic Ass’n, http://www.ncaa.org/about?division=d1 (last visited Aug. 9, 2017) [https://perma.cc/MCA2-9W34].
first was decided on the merits by an NLRB administrative law judge. The Board then decided the matter was outside its jurisdiction. Thereafter, the General Counsel for the Board decided to revisit the substantive issues on the merits. The result culminated with seemingly definitive guidance to all private institutions at the highest level of sports.

The precise relationship between student-athletes and private institutions came to the legal battleground through a surprising source: football players at Northwestern University ("Northwestern") requesting legal status as "employees" under the NLRA. Northwestern is a private institution, and privately owned entities fall under the jurisdiction of the NLRA and the NLRB.

Four published matters either directly or indirectly involve Northwestern essentially as a lead defendant. Comprehensively, the published matters provide background for understanding the changing landscape of the student-athlete relationship with private institutions. The published matters appear in the following chronological order: (1) a decision by an NLRB hearing officer or Regional Director; (2) the appeal of that decision to the full NLRB Board; (3) an NLRB Advice Memorandum from a Regional Director regarding Handbook policies; and (4) a Memorandum by the NLRB Office of the General Counsel. The first two matters concern only whether the Northwestern players were statutory employees under the NLRA in a "representation" case, in which the students sought to form a bargaining unit and have a union election. The Advice Memorandum assumes student-athletes have employee status and opines on the legality

24. See discussion infra Part I.A. The NLRB also uses the term "hearing officer" to describe those who hear the evidence and make decisions prior to a final decision from the Board.
25. See discussion infra Part I.B.
26. MEMORANDUM GC 17-01, supra note 18.
28. See 29 U.S.C. § 152(3) (2012) (excluding the state or federal governments or any subdivision thereof from the statutory definition of employer under the NLRA).
31. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice at the Nat’l Labor Relations Bd. to Peter Sung Ohr, Reg’l Dir. (Sept. 22, 2016) [hereinafter Advice Memorandum].
32. MEMORANDUM GC 17-01, supra note 18.
of Northwestern’s Handbook as it relates to student-athletes.\textsuperscript{34} The GCM provides guidance to all private institutions on whether student workers in various categories qualify for employee status.\textsuperscript{35}

All of these matters form a complex legal web. That matrix will challenge drafters of rules and policies designed to regulate social media expressions and actions of student-athletes. The plot thickens around issues that the institution would rather suppress.

\textbf{A. Preliminary Decision Granting Employee Status to Student-Athletes}

The first matter involves Northwestern University scholarship football players who claimed they were statutory employees under the NLRA.\textsuperscript{36} A hearing officer agreed, stating that the athletes fall within the broad definition of an employee, which is defined as a person “who performs services for another under a contract of hire, subject to the other’s control . . . and in return for payment.”\textsuperscript{37} The hearing officer detailed various ways in which the coaches “have control over nearly every aspect of the players’ private lives by virtue of . . . many rules that they must follow under threat of discipline and/or the loss of scholarship.”\textsuperscript{38} The hearing officer also found that playing football was a service “in exchange for the compensation set forth in their ‘tender’ [a/k/a grant-in-aid or scholarship].”\textsuperscript{39}

\textbf{B. Full Board Decision: The Jurisdictional Wink and Nod}

The second matter is the full NLRB Board decision that reviewed the hearing officer’s decision.\textsuperscript{40} Rather than endorse the hearing officer’s decision or decide the issue on the merits, the Board used its discretion to decline to assert jurisdiction.\textsuperscript{41} The Board succinctly stated its rationale:

\begin{quote}
Our decision is primarily premised on the finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of
\end{quote}

\footnotesize
\textsuperscript{34} See Advice Memorandum, supra note 31.
\textsuperscript{35} Memorandum GC 17-01, supra note 18.
\textsuperscript{37} Id. at 13 (citing Brown Univ. & Int’l. Union et al., 342 N.L.R.B. 483, 490 n.27 (2004)).
\textsuperscript{38} Id. at 16.
\textsuperscript{39} Id. at 18.
\textsuperscript{40} See Nw. Univ. and Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167 (Aug. 17, 2015).
\textsuperscript{41} Id. at 1.
[Football Bowl Subdivision ("FBS") football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.\textsuperscript{42}

The underlying reason a decision on the merits would not promote stability in labor relations is that employee status for only private institutions creates an inconsistent status for the college football industry at the highest level—D-1 FBS. The Board emphasized that “of the roughly 125 colleges and universities that participate in FBS football, all but 17 are [public] state-run institutions.”\textsuperscript{43} The Board further noted that Northwestern is the only private school in the Big Ten Conference “and thus the Board cannot assert jurisdiction over any of Northwestern’s primary competitors.”\textsuperscript{44} The Board, therefore, was reluctant to unwittingly create greater burdens for the conference private institutions than the public institutions. Such a public-private divide within the Big Ten Conference likely would have implications for all of college football.

The Board then concluded that although there were “other contexts” in which a decision on employee status helped “promote uniformity and stability,”\textsuperscript{45} an employee status for the student-athletes of the only private school within the Big Ten, and for the student-athletes of only 17 of the 125 schools in FBS football, actually would promote a lack of uniformity and stability.\textsuperscript{46} In the Board’s words, the existing FBS public-private divide is “an inherent asymmetry.”\textsuperscript{47} The Board also noted its legal authority to use its discretion in declining jurisdiction, even though the Board could have heard the case.\textsuperscript{48}

Assuming jurisdiction and rendering a decision is preferable for the litigants. A decision would have provided clarity in the relationship between student-athletes and the schools for which they play football. As will be noted below, the NLRB’s thinking evolved on this issue to come to the same conclusion.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{42} \textit{Id.} at 3.
\item \textsuperscript{43} \textit{Id.} at 5.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 2 n.3 (“[W]e are exercising our discretion to decline jurisdiction in this case . . . .”).
\item \textsuperscript{48} The Board relegated an important point to a footnote. \textit{See id.} at 4 n.9. The Board chose to assert jurisdiction in several other cases that had both private and public employers. In footnote 9, the Board cited \textit{Big East Conference}, 282
\end{itemize}
Although the above language clearly states why the Board refused to exercise jurisdiction, the Board also clearly stated the narrow scope of the decision. The Board did not determine that the hearing officer erred in holding that the Northwestern players were statutory employees. The Board premised its conclusion and rationale on the carefully worded precursor, “even if the scholarship players were statutory employees (which, again, is an issue we do not decide) . . .”49 Similarly, the Board stated that there is no material error in the factual findings of the Hearing Officer, also known as the Regional Director.50 In the Board’s words, “The Regional Director’s factual findings appear, in the main, to be fully supported by the record.”51 And the Board clearly stated that it chose not to scrutinize the legal conclusions of the hearing officer because it declined to exercise jurisdiction.52 Thus, the Board did not find material errors of fact or law in the hearing officer’s conclusion that Northwestern student-athletes were employees.53

In fact, the implication is that the Board agreed with the finding. If the Board examined the merits and decided against the employee status, there would be uniformity in labor relations—that is, all student-athletes playing for a private or public school would have the same status of “non-employees.” Only a decision to classify the private school athletes as employees would create the incongruity. A careful reading of the Board’s decision therefore provides an unofficial “wink and nod” to employee status without expressing it directly.

Finally, the Board’s rationale for denying jurisdiction narrows its precedential value. The Board suggests that a change in circumstances

---

49. *Id.* at 3 (emphasis added).
50. *Id.* at 2 n.3.
51. *Id.*
52. *Id.*
53. *Id.*
could be cause for asserting jurisdiction in the future.\textsuperscript{54} The Board first admits that the fundamental premise of its denial was the interrelatedness of the NCAA, school conferences, and the schools within the conferences.\textsuperscript{55} The Board observed that “[j]ust as the nature of league sports and the NCAA’s oversight renders individual team bargaining problematic, the way that FBS football itself is structured and the nature of the colleges and universities involved strongly suggest that asserting jurisdiction in this case would not promote stability in labor relations.”\textsuperscript{56}

In other words, a significant reason for declining jurisdiction is that the inherent NCAA oversight over the college sports industry is anathema to “single team” bargaining.\textsuperscript{57} The Board admitted that its decision could change if the NCAA relationship with the individual schools changed. There are two particular passages of relevance. In the first passage, the Board States,

As a final note, the Board’s decision not to assert jurisdiction does not preclude a reconsideration of this issue in the future. For example, if the circumstances of Northwestern’s players or FBS football change such that the underpinnings of our conclusions regarding jurisdiction warrant reassessment, the Board may revisit its policy in this area.\textsuperscript{58}

The Board likely knew of the highly publicized line of cases challenging the legal relationship of the NCAA and the student-athletes under antitrust law. The lead case, \textit{O’Bannon v. National Collegiate Athletic Association}, is the largest class action suit by students to reach a federal court and be

\textsuperscript{54} Id. at 6 (“We note that our decision to decline jurisdiction in this case is based on the facts in the record before us, and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today.”).

\textsuperscript{55} Id. at 5 (“Other industries, however, are not characterized by the degree of interrelationship present among and between teams in a sports league.”).

\textsuperscript{56} Id.

\textsuperscript{57} Id. at 4–5. The Board reaffirmed that point in footnote 15. “To be clear, we are not suggesting that the NCAA’s control over many of the terms and conditions . . . is an independent reason to decline to assert jurisdiction. We merely observe that bargaining in a single-team unit will not promote labor stability in this case.” Id. at 4 n.15. The Board did not define the term “single-team unit,” but the obvious reference is to a matter confined to a single institution, such as Northwestern and its team, not a matter designed to cover all of the Big Ten Conference teams. See discussion supra Part III.A.

\textsuperscript{58} Id. at 6 (emphasis added) (internal citations omitted).
decided on the merits. The Board’s second passage forewarns of a possibly changed relationship, though, again, it refuses to cite the authority. As stated by the Board, “[R]ecent changes, as well as calls for additional reforms, suggest that the situation of scholarship players may well change in the near future.”

These limitations to the breadth and scope of the Board’s jurisdictional denial provide the opportunity for the NLRB’s Office of the General Counsel to revisit the question of student-athletes’ status, including whether Northwestern’s Handbook policies, which regulate student-athlete expressions through social media and other activities, are unlawful under the NLRA.

II. THE GENERAL COUNSEL MEMORANDUM

The Board’s jurisdictional denial discussed above was not the end of student-athletes claims in large part because of a GCM that revived the claims on the merits.

A. Background and the Return to Established Precedent

The GCM, in conjunction with a separate Advice Memorandum from an NLRB Regional Director, has changed the legal landscape in this area. The Board declined to assert jurisdiction over the case designed to decide whether student-athletes at Northwestern were employees. Yet the NLRB General Counsel issued a memorandum, the GCM, which stated that various types of student workers in higher education are employees for NLRB purposes.

To evaluate this GCM in a vacuum understates its impact. To appreciate the memorandum’s value, it is necessary to understand the cases that preceded it and the subtle forecasting emanating from those cases regarding the future relationship between college students and their institutions. The GCM also is important—perhaps even more important than any single NLRB case—because of its ambitious scope and breadth. The next section of this Article discusses that issue.

The General Counsel’s rationale for reopening the student-athlete issue after the jurisdictional denial is rooted in NLRB precedent. It cannot be overstated that although the employee designation is relatively new and robustly disruptive to the college sports industry, linkage to precedent was the basis for making the determination. One succinct passage notes the

59. See O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
61. Id. at 1.
62. MEMORANDUM GC 17-01, supra note 18.
63. See infra notes 64–69 and accompanying text.
policy and history of Board interpretations of the NLRA: “In applying the NLRA’s expansive language and purpose to specific situations, the Board has long made use of common law agency rules governing the conventional master-servant relationship.”64 The General Counsel then reiterated the applicable legal standard for determining the legal status of the Northwestern scholarship athletes. According to the rules, “an employee includes any person ‘who perform[s] services for another and [is] subject to the other’s control or right of control. Consideration, i.e. payment, is strongly indicative of employee status.’”65

As it relates to student-athletes, the General Counsel relied primarily on two cases, Boston Medical Center and Columbia University, as controlling precedent.66 The General Counsel’s examination of the evidentiary record in Northwestern University brought the conclusion that student-athletes did perform services for their college—playing football—in return for compensation through the grant-in-aid, also known as the scholarship.67 The General Counsel also concluded that the student-athletes were under the college’s control “from the time they wake up until the appointed hour that they go to sleep.”68 As such, those student-athletes are statutory employees under the Act.69

B. Scope and Breadth

Two primary reasons show why strong adherence to precedent was important. First, the General Counsel chose a potentially dangerous task—providing guidance on the merits of an issue after the Board already refused to adjudicate a case involving that same issue. Second, he chose to expand the scope and, therefore, the significance of the guidance. Instead of ruling on one school matter, he elected to provide guidance for all D-I private schools.70 This pronouncement was neither an internal memorandum to himself nor an advisory letter with a disclaimer that it was unofficial or for discussion purposes only. Rather, the Memorandum was to “all Regional Directors, Officers-in-Charge, and Resident

64. MEMORANDUM GC 17-01, supra note 18, at 18 (emphasis added).
65. Id. (emphasis added).
67. MEMORANDUM GC 17-01, supra note 18, at 19–20.
68. Id. at 20
69. Id.
70. Id. at 2.
Officers.” The General Counsel, therefore, provided direction to virtually every preliminary decision-maker within the NLRB. A solid legal foundation should exist for such a quest.

Regarding the scope of the GCM, the General Counsel examined various disputes involving what he termed “non-academic student employees.” His obvious purpose was to provide comprehensive guidance in a single document on how to treat the issue of students as employees at institutions of higher learning. As stated in the Memorandum, “This Report is intended as a guide for employers, labor unions, and employees that summarizes Board law regarding NLRA employee status in the university setting and explains how the Office of the General Counsel will apply these representational decisions in the unfair labor practice arena.”

Therefore, the GCM provides guidance to all interested parties to the dispute while attempting to add predictability in decision-making because every preliminary decision-maker must follow the same legal standard. The GCM thereby should further stability in labor relations.

These pronouncements are far from perfunctory. After discussing the substance of the GCM, this Article explains how the GCM rather ingeniously justified tackling the issue on the merits despite the Board’s decision to do the opposite. Skillfully, yet subtly and respectfully, the General Counsel provided the answer to why jurisdiction should exist. He made the case for increased stability in labor relations, countering the Board’s basis for rejection of the case in Northwestern University.

C. Substantive Guidance on Treatment of Student-Athletes as Employees Under the Act

The discussion below illustrates just how quickly student-athlete labor law jurisprudence involving student-athletes is evolving. This section examines foundational cases, followed by an examination of how decisions have rejected institutional attempts to exclude educational institutions from the scope of the NLRB. Finally, this section focuses on the most recent case findings that the nature of the relationship of student-athletes to their respective institutions is more economic than educational.

71. Id.
72. Id.
73. Id. at 1.
1. Foundational Cases

The chronology of decisions is noteworthy. The Board’s rejection of jurisdiction in *Northwestern University* was in August 2015. That decision narrowly involved the application of the NLRA to student-athletes in a representation case. One year later, the Board decided *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW (“Columbia University”),* which involved graduate students who, like student-athletes, were not regarded previously by the university as “employees” under labor laws. Specifically, the Board overturned *Brown University,* a 2004 decision, and determined that graduate student-assistants were employees under the NLRA. Although the aggrieved student-assistants in *Columbia University* primarily were graduate students, at no point in the opinion did the Board exclude undergraduates or scholarship athletes from possibly receiving employee status. In fact, the Board specifically granted bargaining unit status to a group that included undergraduate students.

After deciding *Columbia University,* the General Counsel arrived at the same conclusion a mere six months later in January 2017. His GCM gave broad application to the 2016 decision in *Columbia University.* The GCM characterized *Columbia University* as an “important representation decision directly impacting unfair labor practice case processing . . . .”

The GCM emphasized that *Columbia University* was the culmination of nearly two decades of decisions in the educational arena. The overarching issue in *Columbia University* was whether doctoral and student-assistants with teaching and research duties for pay are statutory employees as defined in Section 2(3) of the NLRA. The Board first observed that Section 2(3) is very broad. In the Board’s words, “‘[t]he term “employee” shall include any employee,’ subject to certain exceptions—none of which address students employed by their universities.” The Board then affirmed that exercising jurisdiction over a student worker issue is within the congressional intent

75. The Trustees of Columbia Univ. in the City of N.Y. and Graduate Workers of Columbia-GWC, UAW, 364 N.L.R.B. No. 90 (Aug. 23, 2016).
76. *Id.* at 1; see also *Brown Univ. & Int’l. Union* et al., 342 N.L.R.B. 483 (July 13, 2004).
78. MEMORANDUM GC 17-01, supra note 18, at 10.
79. See *id.* at 10–16.
81. *Id.* at 7.
and federal labor policy. The Board stated that the federal policy is to “encourage” collective bargaining and “protect” the right of workers to “full freedom to express choice[s]” about their representatives. The Board decided that “[p]ermitting student assistants to choose whether they wish to engage in collective bargaining—not prohibiting it—would further the Act’s policies.” Because there are already 64,000 unionized student-assistants at 28 public universities, in addition to NYU, a private institution, this issue is ripe and in need of consistent and comprehensive treatment among affected institutions.

The Board applied the common law definition of “employee” to doctoral students in two categories: doctoral students with teaching duties and doctoral students with research duties. In both cases, the Board found that the “student workers” fell within the definition of “employee.” Regarding research assistants, the Board stated that “where a university exerts the requisite control over the research assistant’s work, and specific work is performed as a condition of receiving the financial award, a research assistant is properly treated as an employee under the Act.”

In Columbia University, the Board also was clear in articulating the source of their discontent—the Board’s prior decision in Brown University. In Brown University, the Board held that graduate student-assistants were not employees because their role was an integral part of their education at the institution and that collective bargaining is a concept “largely foreign to higher education.” The Board emphasized that the supervised teaching or research was “an integral component of their academic development.” In Columbia University, the Board concluded that its error in Brown University was in improperly framing the test. The test is not whether the student-school relationship was “primarily” more educational than economic. That test implies an either-or analysis. The appropriate test is to determine whether the economic relationship exists.

82. Id. at 6.
83. Id.
84. Id. at 7.
85. Id. at 10.
86. Id. at 14.
87. Id. at 12.
88. Id. at 17.
90. Id. at 490.
91. Id. at 483.
93. Id. at 3.
at all. The Board stated that being paid is the focus and that student-assistants “who perform work at the direction of their university for which they are compensated are statutory employees.” The Board reasoned further that this “view better comports with the language of Section 2(3) of the Act and common law agency principles, the clear policy of the Act, and the relevant empirical evidence.” The fact that the relationship exists within academia is not dispositive. Therefore, the Board concluded that an employment relationship still can exist within an educational environment.

The Board stated that “[w]e can discern no such policies that speak to whether a common law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or other non-economic relationship.”

The General Counsel carefully distinguished the prior non-employee cases, returning to prior precedent that found employee status for various classes of student workers. The case chronology and summary of significant cases is below.

<table>
<thead>
<tr>
<th>Case/Year</th>
<th>Student Category</th>
<th>Statutory Employee Status?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boston Medical Center Corporation, 1999</td>
<td>Interns, Residents, Fellows at Nonprofit Teaching Hospital</td>
<td>Yes</td>
</tr>
<tr>
<td>New York University, 2000</td>
<td>Graduate Student-Assistants</td>
<td>Yes</td>
</tr>
<tr>
<td>Brown University, (2004)</td>
<td>Graduate Student-Assistants</td>
<td>No</td>
</tr>
<tr>
<td>Columbia University, 2016</td>
<td>Doctoral Students (Teaching Fellow or Research Assistants)</td>
<td>Yes</td>
</tr>
</tbody>
</table>

This chart clarifies that at the time of drafting the GCM, the weight of authority actually favored statutory employee status for a range of students. No cases, however, concerned student-athletes. Of course, that observation begs the question of whether the underlying legal theory allowing those groups of students to obtain employee status also allows student-athletes to be classified as employees.

94. Id. at 5.  
95. Id. at 4.  
96. Id.  
97. Id. at 17.  
98. Id. at 6.  
99. Id. at 2–17.  
The GCM addresses that question with a two-pronged analysis: rejecting an educational exemption as advocated by the institutions and then applying a common law Master-Servant test\(^{101}\) to determine if an economic relationship exists within the educational environment.\(^{102}\) If the economic relationship exists, the Board should find an employee status.

2. Rejection of the Educational Exclusion

The above chart was created to highlight that among the primary cases analyzed by the General Counsel, only Brown University found against employee status for the students at issue. The GCM exposed the underlying legal premise of that case. In the General Counsel’s view, “The crux of the Brown majority’s decision was that graduate assistants are not employees because they are primarily students and have a primarily educational, not economic, relationship with the university.”\(^{103}\)

The GCM then notes that in New York University, the Board rejected this educational exception theory.\(^{104}\) The General Counsel summarized New York University by stating that “[t]he NYU Board also rejected the argument that graduate assistants should be denied the Act’s protection because their work is ‘primarily educational’ and instead explained that ‘obtain[ing] educational benefits from employment is not inconsistent with employee status.’”\(^{105}\)

The GCM then highlighted the analytic link between Boston Medical Center and Columbia University, despite the cases being nearly two decades apart. The General Counsel considered the cases “strikingly similar” and found that Section 2(3) of the NLRA is intentionally broad in scope, without listing students among its exclusions.\(^{106}\) That provision states in relevant part that “[t]he term ‘employee’ shall include any employee . . . and shall not be

\(^{101}\) The Master Servant relationship is the circumstance in which the master typically has nearly complete authority over the manner, place, and time of the servant’s services on behalf of the master. See Master and Servant, BLACK’S LAW DICTIONARY (10th ed. 2014).

\(^{102}\) Although the General Counsel did not say so specifically, the analysis appears to be two-pronged. Logically, the educational exemption issue is a threshold question because if it exists, the fact-specific common law test is moot.

\(^{103}\) MEMORANDUM GC 17-01, supra note 18, at 11 (citing Brown Univ., 342 N.L.R.B. at 487).

\(^{104}\) Id. at 10.

\(^{105}\) Id. at 10–11.

\(^{106}\) Id. at 15 (citing Bos. Med. Ctr. Corp., 330 N.L.R.B. 152, 160 (Nov. 26, 1999)).
limited to the employees of a particular employer, unless the Act [provides an exclusion].”

The GCM further states that the definition of “employee” is “strikingly” broad, covering “any person who works for another in return for financial or other compensation.” To erase any doubt as to congressional intent, the General Counsel said, “Section 2(3) contains only a few enumerated exceptions, and university employees, football players, and students are not among them.” It is unclear whether the General Counsel viewed the institutional educational exemption argument as being one as a matter of law. If so, institutions will have difficulty establishing a factual basis to alter the General Counsel’s conclusion that university employees, football players, and students are outside of the institutional educational exemption.

3. Finding the Relationship More Economic than Educational

Having disposed of the blanket educational exemption argument, the General Counsel relied upon the precedent of Boston Medical Center and Columbia University to determine whether students who work for an institution are employees under the Act. In both cases, the Board applied the common law Master-Servant test and found that students who provide “services” for an educational institution and receive “compensation” in return meet the standard. Importantly, the substance of the activity is determinative, not the label used to describe services or compensation. Therefore, the term “stipend” for patient observation and care did not foreclose the employee status in Boston Medical Center.

The General Counsel clearly sought to provide muscularity to Boston Medical Center. He highlighted the fact that when a party asked the Board to reconsider the case in light of the contrary decision in Brown University, the Board said, “Boston Medical Center has been the law for over a decade, and no court of appeals has questioned its validity.”

108. MEMORANDUM GC 17-01, supra note 18, at 12 (citing The Trustees of Columbia Univ. in the City of N.Y. and Graduate Workers of Columbia-GWC, UAW, 364 N.L.R.B. No. 90, at 4).
109. Id. at 18.
110. See id. at 10–16.
111. See id. at 19–23 (discussing the nature of the student’s services) (internal quotations omitted); Bos. Med. Ctr. Corp., 330 N.L.R.B. 152 (discussing the elements of the services of the interns, residents, and fellows).
112. Id. at 15.
113. Id. at 15–16; see also Bos. Med. Ctr. Corp., 330 N.L.R.B. 152.
The majority of these cases, therefore, conclude that the label of "student" does not exclude students automatically from being employees. Therein is the legal link to the hearing officer’s decision in Northwestern University, albeit before the Board refused to exercise jurisdiction as a final decision.

D. Application of Precedent to Student-Athletes

The GCM provided guidance on various categories of students who also worked for the university. The General Counsel devoted a separate section to the analysis of student-athletes. Consistent with prior cases, his inquiry was whether the student-school relationship was like other commercial-economic relationships with a "sufficiently substantial effect on commerce." The GCM applied the common law test, that is, whether the students "perform services for their colleges and the NCAA, subject to their control, in return for compensation." The GCM detailed various factual findings from the hearing officer’s decision in Northwestern University, evidencing a primarily economic relationship between Northwestern and its scholarship football players. Based on the evidentiary record in Northwestern University, the General Counsel came to the same conclusion: Northwestern football student-athletes on scholarship “clearly satisfy the broad Section 2(3) definition of employee and the common law test for statutory employees.”

Facts of decisional significance include substantial evidence that the players received significant compensation—up to $76,000 per year—for as many as five years in exchange for their football “services.” The General Counsel also emphasized that there was ample evidentiary support for the factual conclusion that the school controlled numerous facets of the players’ daily lives, “from the time they wake up until the appointed hour that they go to sleep.” The GCM included that element of control in the rationale for

115. Id. at 17 (citing the Board’s jurisdictional rejection in Nw. Univ., 362 N.L.R.B. No. 167, at 6 n. 28 (Aug. 17, 2015)).
116. MEMORANDUM GC 17-01, supra note 18, at 19 (emphasis added).
117. Id. at 19.
118. Id. at 20.
119. Id. at 19.
120. Id. at 19–20.
finding that the athletes fell within the common law definition of an employee.\(^\text{121}\)

III. GCM RATIONALE FOR WHY GUIDANCE ON STUDENT-ATHLETE STATUS IS AUTHORIZED DESPITE PRIOR BOARD DENIAL OF JURISDICTION IN NORTHWESTERN UNIVERSITY

The GCM provided guidance on the employee status of student-workers in various categories after the Board refused to exercise its jurisdiction to decide the question on the merits.\(^\text{122}\) Having discussed the substance of the GCM, this Article returns to the curious justification for the GCM. The General Counsel spent a significant portion of the memorandum explaining why he could act when the Board declined to do so.

A. The GCM Policy Rebuttal

The Board refused to assert jurisdiction in Northwestern University because a decision would not “promote stability in labor relations.”\(^\text{123}\) It is worth reiterating that the reason for that conclusion was that the decision would be applicable only to a single private school in D-1 FBS football, Northwestern University, in an industry in which the vast majority of the teams are public institutions.\(^\text{124}\) The Board reasoned that the NCAA has such a controlling influence over individual teams that a decision involving a single school relationship with a single institution is an inadequate basis for labor guidance in the college sports industry.\(^\text{125}\)

The General Counsel issued the GCM one year and four months after the Board’s rejection in Northwestern University. He also had the benefit of the Board’s reversal of fortunes in Columbia University. That case returned to the consistent findings and legal principles leading to the conclusion that students are statutory employees. Columbia University as a precursor to the GCM is not just a matter of timing. The GCM intentionally “summarize[d] this recent precedent” in a way that provided

\(^{121}\) The General Counsel described the common law definition of employee as when “any employee” performs duties “for, and under the control of” the employer in exchange for compensation. See id. at 10.

\(^{122}\) See discussion supra Part I.B.


\(^{124}\) The Board emphasized that there are 125 schools within D-1 FBS football and all but 17 are public institutions. Id.

\(^{125}\) Id. at 3.
consistent and clear authority. Accordingly, the GCM cataloged the cases in a way that now can provide stability in legal analysis on the student-as-employee issue.

The General Counsel, therefore, strategically showed the consistency of Board decisions for comprehensive application to all the various circumstances of student-employees. The scope of the GCM extends beyond student-athletes to include medical interns, student-assistants, non-academic university workers, faculty members at religious institutions, and faculty members who may be managerial and thus excluded from protections of the NLRA. The GCM stated that the Office of the General Counsel “will apply” the representational decisions in the matter set forth in the GCM. The language clearly attempts to establish a quasi-mandate uniform action for similar circumstances, which promotes stability and consistency within the policy of the NLRA and discretionary jurisdiction by the NLRB.

B. Changed Circumstances

In Northwestern University, the Board’s jurisdictional decision had several “out-clauses,” or thinly veiled reasons why it may revisit the issue and potentially assume jurisdiction in the future. The Board’s primary point was that changed circumstances could cause the Board to revisit the issue.

1. Multi-School Context.

The Board’s denial in Northwestern University carefully delineated “out-clauses.” It states the following, in relevant part:

As a final note, the Board’s decision not to assert jurisdiction does not preclude a reconsideration of this issue in the future. For example, if the circumstances of Northwestern’s players or FBS football change such that the underpinnings of our conclusions

126. Memorandum GC 17-01, supra note 18, at 2.
127. Id. at 2–15.
128. Id. at 1.
129. See The Trustees of Columbia Univ. in the City of N.Y. and Graduate Workers of Columbia-GWC, UAW, 364 N.L.R.B. No. 90, at 20 (2016).
131. Id. (“We note that our decision to decline jurisdiction in this case is based on the facts in the record before us, and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today.”).
132. Id.
regarding jurisdiction warrant reassessment, the Board may revisit its policy in this area.\footnote{133 Id.}

The Board could have been articulating that a critical mass of private institutions, not just Northwestern, may have a primarily economic, not educational, relationship with their students. Such evidence may be cause for the aforementioned reassessment of the issue.

Indeed, the General Counsel separately observed possible changes that could be a basis for action.\footnote{134 Id.} Northwestern University, as originally heard by the Board, involved what the Board termed a “single-team case” concerning only Northwestern players.\footnote{135 Id. (citing N. Am. Soccer League, 236 N.L.R.B. 1317, 1321 (June 30, 1978)).} No other private schools or players were involved in the legal action attempting to determine whether Northwestern’s student-athletes were employees under the NLRA.\footnote{136 Id. at 5.} In that instance, the Board stated that “it would be difficult to imagine any degree of stability in labor relations’ if we were to assert jurisdiction in this single-team case.”\footnote{137 Id. (citing N. Am. Soccer League, 236 N.L.R.B. at 1321–1322).}

As the GCM identified, the Board admitted that it avoided the broader circumstance of the inclusion of other private schools in the suit.\footnote{138 MEMORANDUM GC 17-01, supra note 18, at 17.} The Board stated, “we are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board’s approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities).”\footnote{139 Id. (citing Nw. Univ., 362 N.L.R.B. No. 167, at 6) (emphasis added).}

The Board’s limitation on its ruling allows for multi-school action. Indeed, the General Counsel then made clear that his guidance was not just for a single group of students at one institution but for all private colleges and universities.\footnote{140 MEMORANDUM GC 17-01, supra note 18, at 2.} His reasoning was that the common law definition of an employee, that is, compensation for services performed under an employer’s control, “do[es] not seem to be unique to Northwestern, but also appear[s] to be true in the other Division I FBS football private colleges and universities.”\footnote{141 Id. at 19.}

The GCM, therefore, concluded that “Division 1 FBS scholarship football players in private colleges and universities are employees under the NLRA” and that such a decision comports with the “statutory language
and policies of the NLRA, and the Board’s interpretation of *Boston Medical Center* and *Columbia University*. The General Counsel’s reliance on *Columbia University* also was the basis for another part of the rationale for action—the distinction between a request for a single bargaining unit and unfair labor practices that violate student rights under Section 7 of the Act.

2. Distinction Between a Single Representation Case and Unfair Labor Practices

The Board provided several reasons to limit its jurisdictional denial in *Northwestern University*, leaving opportunities to refine or opine differently in the future. The General Counsel skillfully dissected the *Northwestern University* decision to reveal a distinction between that case, which he did not rely upon, and *Columbia University*, the case on which he placed primary reliance.

In *Northwestern University*, the hearing officer framed the issue as whether the scholarship players are employees “and therefore entitled to choose whether or not to be represented for the purposes of collective bargaining.” Thus, the only question before the NLRB was whether Northwestern University’s scholarship football players could form a certified bargaining unit under Section 2(3) of the Act in order to negotiate terms and conditions of employment through union representation—a “representation” case.

The GCM responded to a different question: whether Section 7 of the Act prohibits Northwestern from imposing rules that curtail protected speech and self-organizing activities of student-athletes. If so, the rule would be an unfair labor practice under Section 8(a)(1) of the Act. The NLRB General Counsel clarified that a representation case provides a different remedy than

142. *Id.* at 18.
143. *Id.* at 10–14; see also *The Trustees of Columbia Univ. in the City of N.Y.* and *Graduate Workers of Columbia-GWC, UAW*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).
145. MEMORANDUM GC 17-01, *supra* note 18, at 1.
146. Section 7 of the Act expresses the following statement: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157 (2012).
147. Section 8(a)(1) describes unfair labor practices as including the practice of an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the NLRA.” 29 U.S.C. § 158(a)(1).
the quest to determine if there is an unfair labor practice, despite the two causes of action existing in the same litigation.\textsuperscript{148}

The GCM distinguished \textit{Northwestern University}, stating that representation cases like \textit{Northwestern University} “did not directly address the right of the workers . . . to seek protection against unfair labor practices.”\textsuperscript{149} The General Counsel then clarified that his GCM concerned only how his office will apply recent precedent to unfair labor practices for various categories of workers.\textsuperscript{150}

One of the categories was scholarship student-athletes.\textsuperscript{151}

One related point by the General Counsel is that a single representation case is different from issuing guidance to all private institutions. Stated differently, it is one thing to refuse to extend jurisdiction to “bargaining rights” in a representation case at a single private school;\textsuperscript{152} it is quite another matter to decide Section 7 rights for all private institutions with scholarship student-athletes. The General Counsel stated, “it is clear that nothing in \textit{Northwestern} precludes the finding that Northwestern (or other private college/university) scholarship football players are employees under the Act and \textit{enjoy the protection of Section 7}.”\textsuperscript{153} The General Counsel then provided an example of when Section 7 protects a student-athlete who voices his grievances against the school:

\begin{quote}
[A single representation case for bargaining rights] does not answer the question of whether, for example, a football player who has been kicked off the team and lost his scholarship because he discussed improving concussion protocols with his teammates in violation of an unlawful team rule would be entitled to the protections of the Act.\textsuperscript{154}
\end{quote}

The ability of a scholarship football player at Northwestern to discuss certain working condition issues is separate from a bargaining unit determination, according to the General Counsel.\textsuperscript{155} The former is a Section 7 right involving what student-athletes in private schools can discuss amongst themselves, regardless of whether they actively pursue a bargaining right and union representation.\textsuperscript{156}
That difference is a fine distinction to the uninitiated, but underlying the point is something basic—that United States law should not leave gaps as to which citizens can know and understand their legal rights. The General Counsel emphasized this notion by stating that “[s]ince the issue was raised but left unresolved in Northwestern, it is important that these individuals know whether the Act’s protection extends to them, i.e. whether if they engage in concerted activity for mutual aid and protection, such activity is protected by the NLRA.”\footnote{157. MEMORANDUM GC 17-01, supra note 18, at 1 (emphasis added).}

The importance of providing student-athletes with clarification of their rights leads to the discussion of the implications of Section 7 rights. Can student-athletes have protections against their school’s rules preventing their discussion of certain issues?

3. Erosion of NCAA Dominance

The Board in Northwestern University refused to use its discretion to exercise jurisdiction when the matter before them involved a single private school case in an industry dominated by the NCAA and public institutions.\footnote{158. Nw. Univ., 362 N.L.R.B. No. 167, at 5–6.} The Board admitted it could reopen the matter upon a showing of changed circumstances, which easily could include the NCAA’s changed relationship with its member institutions.\footnote{159. Id. at 6.}

Evidence shows that D-1 schools now have greater autonomy to structure their football programs and “negotiate” the amount of compensation, services, and benefits with players.\footnote{160. See Michelle Brutlag Hosick, Board Adopts New Division I Structure, NAT’L COLLEGIATE ATHLETIC ASS’N (Aug. 7, 2014, 11:49 AM), http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure [https://perma.cc/SU6C-PW6T].} The NCAA’s D-1 Board of Directors granted increased autonomy for Power Five conferences.\footnote{161. Id.} The Big Ten, which includes Northwestern, is one of the Power Five conferences.\footnote{162. See Football Standings, NAT’L COLLEGIATE ATHLETIC ASS’N, http://www.nca.com/standings/football/fbs (last updated Oct. 22, 2017, 3:05 AM) [https://perma.cc/A4PP-UQFL].} Now, those conferences essentially will write their own rules on important items, such as the cost of attendance for scholarships, staff size, recruiting rules, and insurance benefits.\footnote{163. See Hosick, supra note 160.}

Additionally, in March 2016, the NCAA Board of Governors approved a one-time, $200 million distribution to its member
institutions for academic support, life skills, and career enhancements for their student-athletes.\footnote{164} Saliently, the disbursements are at the school’s discretion.\footnote{165}

The underlying source for these changes likely is the Ninth Circuit’s \textit{opinion} in \textit{O’Bannon v. National Collegiate Athletic Association}.\footnote{166} The \textit{O’Bannon} plaintiffs asserted that antitrust law prohibits agreements between the NCAA and other entities to limit scholarships to a certain sum and to fix a price of the name, image, and likeness (“NIL”) of players at zero dollars.\footnote{167}

Largely, the Court agreed. \textit{O’Bannon} clearly stated, albeit in dicta, that schools now may offer individual student-athletes more “compensation” than previously prescribed by the NCAA.\footnote{168} The additional institutional flexibility to increase compensation occurred because the Court held that the prior NCAA rule that limited scholarships to $5,000 was an antitrust law violation and, thus, invalid.\footnote{169} In the court’s words, “we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL.”\footnote{170} The Court clearly forecasted that flexible arrangements between schools and student-athletes are on the horizon.

In reaction to the inevitability of increased class action litigation from former and current student-athletes, the NCAA expanded opportunities for the five wealthiest football conferences to provide compensation to their scholarship student-athletes.\footnote{171} Importantly, the Ninth Circuit stated that

\begin{itemize}
\item \textit{O’Bannon}, 802 F.3d at 1074–76.
\item Id. at 1078.
\item Id. at 1079.
\item See Jake New, \textit{Autonomy Arrives at the NCAA}, INSIDE HIGHER EDUC. (Jan. 19, 2015), https://www.insidehighered.com/news/2015/01/19/power-five-leagues-
antitrust law protects the right of individual schools to establish a trust fund for scholarship players, which is disbursable when eligibility expires, as long as the institution tethers the disbursement to educational purposes.¹⁷²

This change undercuts the Board’s rationale in Northwestern University. The Board stated that a single entity private school case within an industry dominated by the NCAA does not advance stability in labor relations.¹⁷³ A major part of the Board’s rationale was that the NCAA requires the school and athletes to operate within the NCAA’s “constraints,” including, but not limited to, the following “dictates”: (1) the maximum number of grant-in-aid scholarships; (2) caps on the number of players in preseason practices; (3) the minimum academic requirements for eligibility; (4) minimum grade point averages; and (5) limit on mandatory practices.¹⁷⁴

Arguably, the more the NCAA relaxes its regulatory hold on D-1 FBS schools, the weaker the Board’s original rationale. Instead of a three-headed regulatory environment—the NCAA, the conferences, and the schools—against students, greater autonomy by the schools increases a two-party relationship of school versus students. In other words, the school-student relationship likely will be akin more to other employer-employee relationships over which the NLRB typically uses its discretion to retain jurisdiction.

Northwestern University reinforces the idea that the Board confined its review to “scholarship players at this single institution,” which did not promote labor relations stability.¹⁷⁵ But it quickly added that “recent changes, as well as calls for additional reforms, suggest that the situation of scholarship players may well change in the near future.”¹⁷⁶

The Board’s decision to reject jurisdiction in Northwestern University was on August 17, 2015.¹⁷⁷ The Ninth Circuit’s decision in O’Bannon was on September 30, 2016.¹⁷⁸ O’Bannon arguably was one of the most highly publicized cases in the history of sports law.¹⁷⁹ The Board likely was aware

expand-athletic-scholarships-cover-full-cost-attendance [https://perma.cc/SET8-KRRF].

¹⁷². O’Bannon, 802 F.3d at 1076.
¹⁷⁴. Id. at 2.
¹⁷⁵. Id. at 6.
¹⁷⁶. Id. at 7.
¹⁷⁷. Id. at 1.
¹⁷⁸. O’Bannon, 802 F.3d 1049.
of the legal premises of *O’Bannon* at the time it decided its case, and the author would be willing to bet his scholarship, if he had one, that *O’Bannon* was the change referenced in *Northwestern University*.

4. Analogous Legal Principles from Antitrust Law

The NCAA reforms contemplated in *Northwestern University* find an analogous battleground of legal principles in another part of *O’Bannon*. The firestorm at the bottom is the same educational exemption versus the economic relationship test discussed in *Columbia University*. In *O’Bannon*, the NCAA lost its argument that educational institutions essentially are exempt from antitrust law. The argument is remarkably similar to Northwestern’s argument that the educational relationship exempts it from labor law.

Instead, both the Ninth Circuit and the NLRB determined in their respective cases that the institutions were engaged in “commercial activity” in interstate commerce. Commerce was defined broadly in *O’Bannon* as including “almost every activity from which the actor anticipates economic gain . . . [including] the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship.”

Despite denying jurisdiction, the Board admitted that Northwestern’s rules regarding its student-athletes have a substantial effect on commerce. The Board apparently realized that an educational exemption likely would not exist as applied to scholarship student-athletes, even though the legal premises are rooted in employment law rather than antitrust law.

Not all economic-based theories, however, favor the athletes. There is another battleground for student-athletes’ rights versus the NCAA and

---

180. *O’Bannon*, 802 F.3d at 1049.
181. Id.
182. Id. at 1059.
183. Id. at 1064; *Nw. Univ.*, 362 N.L.R.B. No. 167, at 3 n.5.
184. *O’Bannon*, 802 F.3d at 1064.
member institutions, beyond the NLRA, NIL rights, and antitrust law. Current and former scholarship athletes on the University of Pennsylvania track and field team sued the NCAA, claiming that the Fair Labor Standards Act ("FLSA") has wage-and-hour provisions that require student-athletes to be paid at least minimum wage for work they performed as "employees." The court rejected that claim, holding that the FLSA does not apply to student-athletes.

The court applied an "economic reality" test and held that the "revered tradition" of amateurism was an "essential part of the economic realities of the relationship between the Plaintiffs and Penn." The Court also said that the Department of Labor already knew that thousands of students were unpaid and chose not to consider them employees. In support, the Court cited the Department of Labor Field Operations Handbook used by its wage and hour division. The Handbook states that student participation in college sports, inter alia, are "primarily for the benefit of the participants as part of the educational opportunities." Clearly, this federal court looked beyond the statutory definition of employee to arrive at its decision.

Congress enacted these various laws for differing purposes, reserving wide discretion to the agency with oversight responsibility. As noted in Berger, the FLSA defines "employee" broadly as "any individual employed by an employer." Yet, the Court did not use the same employee definition and test used by the NLRB in interpreting the NLRA.

Both Berger and the issues in this Article involve concerted activity by student-athletes. The distinction is that the student-athlete remedy in Berger was to receive a minimum wage. This Article contemplates the student-athletes who seek a different remedy—the right to organize themselves without unreasonable restrictions from their school. Section 7 of the Act specifically governs the latter rights.

188. Berger, 162 F. Supp. 3d at 857.
189. Id. at 856.
190. Id.
191. Id.
192. Id.
193. Id. at 850.
194. Id. at 847.
IV. WHAT WE CAN LEARN FROM A STUDENT HANDBOOK: SECTION 7 RIGHTS FOR STUDENT-ATHLETES

In *Northwestern University*, the Board admitted that changed circumstances could cause a reexamination of the jurisdictional issue in cases involving student-athletes. An NLRB Regional Director found that opportunity through Northwestern’s Student Handbook. He issued an Advice Memorandum in 2016 that focused on the Handbook sections that regulate student-athlete conduct, including, but not limited to, their use of social media and interactions with media and the public.\(^{195}\)

Section 7 of the Act determines the legality of rules and policies regulating certain activities of employees or those who claim the status of an employee.\(^{196}\) Section 7 states that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”\(^{197}\)

Extending Section 7 rights to student-athletes is uncharted territory. In that sense, it is fortuitous that the Board actually has provided interpretative guidance through two documents. The GCM provides comprehensive guidance on the state of labor law as applied to a broad range of working students. The Regional Director’s Advice Memorandum more narrowly focused on scholarship student-athletes. These documents in tandem operate as precedent for future matters involving the employee status of the students.\(^{198}\)

In his Advice Memorandum, the Regional Director first distinguished his matter from *Northwestern University* on the same basis as the General Counsel provided in his GCM.\(^{199}\) This Regional Director already was familiar with *Northwestern University* because he was the hearing officer

---

197. *Id.*
198. The Advice Memorandum was dispersed prior to the GCM. The GCM was discussed first because it provides the state of NLRB precedent and a framework to analyze future cases whereas the Advice Memorandum issues conclusions without the infusion of case law and is scant on analysis. The GCM, therefore, is vital to understanding how and why the Regional Director reached certain conclusions in the Advice Memorandum despite the lack of explicit rationale.
in that case.\footnote{200} As noted above, \textit{Northwestern University} was a representation case under Section 2(3) of the Act.\footnote{201} The student request in \textit{Northwestern University} was for a certified bargaining unit for a representative election.\footnote{202} The Advice Memorandum concerns unfair labor practices under Section 7 and Section 8(a)(1) of the Act.\footnote{203}

The specific issue for the student-athletes was whether certain rules in the Northwestern Football Handbook (“Handbook”) were “unlawfully broad” and violated the players’ right to engage in activities protected by Section 7 and Section 8(a)(1) of the NLRA.\footnote{204} The Regional Director found each of the Handbook provisions unlawful in the Advice Memorandum.\footnote{205}

The Regional Director chose to copy large sections of the Handbook verbatim into his memorandum and opined on whether any parts of the total section unlawfully prohibited protected activity under Section 7.\footnote{206} To contextualize the Director’s analysis, this Article generally replicates the format used by the Regional Director and then analyzes the Director’s opinion. For additional reader clarity, the language the Regional Director found unlawful appears italicized in this Article. This Article notes why the Regional Director found fault with the provisions. Northwestern’s corrections are in bold. In almost all instances, the Regional Director agreed with Northwestern’s bolded corrections. Those corrections also provide insight for other schools and are part of this Article’s analysis.

\textit{A. Social Media Policy}

The first Handbook section scrutinized by the Regional Director was the social media policy. The Regional Director focused the most attention on this section of the Handbook. NLRB case law corroborates and fills in the gaps of the Regional Director’s rationale regarding this policy. Particular attention was devoted to the recent lead case of \textit{Durham School Services, L.P.}\footnote{207} In \textit{Durham}, the Board held that an employer’s Handbook contained unlawful restrictions on social networking under Section 7.\footnote{208}

\begin{itemize}
\item \footnote{200} Advice Memorandum, supra note 31. Mr. Kearney also decided the original finding that the scholarship student-athletes at Northwestern were employees for bargaining unit purposes. \textit{Id.}
\item \footnote{201} See discussion supra Part III.B.2.
\item \footnote{202} Advice Memorandum, supra note 31, at 1.
\item \footnote{203} \textit{Id.}
\item \footnote{204} \textit{Id.}
\item \footnote{205} \textit{Id.}
\item \footnote{206} \textit{Id.} at 2–5.
\item \footnote{207} Durham Sch. Services, L.P. et al., 360 N.L.R.B. 694 (Apr. 25, 2014).
\item \footnote{208} \textit{Id.} at 704.
\end{itemize}
After citing and applying various tests, the Board repeatedly used the same phrase as used by the Regional Director—that the offending policy “could reasonably be construed” as prohibiting or restricting “Section 7 activity.”

The Regional Director depicted Northwestern’s corrected language in bold. The Regional Director agreed with Northwestern that all of the bold sections cured the unlawful sections. The social media policy in Northwestern’s Handbook stated, in relevant part:

[W]e are concerned about . . . protecting the image and reputation of Northwestern University and its Department of Athletics . . . Publicly posted information on social networking websites can be seen may be regularly monitored by any person with a smart phone or internet access, including individuals a number of sources within Northwestern University (e.g., Athletics Department, Student Affairs, University Police) . . . Northwestern student-athletes should be very careful when using online social networking sites and keep in mind that sanctions may be imposed if these sites are used improperly or depict inappropriate, embarrassing, harassing, unlawful or dangerous behaviors such as full or partial nudity (of yourself or another), sex, racial or sexual epithets, underage drinking, drugs, weapons or firearms, hazing, [or] harassment . . .

The Handbook also contained sections designed to provide instructional detail and examples to assist students in how to apply the above social media policy:

Do not post any information, photos or other items online that contain full or partial nudity . . . or unlawful activity could embarrass you, your family, your team, the Athletics Department or Northwestern University . . . Examples of inappropriate or offensive behaviors posted on social networking sites may include . . . [p]hotos meant to harass, bully or demean the individuals included in the photo by offensive reference to their race, sex, disability, age, national origin, religion or any other status protected by law or Northwestern University policy.

The Regional Director examined the above provisions for potential violations of Section 7 of the NLRA. The Regional Director provided

209. Id.
211. Id. at 2 (emphasis added).
only the conclusion that the social media policy “would reasonably be construed as prohibiting Section 7 activity.”

There was no rationale revealing which parts of the policy violated particular sections of Section 7. The conclusory language is well-established verbiage because it tracks bedrock NLRB caselaw.

The Advice Memorandum found several sections of the social media policy unlawful. The primary offenders were words that were ambiguously overbroad and chilled activity protected by Section 7 of the Act.

1. “Inappropriate” and “Embarrassing”—Overbroad Language with a Chilling Effect on Protected Section 7 Activity

The social media policy states that online posts depicting “inappropriate, embarrassing . . . behaviors” may warrant sanctions against the student-athlete. Section 7 does not protect only the right of employees to form, join, or assist labor organizations and choose their collective bargaining representatives but also allows employees “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”

Concerted activity for mutual aid or protection beyond collective bargaining logically includes the ability to communicate through written word, oral speech, or any other means to protect a wide range of joint self-help activities, even if the goal is not to form or participate in a union. For labor law purposes, protected speech falls under Section 7. Therefore, if an employer’s policy prohibits employees from talking about common grievances against the employer or meeting to strategize about how to help each other, the policy violates Section 7.

As applied, Northwestern is the employer of student-athlete employees. The school Handbook, therefore, cannot prohibit the protected activity of

---

214. The only other language in the Advice Memorandum under the social media policy was the additional conclusion that the Northwestern amendments that the Regional Director placed in bold did correct the unlawful language and, thus, “the corrected language is lawful as written.” Id. at 3.
215. See Durham Sch. Services, L.P. et al., 360 N.L.R.B. 694 (Apr. 25, 2014), for the summarized line of cases. Durham is discussed more fully in Part IV.B.I.
217. Id. at 5.
220. Id.
221. Id.
posting online communications designed for mutual aid and protection. Assume a scholarship student-athlete posted a video on Facebook showing a coach’s verbal tirade or other physically or mentally abusive behaviors. Using social media to expose that behavior could embarrass the coach and the university. A school policy that prohibits “inappropriate” or “embarrassing” communications or activities by its student-athletes, however, violates Section 7. The same result flows where players receive punishment for creating a players-only meeting outside of practice so they can discuss ways to get extra water breaks during intensive practices on brutally hot days. The Northwestern Handbook language is therefore overbroad because it captures such communication and actions that otherwise are protected activity under Section 7. The Durham line of cases corroborate that analysis.

2. “Family” and “Team” Protection—Inadequate Purpose

Northwestern used a broad definition of embarrassment in its draft of student-athlete prohibitions. The policy originally did not prohibit just inappropriate and embarrassing content; it also protected the school from student-athlete posts that may “embarrass you, your family, [or] your team . . . .”222 Student-athletes could not complain about onerous or abusive changes to their eating and living arrangements, class schedules, and practices—all of which would be protected Section 7 activity.223

Northwestern struck the clause and the Regional Director called that clause unlawful.224 The reasonable inference is that such language has a chilling effect on social media communications that may embarrass the team. The Durham line of cases also support that conclusion.225

B. Corroboration from NLRB Case Law

The NLRB has faced similar circumstances concerning overbroad provisions. In Durham, the Board found the employer-school’s social networking policy unlawful in several respects, including the determination that some provisions were overbroad.226

---

222. See Advice Memorandum, supra note 31, at 2.
223. Id. at 3.
224. Id. at 2–3.
225. See infra Part IV.B.1.
1. Appropriate Tests for Section 7 Determinations

In Durham, the Board provided one of the most concise summaries of the applicable standard to decide Section 7 controversies. Without drawing too fine a point on overlapping substance, the tests determine three things. First, the tests determine whether the employer’s rule or policy would “reasonably tend to chill employees in the exercise of their Section 7 rights,” even without actual enforcement of the provisions.\textsuperscript{227} The tests next determine whether the employer’s rule or policy \textit{expressly} restricts Section 7 activity, or if not, whether employees “would reasonably construe the language to prohibit Section 7 activity.”\textsuperscript{228} Lastly, the tests determine whether the employer’s rule or policy “could reasonably be construed as coercive,” even if other reasonable constructions exist.\textsuperscript{229}

The Board then noted an important rule of construction for ambiguous provisions. The Board stated that “[e]ven if a rule is ambiguous, any ambiguity in a work rule that may restrict protected concerted conduct ‘must be construed against the [employer] as the promulgator of the rule.’”\textsuperscript{230}

The NLRB and the Court, therefore, should examine Handbook provisions not only for overt prohibitions on Section 7 activity but also the inferences of a chilling effect and ambiguity.

2. Application of the Multi-Test Standard

\textit{Durham} involved an employer who provided school transportation services and an employee bus driver, Helen Cheesman, who claimed that her employer terminated her because of the employer’s attempt to “disenfranchise her from voting in the representation election.”\textsuperscript{231} Cheesman’s union filed several objections to the election with the NLRB and a complaint alleging that the employer engaged in various unfair labor practices.\textsuperscript{232}

\begin{itemize}
\item \textsuperscript{227} \textit{Id.} (citing Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998)).
\item \textsuperscript{228} \textit{Id.} The Board noted that this two-pronged explicit or implicit inquiry was a refinement of the chilling test. When applying the test, the Board also will examine whether the rule was created to prohibit Section 7 activity or actually applied to restrict such activity by employees. \textit{Id.} (citing Lutheran Heritage Vill.-Livonia, 343 N.L.R.B. 646, 646 (2004)).
\item \textsuperscript{229} \textit{Id.} at 704–05 (citing Double D Constr. Grp., 339 N.L.R.B. 303, 304 (2003)).
\item \textsuperscript{230} \textit{Id.} at 705 (citing Ark Las Vegas Restaurant, 343 N.L.R.B. 1281, 1282 (2004)).
\item \textsuperscript{231} \textit{Id.} at 701.
\item \textsuperscript{232} \textit{Id.} at 698.
\end{itemize}
Among the alleged unfair labor practices was a claim that the employer’s Handbook Addendum contained an unlawful “Social Networking Policy.”\textsuperscript{233} The policy stated that “[i]t is also recommended that the employees . . . limit contact with parents or school officials, and keep all contact appropriate. Inappropriate communication with students, parents, or school representatives will be grounds for immediate dismissal.”\textsuperscript{234}

The Board then focused on two other sections of the policy. The first bore the subheading, “Interaction with Co-workers,” and stated, in relevant part, that “communication with coworkers should be kept professional and respectful, even outside of work hours.”\textsuperscript{235} The other scrutinized provision was titled, “Expectations of Privacy.”\textsuperscript{236} The language stated, in relevant part, that “[e]mployees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers should not have any expectation of privacy, and may be subject to investigation and possible discipline.”\textsuperscript{237}

The \textit{Durham} Board first applied the chilling test and incorporated the overbroad principle. In stating that the social networking policy reasonably would tend to chill employees in the exercise of Section 7 rights, the Board reasoned that “[w]hile the policy does not explicitly restrict Section 7 protected activity, it contains no limiting language whatsoever, and is so overbroad that it could reasonably be construed as extending to Section 7 activity.”\textsuperscript{238}

In \textit{Durham}, the Board focused on the employer’s privacy provisions. It applied the NRLB’s rule for the construction of ambiguous terms.\textsuperscript{239} The Board highlighted the employer’s troubling terms that advised employees “to . . . keep all contact appropriate . . . professional and respectful” and warned employees that sharing “unfavorable information” could bring an investigation and disciplinary action by the employer.\textsuperscript{240}

The Board clearly stated the error in that language under Section 7: “[W]ithout indicating what the Employer considers appropriate or inappropriate conduct, or what is considered professional and respectful, or what constitutes unfavorable information is, in my view, unreasonably broad and vague.”\textsuperscript{241} The Board concluded that employees reasonably could

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{233} Id. at 704.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} Id.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id.
\end{itemize}
\end{footnotesize}
interpret this language as restraining their Section 7 right to “communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection.”\textsuperscript{242} The Board specifically noted that ambiguity is to be construed against the employer.\textsuperscript{243}

The ambiguity rule in Durham likely also was a part of the reasoning of the Regional Director in the Advice Memorandum. The Regional Director concluded that if the terms “inappropriate” and “embarrassing” remained in the policy, they “would reasonably be construed as prohibiting Section 7 activity.”\textsuperscript{244} Although he provided no rationale, “inappropriate” and “embarrassing” are as ambiguous and vague as the terms found in Durham. Accordingly, the rationale is equally applicable to both circumstances. All other private colleges and universities with similarly toxic terms in their social media policies for student-athletes likely would receive an unfavorable decision from the NLRB.

Similarly, the Northwestern social media policy provides no limitation or definition for its terms “inappropriate” and “embarrassing.” Northwestern deleted both terms in its revised version.\textsuperscript{245} The language would have been unlawful if these terms remained, according to the Regional Director.\textsuperscript{246}

Lastly, the Durham Board applied the rule preventing coercion.\textsuperscript{247} Both the coercion and ambiguity rules evidence a deeply rooted policy to encourage self-organizing activities by employees rooted in the NLRA and the Board decisions. In Durham, the Board purposefully admitted that there was no evidence of specific instances of disciplinary action against employees.\textsuperscript{248} Nonetheless, a policy still can be unlawful. The Board concluded that the “mere maintenance” of the policy provisions would have a “reasonable tendency to . . . coerce the pro-union campaign tendencies activities of employees . . . .”\textsuperscript{249}

In the Advice Memorandum regarding Northwestern’s Handbook, the protected activity was not voting in an election like Durham. It is not difficult, however, to imagine student-athletes having an election among

\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Advice Memorandum, supra note 31, at 2.
\textsuperscript{245} See id. at 2–5.
\textsuperscript{246} For context, the relevant clause in the Northwestern Handbook under “Social Media Policy” stated “Northwestern student-athletes should . . . keep in mind that sanctions may be imposed if these sites are used improperly or depict inappropriate, embarrassing . . . or dangerous behaviors.” See Advice Memorandum, supra note 31, at 2 (emphasis added).
\textsuperscript{247} Durham, 360 N.L.R.B. at 703.
\textsuperscript{248} Id. at 705.
\textsuperscript{249} Id.
themselves to elect a representative spokesperson to discuss grievances with coaches or the administration. In fact, the Northwestern University representation case, as decided by the administrative law judge, would have authorized a union vote by scholarship student-athletes. Several other scenarios apart from representation cases could have violated the Northwestern policy. Student-athletes would be just as protected using Facebook, Instagram, or Twitter to advocate arranging their class schedules in a way efficient for study or for particular courses of interest within their majors without loss of playing time or other adverse consequences.

If Northwestern or some other private school in higher education has a social media policy with similarly ambiguous, vague, or overbroad language, the NLRB should find such language an unlawful restriction on protected Section 7 activity. The finding would be the same even if the school did not impose disciplinary actions against the student-athletes. Even if the ambiguity is benign, the above standards favor giving the student-athlete the benefit of the doubt. It is also noteworthy that the same fate also would inure to those schools that applied such a policy to medical interns and graduate student-workers per the NLRB rulings in Boston Medical Center and Columbia University.


The Regional Director approved of Northwestern’s replacement language. Instead of prohibiting “inappropriate” and “embarrassing” behavior by a student-athlete, the cure prohibits only behavior that had no reasonable connection to the lawful forming or joining of a bargaining unit or mutual benefit. Authorized prohibitions include those that “contain full or partial nudity (of yourself or another), sex, racial or sexual epithets, underage drinking, drugs, weapons or firearms, hazing, harassment or unlawful activity . . . .”

Certainly, a Facebook post that boasts of sexual indiscretions or displays firearms is not part of a mutual protection of student-athletes in their working environment. Such activity, therefore, is not protected. Even

---

250. The administrative law judge in fact said, “I direct an immediate election in this case.” Nw. Univ. and Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167, at 19 (Aug. 17, 2015). The election did not occur due to an appeal and full Board refusal to exercise jurisdiction over the case. Id.


252. See Advice Memorandum, supra note 31, at 5.

253. Id. at 2.
hazing, which finds its way into the football culture, is not for the mutual aid and protection of student-athletes. This conclusion is evident from the Regional Director’s approval of Northwestern’s amended language that prohibited online communications that depict hazing.\textsuperscript{254}

4. \textit{Inadequacy of Image and Reputation Rationale}

The application of Section 7 to Northwestern’s social media policy is particularly interesting when analyzing a seemingly innocent preamble. Northwestern’s original social media policy stated, “We are concerned about . . . protecting the image and reputation of Northwestern University and its Department of Athletics.”\textsuperscript{255} This language had legal consequence beyond its literal terms.

Initially, the language appears benign. Yet, Northwestern deleted the phrase without replacement, and the Regional Director accepted the deletion.\textsuperscript{256} A reasonable inference is that Northwestern realized that protecting the image and reputation of the school is so broad that it could prohibit social media posts regarding the formation or joining of student-athlete groups for their mutual benefit—protected Section 7 activity.\textsuperscript{257} Counsel for the university likely sought to avoid an unfavorable ruling from the NLRB and chose to eliminate the potential conflict between the school’s reputational interest and the student-athletes’ interests in bargaining jointly. Eliminating the reference to the school’s image and reputation removes even the appearance of impropriety or conflicting interests.

A hypothetical shows how easily the issue could arise. Assume a student-athlete posts an image on Instagram showing a coach grabbing him by the shoulder pads while screaming, “Get your ass in gear,” or other colorful words to that effect. The post likely would impugn the image or reputation of the school. If the player’s language in his post to his fellow athletes encourages a collective protest against verbal or hands-on abuses by coaches, the posting activity likely would be protected under Section 7. The Regional Director, therefore, likely will opine that a school’s image and reputation is an inadequate reason to prohibit otherwise protected social media posts.

\textsuperscript{254} See \textit{id.} at 5.
\textsuperscript{255} Id.
\textsuperscript{256} Id. at 2, 5.
5. Inadequacy of Monitoring Functions

Northwestern’s Handbook originally stated that social media websites “may be regularly monitored” by “a number of sources” within the university, including, but not limited to, the Athletics Department, Student Affairs, and University Police.258 The referenced types of activities were overbroad in that the policy prohibited social media posts that could include concerted activity for the mutual benefit or protection of the athletes. Northwestern’s curative language stated that “publicly posted” websites “can be seen”—rather than “monitored”—by “any person with a smart phone or internet access, including individuals within Northwestern University.”259

Similar to the removal of image and reputation as a basis for prohibitions, Northwestern determined that it was wiser to avoid any appearance that the policy was putting the university’s interests ahead of the student-athletes’ interests. The advantage to the university is not obvious in the original policy language. A careful review of the original policy, however, reveals an ambiguity. Nothing in the original language restricts university access to only those communications posted to the public. By failing to limit the university’s access to the student-athletes, the policy allows Northwestern to gain access to private posts.

The curative language states that the university only has access to “publicly posted” websites.260 Prior to that amendment, the policy did not preclude the university from accessing private posts in which the student-athlete adjusted the privacy setting to restrict access to the post to only friends or, more to the point, fellow scholarship student-athletes.

Colleges and universities have a legitimate interest in proactively finding a hornet’s nest before anyone gets stung, including the school. Preventive action generally is a good policy, but if the school uses that principle to enact a rule requiring that student-athletes share all private posts with the “Athletics Department, Student Affairs, [and] University Police”261—as was stated in Northwestern’s original policy—the NRLB may find that rule to be a chilling and unlawful policy. A real possibility exists that this issue could ripen into a contested matter. The Regional Director found that

259. Id.
260. Id.
261. Id. at 2.
Northwestern’s rules required a coach to have access to social media accounts of the scholarship football players.262

Northwestern, presumably with advice from its attorneys, decided to give the university the same rights of access to student-athletes’ websites as any other member of the general public.263 That access would remove any inference that the school attempted extraordinary access to thwart or prohibit otherwise protected speech. Inferentially, the reason for a university’s access to private posts may be to prevent dissemination of information between student-athletes in a private group. It does not take much imagination to envision campus police or a member of the coaching staff monitoring social media sites of student-athletes to see if the student-athletes posted messages or images that the university might consider “inappropriate or “embarrassing” or damaging to the “image” or “reputation” of the university.

At first blush, it seems that the university should be able to impose “sanctions” as deterrents to prevent these student-athletes, some of whom are teenagers, from bad behavior or bad judgment. The well-purposed sanction simply may be to require immediate removal of the posts. Immediate removal would prevent dissemination to others, including NCAA investigators or labor unions looking for a new collective bargaining unit. As Durham made clear, however, reasonable purposes do not exempt the employer if the rules also have chilling effects on protected Section 7 activity.

Thus, although Northwestern’s original social media policy appears to protect its legitimate interest in the school’s image and reputation, Northwestern nonetheless chose to delete the reference. This deletion of the reference occurred to prevent the following consequences: (1) any inference that the university was prioritizing its own interests over the organizational interests of its student-athletes; and (2) any potential chilling effect the university’s interests may have on the student-athletes’ rights to protected Section 7 activity. Private institutions in higher education with scholarship student-athletes should reexamine their Handbooks for similar clauses and pursue similar curative actions.

6. Safe Haven Provisions Prohibiting Illegal Activity

Northwestern, or any of the other 16 private D-1 schools, faces the question of whether the existing Handbook provisions may be unlawful under Section 7. University counsel or another responsible source at


263. Northwestern removed language in its policy that limited players’ communications with the press. See Advice Memorandum, supra note 31, at 3.
Northwestern was wise to be proactive in creating solutions rather than litigating against the NLRB.

It also was wise that the university took advantage of an obvious safe haven. That safe haven simply allows prohibitions on that which is illegal. Northwestern deleted overbroad language like “inappropriate” and “embarrassing” and replaced it with the umbrella term “unlawful . . . behaviors.” The amended policy contains the following examples within that umbrella: (1) underage drinking; (2) drugs—presumably non-prescription; (3) weapons or firearms—presumably unlicensed; and (4) references offensive to those with a “status protected by law.” The common sense logic is that the NLRA does not protect illegal activity, even if the employees’ illegal activities are an attempt to create or band together for bargaining or mutual aid and protection.

C. The Sports Medicine and Player Communications Rule: The Link Between Injury Complaints and Section 7 Activity

Scholarship football players in D-1, the highest level of the collegiate game, inevitably face the prospect of injuries. Yet, of course, not every injured player who broadcasts an injury is engaged in protected Section 7 activity. The potential for protected activity to be associated with athletic injuries, however, is palpable. For example, former players have filed lawsuits mutually against the NCAA and their respective member institutions regarding concussions. The plaintiffs requested certification as a class action suit. Requesting class action certification alone represents an attempt to complain and seek redress for the mutual aid of similarly situated former student-athletes. The Ninth Circuit Court of Appeals in O’Bannon allowed current NCAA scholarship student-athletes to join the certified class action lawsuit, alleging antitrust violations by the

264. Id. at 2.
265. Id.
267. See supra note 4.
269. Class action suits can be authorized in federal litigation under Rule 23(a) of the Federal Rules of Civil Procedure when the following occur: (1) “joinder of all members is impracticable”; (2) common questions of law or fact exist; (3) the claims or defenses are typical among the class; and (4) the chosen plaintiff representatives “fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a).
Thus, it is not far-fetched to envision student-athletes discussing or mobilizing themselves against the NCAA or member institutions in some future controversy.

The Northwestern litigation and the concussion and antitrust litigation all are highly publicized. Most, if not all, student-athletes at the private schools likely are aware of mobilizing possibilities regarding health issues of all student-athletes through either litigation or labor law. Private school student-athletes who join in litigation likely do not have protection under Section 7 simply through filings with the court.

There is potential Section 7 activity while scholarship student-athletes at a private college or university communicate with others about injuries or safety concerns in an effort to protect themselves while engaging in the sport. As Durham articulated, the students have the right to “communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection.” This right includes the statutory right to join with others to select their own representatives. Consistent with the thesis of this Article, such student-athlete communications include their use of social media.

The potential for a university rule violation is more than hypothetical. The NLRB clearly stated through its General Counsel that student-athletes are employees of private universities and that the institutions are subject to Section 7 and potential unfair labor practice claims of scholarship student-athletes. If these student-athletes choose to communicate with other private school student-athletes about concussions or other health aspects of the game, that is, their work, no one reasonably can question that such communication is for their “mutual aid or protection.” If a private institution, therefore, enacts a rule or policy that restricts or prohibits such communication, the school faces a very real possibility that


273. See discussion supra Part II.

274. The “mutual aid and protection” of employees is part of the activity protected by Section 7 of the NLRA. § 157.
the NLRB will find that provision unlawful. In fact, the NLRB’s Regional Director did just that, relative to Northwestern’s “Sports Medicine [and] Player Policy Communication Rule.”275

The Northwestern provision in question stated the following: “Confidential: Never discuss any aspects of the team, the physical condition of any players, planned strategies, etc. with anyone. The team is a family and what takes place on the field, in meetings or in the locker room stays within this family.”276 The NLRB Regional Director found the provision unlawful because it “would reasonably be construed to prohibit Section 7 activity, including discussions about vital health and safety issues.”277 Northwestern deleted the offending provision and replaced it with language curing the legal infirmity. The new language stated,

Protected Personal Health Information: Based on privacy considerations associated with medical conditions and the need to ensure that teams with whom we compete do not obtain medical information about our student-athletes, you should not reveal the medical conditions or injuries to persons outside the Northwestern University football team and staff.278

The amendment then limited the scope of the prohibition by stating,

This restriction does not apply to information that is generally known and available to the public, nor does it prohibit student athletes from discussing general medical issues and concerns with third parties provided that such discussions do not identify the physical or medical condition or injury of specific or named student athletes.279

Perhaps anticipating controversy in authorizing the new provision, the Regional Director explained why his advice comported with Section 7. He emphasized that allowing the discussion of general medical issues while prohibiting discussions of specific players “struck the proper balance.”280 That balance, in his words, was between the need to maintain confidentiality of the players and team while conversely permitting

275. Advice Memorandum, supra note 31, at 3.
276. Id.
277. Id. at 4.
278. Id. at 3.
279. Id. (emphasis added).
280. Id.
players to “speak out . . . about vital health and safety issues impacting themselves, their teammates, and fellow collegiate football players.”

The Regional Director was cognizant of federal laws protecting the privacy of various health and educational student records and did not want to advise schools to jeopardize compliance with those laws in order to comply with Section 7 of the NLRA. The balance, therefore, is to allow privacy-related prohibitions while also allowing communications that further self-organizing activities for the mutual benefit of student-athlete employees. The Regional Director’s reference to allowing players to “speak out” on “health and safety issues impacting themselves, their teammates and fellow collegiate football players” easily contemplates the use of social media to discuss issues, such as the impact of concussions in college football and the dangers of high intensity drills in extreme summer conditions.

The 16 other private D-1 schools will encounter the same issue if their Handbooks contain the same type of medical prohibitions. The law is in many ways the art of distinctions. The General Counsel’s office for these institutions likely is to become acquainted with Handbook language that separates medical prohibitions of specific players versus allowances for general health issue discussion among student-athletes and the public.

Medical grievances have implications and application beyond sports. The GCM provided guidance to private schools for medical resident interns and graduate student-workers. Medical schools have come under fire for the extraordinarily long periods that residents are on call. A Handbook provision preventing the discussion of those conditions is arguably just as unlawful under Section 7 as the sports medicine prohibitions originally enacted by Northwestern.

281. Id.
282. A primary federal law for such protection is the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232(g) (2012). FERPA protects the privacy of student education records. FERPA applies to all educational agencies and institutions that receive funds under any program administered by the United States Department of Education. Private schools can admit students who receive federal loans to pay for tuition and room and board, so they too can be subject to FERPA. See id.
283. Advice Memorandum, supra note 31, at 3.
284. MEMORANDUM GC 17-01, supra note 18, at 16–17.
285. Reportedly, residents “are expected to spend up to 80 hours a week in the hospital and endure single shifts that routinely last up to 28 hours.” Ryan Park, Why So Many Young Doctors Work Such Awful Hours, ATLANTIC (Feb. 21, 2017), https://www.theatlantic.com/business/archive/2017/02/doctors-long-hours-schedules/516639/ [https://perma.cc/Z763-C37K].
D. Student-Athlete Rights and Responsibilities—Dispute Resolution Procedure

At the core of an employee’s Section 7 right to communicate “freely” with fellow employees and others regarding “work issues” for their “mutual aid or protection” is the ability to complain about working conditions imposed by the employer and seek redress for the complained-of conditions through collective action by the employees.286 Therefore, if a private employer enacts a handbook policy that prohibits or restricts the discussion of a workplace grievance among employees or others, the employer and the handbook policy clearly violates Section 7.287

Northwestern had such a provision in its original student-athlete Handbook. The “Dispute Resolution Procedure” stated that any student-athlete with a complaint or grievance involving his “personal rights and relationship to the athletic program” first must discuss the issue with the school’s Director of Football Operations.288 If the matter remained unresolved, the student-athlete would meet with the Senior Associate Athletic Director or the Athletics Director.289 If there still was no resolution of the dispute, the student-athlete could appeal to the Faculty Committee on Athletics and Recreation and, ultimately, the President of the University.290

Upon review, the NLRB Regional Director concluded that this prohibition “would reasonably be construed as prohibiting Section 7 activity.”291 The only reasoning necessary was the simple statement that such a rule unlawfully “prohibit[s] discussions with fellow players and their parties concerning workplace grievances.”292

Wisely, Northwestern deleted the provision without an attempt to resurrect, ameliorate, or otherwise disguise it. Again, the millennial student-athlete is likely to use social media to air grievances about a coach deemed overbearing or unfair anywhere on or off campus.293 Images from

289. Id.
290. Id.
291. Id.
292. Id.
293. “Millennial student-athlete” refers to those who are born in the 1980s or 1990s. Millennial, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/millennial [https://perma.cc/78RM-VPFC]. For example, a University of Central Florida kicker, Donald De La Haye, created a YouTube channel and profited from his regular use of that channel. The NCAA ruled that he was ineligible to play collegiate D-1 football. He chose to keep his channel and lose
mobile devices transferred to Instagram, Facebook, Twitter, or other platforms with editorial text should be an anticipated occurrence once student-athletes are aware of their Section 7 rights in the private school setting. The best practices model of a private school Handbook, therefore, likely will follow Northwestern’s lead in deleting such existing provisions.

E. Athletic Communications—Media Relations

The NLRB considers student-athletes “employees” who have the right to self-organize for their mutual aid and protection under Section 7 of the NLRA. Those activities include student-athletes’ ability to communicate in writing, orally, and through images on social media.

Unsurprisingly, when a private university employer restricts or prohibits a student-athlete’s access to the media, unlawful restraints potentially exist on protected Section 7 activity. Northwestern provides yet another case on point. The university Handbook contained an “Athletic Communications for Student Athletes Rule.” Under the heading “THINGS TO REMEMBER DURING AN INTERVIEW,” the rule originally stated, in relevant part:

You should never agree to an interview unless the interview has been arranged by the athletic communications office. All media requests for interviews with student athletes must be made through athletic communications. If you are contacted directly by the media . . . you should politely, but firmly, redirect the reporter to the athletic communications office.

The Regional Director concluded that this clause reasonably would be construed as prohibiting Section 7 activity. Although no reasoning accompanied the conclusion, the basis likely is that a provision only


295. *Id.* at 5.


297. *Id.* at 5.

298. *Id.*
authorizing university-arranged interviews is essentially a university veto power over all communications with the media initiated by student-athletes—even communications concerning discussions for the mutual aid and protection of the student-athlete and his teammates. The restrictions on access violate Section 7 of the Act because Section 7 extends that right of communication to “others,” including the media.\textsuperscript{299} Therefore, if a student-athlete at a private school chose to speak to the media directly about working conditions, practice times, coach interruptions of classes, dangerous practice conditions, or failure to follow concussion protocol, for example, Section 7 protects the student-athlete’s right to do so.\textsuperscript{300}

Northwestern apparently came to the same conclusion because it deleted the original provision and replaced it with language that gives the student-athlete the right to engage in media interviews without interference from the school. The new provision simply says, “As responsible student athletes, you may directly speak with members of the media if you choose to do so.”\textsuperscript{301}

The amended language provides the player with an option to refer the media to the athletic communications office. A student-athlete, however, should not receive any adverse consequences for choosing direct media contact because punishing the athlete for non-school sanctioned communications on mutual protection issues likely is chilling the activity and coercive. Such punishment is contrary to established NLRB precedent.\textsuperscript{302}

The foregoing limitations on the institutions, however, still allow some freedom in handbook drafting. For example, Section 7 of the Act does not prohibit a school from promoting its culture and mission. Northwestern’s amended media provision encouraged student-athletes to be professional.\textsuperscript{303} It also suggested that players “share credit for your success” by “talking about the contributions of your teammates and use their names.”\textsuperscript{304} The Northwestern media provision even articulates an athletic moral code and life lessons. The policy provided the following advice: “[t]alking about the great work of others shows you have confidence in your own role and the value of your own contributions, so you’re not afraid of letting someone else have their moment of glory, too.”\textsuperscript{305} This language is similar to the modern corporation’s recitation of its core values.\textsuperscript{306}

\textsuperscript{301} Advice Memorandum, supra note 31, at 5.
\textsuperscript{303} See Advice Memorandum, supra note 31, at 5.
\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Facebook, for example, has five core values: (1) Be Bold; (2) Focus on Impact; (3) Move Fast; (4) Be Open; and (5) Build Social Value. Facebook
Again, law is often the art of distinctions. The curative language states that student-athletes “should be aware of and consider” certain elements of good character.\textsuperscript{307} The policy did not phrase the statements as demands. The subtle distinction between encouragement and coercion is the difference between lawful and unlawful in this context.

Importantly, Northwestern deleted the next sentence in its policy: “Avoid the negatives, as they breed discontent and trouble.”\textsuperscript{308} The fine line is that encouraging an optional “yes” is very different for labor purposes from a mandatory “no” on communications affecting the workplace.

The Regional Director said the original provisions were unlawful and accepted the amendments.\textsuperscript{309} The key was creating the opportunity for student-athletes to speak to the media on their own terms. The Regional Director said, “[t]he [e]mployer modified the rule to clarify that student athletes may choose to speak directly to the media and have ‘the option of referring the media . . . to the athletic communications office.’”\textsuperscript{310} Thus, the universities have a legitimate interest in protecting their brands, including the ability to minimize damages from any misguided comments of student-athletes who have a platform for speaking to millions of people. The NLRB now has imposed new constraints on the private institutions that seek to regulate those communications.\textsuperscript{311}

V. SOCIAL PROTESTS AS PROTECTED SECTION 7 ACTIVITY

The majority of this Article has two primary premises. First, scholarship student-athletes at private D-1 schools should have employee status. Second, school rules and policies cannot prohibit or interfere with the student-athlete’s right to self-organize, including the right “to form, join, or assist labor organizations,” choose their own representatives, or engage in other concerted activities for their “mutual aid or protection.”\textsuperscript{312}

For those purposes, “concerted” activities are defined broadly as “when two or more employees take action for their mutual aid or

Careers, Facebook’s 5 Core Values, FACEBOOK (Sept. 8, 2015), https://www.facebook.com/pg/facebookcareers/photos/?tab=album&album_id=1655178611435493 [https://perma.cc/DKZ9-87H4].

308. Id.
309. Id.
310. Id.
311. See MEMORANDUM GC 17-01, supra note 18.
312. 29 U.S.C. § 157. Section 8(a)(1) describes unfair labor practices as including the practice of an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the NLRA.” Id. § 158 (a)(1) (2012).
protection regarding terms and conditions of employment.  

Concerted activity also includes acts by a single employee if he is “acting on the authority of other employees, to bring group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action.” Concerted activity appears so broad that no loopholes exist as long as the activity has a nexus with the workplace.

This section includes a third premise involving social protests. Circumstances exist in which student-athlete communications and activities appear to be social protests but, in fact, have sufficient factual linkage with workplace grievances among co-workers to fall within protected Section 7 activity.

An example may illuminate the controversy, although hypothetical facts have been added to otherwise actual facts. In 2017, Team Israel qualified to play in the 16-team World Baseball Classic—a tournament of nationalistic baseball teams. The team struggled to qualify in recent years, challenged to find sufficient talent among Jews willing to play for the team. In fact, only one player on the roster is a native-born Israeli. To show Jewish pride in the sport, Team Israel players collectively took off their baseball hats and put on yarmulkes during the playing of their national anthem. The activity was a rallying cry to attract other Jewish players, a plea for more players to become nationalistic and represent Israel. A protest regarding a country’s failures, as is occurring in the United States, is only one side of the same coin that asks players to be more nationalistic. Both acts are symbolic expressions.

Several American colleges and universities have foreign-born athletes who are subject to the student-athlete rules. International events can influence those student-athletes. They also can use the sports platform to

314. Id.
317. Id.
318. Id.
319. Id. at B12.
320. See id.
mobilize teammates and recruit others to join a cause. The only facts that are required to link the social cause with labor law protection are a workplace-related cause and an interrelated activity among coworkers.

Adding a few hypothetical facts can bring the issue squarely within the scope of this Article. D-1 college basketball and soccer teams travel internationally during the offseason. Assume that one team has two or more players from a primarily Muslim country and that those players choose to wear a patch in support of the Muslim faith in light of anti-Muslim hate speech occurring during matches and on campus. Assume the players then post the images on social media. Imagine that the school, fearing backlash and a decline in applications, enacts a handbook provision banning all expressions of nationalism among student-athletes. If the players assert that they are employees, consistent with NLRB direction, they may claim that their expressions and related discussions are protected activity under Section 7 and that the handbook prohibition is an unfair labor practice under Section 8(a)(1) of the Act. The institution may counter that the Act only contemplates workplace self-organizing activity, and the social media post is an expression of support for a foreign country, unrelated to playing soccer for a college in the United States.

The issue may ripen to whether the “activity” of posting images on social media is a concerted activity for mutual aid and protection or, conversely, whether playing a sport for a university is an activity that is insufficiently linked to workplace activities. No clear NLRB authority exists on that issue. Yet, applying the above authorities appears to give the student-athletes an edge. That edge exists because two or more players demonstrate concerted activity. Their activity was for their mutual protection because they were responding to anti-Muslim sentiments on campus and in games. A hearing officer, based on NLRB precedent, likely would view the activity as self-organizing in the workplace. The prohibition would be an unfair labor practice because it would prohibit protected activity under Section 7 of the Act.

321. For example, the Michigan State University basketball team traveled to Rome, Florence, Maranello, Verona, Trieste, and Venice, playing in three-day tournaments, including games against senior men’s teams from Italy and Russia. See Michigan St. to Face International Teams on Italy Trip, ESPN (Apr. 23, 2015), http://www.espn.com/mens-college-basketball/story/_/id/12750835/michigan-state-spartans-schedule-men-basketball-trip-italy [https://perma.cc/85LD-85XD].
323. See § 157.
324. See the NLRB decisions interpreting Section 7 of the NLRA discussed supra Part II.C.1. of this article.
Yet another change in facts favors the schools. The hat-switching players on Team Israel probably knew about the national anthem protest of NFL quarterback Colin Kaepernick. Kaepernick knelt during the national anthem to protest the treatment of black men by police forces within the United States.\textsuperscript{325} The publicity, scrutiny, and acrimony associated with that singular act inflamed passions on both sides of the issue and inspired players in other sports to act.\textsuperscript{326} Now assume Kaepernick is a scholarship player at Northwestern instead and kneeling was simply a singular protest. Assume too that the collegiate Kaepernick had someone use his iPhone to create a video of his act and that Kaepernick then shared the video on Instagram with the general public. There was no accompanying plea to his teammates to join him. If the school had a policy that prevented purely individual protest expressions through social media, the NLRB likely would consider the rule lawful because there was no organizing activity under Section 7 of the Act.\textsuperscript{327}

Thus, beyond the more obvious workplace issues of direct grievances involving the sport during play and practice times, that is, the workplace, the companion issue is whether scholarship student-athletes who engage


\textsuperscript{327} \textit{See} §157.
in social activism have the same Section 7 protections. The issue is far from mere semantics.

Further, the state of North Carolina lost the opportunity to host certain NCAA Men’s Basketball Tournament games because of a so-called “bathroom bill” that the LGBTQ and transgender community alleged was unlawfully discriminatory. Assume scholarship football or basketball student-athletes at a private school hold a self-initiated press conference and announce upcoming boycotts of previously scheduled games in the state of North Carolina. The teams also announce through social media that there are openly gay members of the team that received vile threats and harassment on their campus. They develop headbands for their uniforms with the name of their proposed organization that supports the LGBTQ community.

If their school had a social media policy that prohibited unapproved symbols, self-initiated media interviews, or the use of social media for social activism, the policy likely is invalid. The NLRB rationale, like in Northwestern University, would be that players reasonably would view the policy as interfering with their concerted attempts to band together for their mutual aid and protection under Section 7 of the Act. At the very least, the NLRB may follow Durham and conclude that the policy would chill the team’s self-organizing efforts. Even if the policy required prior approval rather than an outright ban, the provision could be unlawfully coercive under the Durham jurisprudence.

Another example highlights the importance of factual distinctions. Wisconsin basketball player Bronson Koenig took part in Native-American protests against an oil pipeline running through cherished property of Native-American tribes. Hypothetically, assume there is disputed evidence on


329. See Advice Memorandum, supra note 31, at 2–5.


331. See id.

whether Koenig actively sought participation from his teammates. Also disputed is whether Koenig personally asked the athletic director to change the venue of any games scheduled in states with approved pipelines.

Wisconsin is a publicly supported university. Therefore, Section 7 does not apply. What if Koenig was a scholarship athlete at a private D-1 institution, and the institution had a rule that prohibited “any attempt of student-athletes to influence or interfere with venues selected by the university, the NCAA or the conference”? If the evidence established that Koenig’s social media posts sought to organize players and that there was a sufficient nexus to mutual workplace issues, Koenig could prevail on his claim that the policy was unlawful under Section 7 and was an unfair labor practice under Section 8(a)(1) of the NLRA.

Koenig could lose, however, depending on a careful delineation of the facts. Assume again that Koenig was playing at a D-1 private school. If the evidence established that he was making a singular protest, without attempting to involve teammates, the policy prohibiting these actions could be lawful. If, on the other hand, the evidence established that Koenig sought to organize teammates, there is a deeper question: do the reasons for the protest have a sufficient nexus with working conditions, that is, the regimen of playing and practicing the sport for the school? If the activity is to help Native-American tribes affected by the pipeline—with no reasonable correlation to playing basketball for the school—there should be no unfair labor practice or unlawful prohibition of protected Section 7 activity. The question for the decision-maker is whether teammates joining to protest oil pipelines are showing support for the tribes, outside of the intended workplace environment under the Act. There is no precedent directly on point for such budding issues, so the school likely possesses the stronger argument.

The overlap between the labor organizational activity and social activism is closer than it appears. As a general proposition, a call for change can be, and often is, for the benefit of those who self-identify with a common grievance. Mobilizing a group to change workplace conditions conceivably could include the environment in which those players live on campus. That cause could be akin to the collective action of the University

334. See 29 U.S.C. § 152(2) (2012) (excluding the state or federal governments or any subdivision thereof from the statutory definition of employer under the NLRA).
335. See discussion supra Part I.B. (noting the public-private divide in NLRB jurisdiction).
of Missouri football team that threatened to boycott future games if the administration failed to address racial issues on campus.336

The link between social activism and the campus environment also could arise from a scenario like the threatened boycott by the University of Minnesota football team.337 The team members claimed that when the administration suspended ten of their teammates, the university violated the teammates’ due process rights.338 If those same scholarship student-athletes chose to meet to form a union to represent themselves against the university in future issues of discipline and the school was a private institution, any rule prohibiting those activities presumably would be unlawful.339 If the school had a handbook rule or policy prohibiting the use of social media to assert the group claims, the same rule also is likely to interfere with protected Section 7 activity.

VI. MODELING BEST PRACTICES

Although this Article focuses on burgeoning rights of student-athletes, this section puts the author in the position of counsel for the private institution and tasked with drafting provisions that manage the relationship between the school and its student-athletes. Obviously, the challenge is to avoid the legal pitfalls Northwestern experienced. Other private schools undoubtedly will review their policies to conform to the recent NLRB proclamations or seek legislative or judicial means to avoid NLRB jurisdiction. Below are some conceptual considerations that may aid that cause.

336. The black football players at the University of Missouri particularly upped the ante after a week of the boycott by pledging a refusal to play unless the university president resigned. See Marc Tracy & Ashley Southall, Black Football Players Lend Heft to Protests at Missouri, N.Y. TIMES (Nov. 8, 2015), https://www.nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html?r=0 [https://perma.cc/RYW4-AV9J]. If Missouri were a private school, its school policies restricting or prohibiting communications or activities that could damage the school’s brand easily could have been before the NLRB, much like the Northwestern Handbook policies for student-athletes.

337. See At Minnesota, a football boycott is over but tensions are not, CHI. TRIBUNE (Dec. 27, 2016), http://www.chicagotribune.com/sports/college/ct-minnesota-football-boycott-tensions-20161227-story.html [https://perma.cc/5A UH-3YMJ].

338. Id.

339. Meetings to form a union clearly are protected activity under Section 7 of the National Labor Relations Act. See § 157.
A. The Horrors of Ambiguity

The jurisprudence following Durham and the Advice Memorandum regarding Northwestern provide the current baseline for a best practices model in drafting employer policies and rules governing student-athletes. One lesson from the foregoing discussion is that drafters should define relevant terms carefully. More to the point, the definitions should leave no doubt that any prohibitions fall clearly outside protected Section 7 activity. In Durham, the Board found that terms like “inappropriate,” “professional,” “respectful,” and “unfavorable” were vague and overbroad.\textsuperscript{340} In the Advice Memorandum, the terms “inappropriate” and “embarrassing” also were deemed to be unlawful.\textsuperscript{341}

Although it is easy to avoid those particular terms, no bright-line test exists for the various other circumstances discussed above. The most recent pronouncement specific to a private university was the Advice Memorandum, which did not provide a rationale linking unlawful policies to a particular legal authority.\textsuperscript{342} Therefore, rule drafters only have inferences, and more satisfyingly, the general guidance from the GCM. The broad language of Section 7 also leaves substantial room for interpretation. The right “to form, join, or assist labor organizations,” “collectively bargain,” or engage in “other concerted activities” for “mutual aid or protection” can include a range of activities not yet tested before the NLRB or the courts.\textsuperscript{343}

There are, however, some clear guideposts. The players’ self-organizing activity must possess a nexus with the workplace.\textsuperscript{344} A social media post regarding an illegal act like the student-athlete brandishing unlicensed firearms is not protected activity under Section 7.

The question then becomes whether some activities, technically not illegal under existing statutes, still can be prohibited without interfering with a student-athlete’s protected rights. Conceivably, a social media post can depict actions that are related to organizing for mutual benefit with teammates but also viewed by the school as “hazing” or “harassing” outside of existing statutes. Defining the prohibited actions is critical. As with many other code-based prohibitions, a party can win or lose based on whether he falls within the defined prohibition.

\textsuperscript{340} See discussion supra Part IV.B.2. regarding the Section 7 standard for vague and overbroad provisions in Durham.

\textsuperscript{341} See discussion supra Part IV.A. regarding the social media policy provisions found to be unlawful.

\textsuperscript{342} See Advice Memorandum, supra note 31.

\textsuperscript{343} See § 157.

\textsuperscript{344} The nexus requirement is evident from statutory definitions, including the definition of an “employee,” which is defined as a person who “works” for another in return for compensation. See MEMORANDUM GC 17-01, supra note 18, at 12.
For example, ambiguity exists in even the revised Northwestern social media policy. The policy prohibits the use of social networking sites that depict “hazing” or “harassment.”\textsuperscript{345} No clear or immediate definition exists for those terms. Neither term says, “This prohibition applies to hazing or harassment as defined by law.” Later, the social media policy includes in the penumbra of violations the following language: “or any content that violates Northwestern University, Athletics Department or student-athlete codes of conduct and/or state or federal laws.”\textsuperscript{346}

Are “hazing” and “harassment” prohibited only if the activity violates existing state or federal law? Or is there a broader or narrower definition in a university code of conduct that applies to the prohibition? If the drafters made clear that its prohibitions only cover violations of federal, state, or local law, the definition is clear, and under the Advice Memorandum, the policy is within the safe harbor and lawful.

Obviously, an attorney for the student-athlete would seek to use the most narrowly defined terms. Narrowly defined terms could generate the argument that the policy did not apply to the student-athlete because his activity fell outside of the defined prohibition, and, consequently, the court should reverse any adverse sanction, such as suspension or a loss of scholarship, for example, imposed against the student-athlete.

Yet, innumerable scenarios that may occur off the field or court do not have interpretive guidance from an NLRB publication or case. An important attribute for drafters, therefore, is having the imagination to envision the potential issues before they arise and draft provisions that solve the problem in advance.

**B. Mixed Messages and Potential for Predominant Use Tests**

Less technical, but just as relevant, is the following question: is the “activity” part of a continuum of actions or part of an overall activity that is unprotected and severable from protected activity? For example, disruptive forces within the music industry provide opportunities for student-athlete mobilization through Section 7 protected activity.\textsuperscript{347} At the time of drafting this Article, Spotify was the leading music streaming service of its kind, with 50 million paying customers and another 50 million who listened without cost.\textsuperscript{348} Investors have valued Spotify at more

\textsuperscript{345} See Advice Memorandum, supra note 31, at 2.
\textsuperscript{346} See id.
\textsuperscript{347} § 157.
\textsuperscript{348} Ben Sisario, Licensing Accord Eases Spotify’s Path to Going Public, N.Y. TIMES, Apr. 5, 2017, at B3.
than $8 billion. Spotify has entered into a licensing agreement with the world’s largest record company, Universal Music Group, enhancing the potential profitability for Spotify’s artists. Can a school prohibit scholarship basketball or football players from teaming up with some of Spotify’s top music artists like Drake, U2, the Weeknd, and Lady Gaga to create songs imploring student-athletes to demand a share of NCAA revenues?

The more precise issue arises under the following scenario: assume the school has incorporated by reference the NCAA rule prohibiting a player from profiting from his own NIL. Assume the above Spotify venture is legal. The university rule seemingly would prohibit the activity under the Regional Director’s Advice Memorandum.

Yet, a challenge by New Age Athletes may be approaching, especially because the NLRB has not faced the following issue: can a titular NCAA rule engrafted into a private school’s social media policy neuter activities otherwise protected under Section 7? There is no direct precedent on this issue.

Nor should the future importance of the intersection of entertainment and sports be underestimated when considering social media policies for student-athletes. Continuing the music streaming hypothetical is instructive. There can be “mixed use” activities. As the New Age Athlete grows in the audacity of business acumen, social media will be a useful tool. Music streaming has untapped potential for reaching and mobilizing student-athletes. “Streaming now makes up a majority of the revenue for record labels,” according to Lucian Grainge, CEO of Universal—the world’s largest record company. Schools can do nothing to prevent student-athletes from creating, hearing, or sharing such streamed content, including clever lyrics that advocate self-organizing activities. The NLRA protects those efforts. Private colleges and universities, therefore, must draft social media policies carefully to avoid provisions that fall within unwittingly broad NCAA prohibitions.

349. *Id.*
350. *Id.*
352. See Advice Memorandum, supra note 31.
354. Sisario, supra note 348.
To date, only Northwestern University speaks to the precise terms for student-athlete polices. Other private schools face the issue, and factual circumstances may vary from those found in Northwestern University. The NLRB may, therefore, look to precedent in other areas of law in the absence of precedent in current labor law. An example already exists for student-athletes. Groundbreaking litigation addresses whether student-athletes have sufficient rights to their own name, image, and likeness (“NIL”) to trump First Amendment rights of entities like the NCAA and private contractors who use their NIL without permission. In Keller v. Electronic Arts, Inc. and Hart v. Electronic Arts, Inc., federal courts adopted a transformative use test, balancing whether the user of the NIL has “transformed” the work beyond a virtual mirror image of the student-athlete’s NIL. Such a test attempts to balance a set of facts to see if the work fits into one legal category over another.

The issues of this Article are related. Keller and Hart involved “work[s]” using players’ NIL. This Article includes players who use their NIL in social media for self-organizing activity. Faced with a provision prohibiting a student-athlete from using his own NIL with Spotify records, the NLRB may consider a predominant use or transformative use test.

The test should examine whether the majority of the content protects organizing activity rather than protecting other purposes like entertainment, which is unrelated to the mobilization of other students. The essential inquiry is two-fold. The first level is to determine whether the totality of the activity falls within a protected category. The second level examines whether there are transformational facts—facts that may pull activities that seem outside of protected activity into Section 7 protection. One example may be a transition from purely individual entertainment, such as creating a tweet about his own concussions, to a message that also tells players to mobilize for a cause, such as a Facebook post emphasizing the collective right to demand stronger protocols in treating concussions. Just as facts can transform an NIL work from a right-of-publicity protection to one that is protected under the NIL-user’s First Amendment rights, there may be facts that transform individualized unprotected activity—a student-athlete’s own

---

357. See Keller, 2010 WL 530108, at *4; Hart, 717 F.3d at 163–65.
358. Under Keller, a transformative video game (“work”) depicting the NIL of a student-athlete survives the student-athlete’s claim that his right of publicity precludes entities from using his NIL without the student-athlete’s permission. See In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d at 1284.
359. See id.; Hart, 717 F.3d at 163–65.
concussion—to protected Section 7 activity. The transformation would exist if additional facts reveal that the concussion discussion mobilizes other players for the cause of stronger protocols for treating concussions.

C. Severability

Another option for the NLRB and courts is to avoid the all-or-nothing approach of a transformative use test. Under that test, if most of the activity is lawful, then all of the activity is lawful even if other actions are subject to exclusion under a school’s policy.\(^{360}\) The unlawful portion is incidental to the majority, lawful portion.\(^{361}\) For example, consider the scenario in which a player uses Instagram solely to show off his new touchdown dance the day before the game, anticipating the opportunity to use it on the field. Here, there is no link to mobilizing players for mutual aid or protection. Add the additional fact that other parts of his Instagram post ask players to boycott future games unless the school removes the mold from the locker rooms. The latter could be protected activity under Section 7.\(^{362}\) The NLRB or court may authorize policies that sever the dance and retain the policies that allow the grievance.

If such a severability standard were employed, the NLRB and courts would face an allocation issue. Again, the evidence would be primary in determining where to draw the line between protected organizing activity and unlawful activity that a social media policy legally can sanction.

The above discussion highlights the difficulties private colleges and universities are likely to face in the future when updating their social media policies for student-athletes. The same issue will exist for the other student-workers.

D. Media Freedom for Student-Athletes

One of the unlawful Northwestern policies was the school’s attempt to regulate and redirect media interviews of student-athletes.\(^{363}\) The broader implication is that all other private D-1 programs with scholarship student-athletes are in the same position as Northwestern for NLRB scrutiny and Handbook revisions. Drafters of a media policy should contemplate the likelihood that the “media” can include social media in all

---

360. See, e.g., Hart, 717 F.3d at 161–71 (discussing and applying the transformative use test).
361. See id.
363. See discussion of “Athletic Communications for Student Athletes Rule” supra Part IV.E.; see also Advice Memorandum, supra note 31, at 5.
forms and platforms. Because social media is largely unregulated, student-athletes may receive interview requests from anyone with a smart phone, anyone mature or immature, any adult or minor, or anyone in bedrooms or bars.

Consider the consequences of a student-athlete who, on the one hand, boasts about receiving funds that violate NCAA rules but, on the other hand, expresses trepidation about losing his eligibility. He may have those discussions with other players or with someone who does not feel bound by journalistic ethics. Also consider the well-intentioned efforts of a school to promulgate rules designed to suppress or prohibit student joint discussions about NCAA errors or abuses by coaches or administrators. School rules that inhibit such activities appear clearly unlawful because, to borrow from standard NLRB decisions, “it would be reasonably construed to prohibit Section 7 activity.”\(^{364}\) Importantly, it must be a reasonable view only from the player’s objective viewpoint—not the viewpoint of the school that promulgated the rule.

Imagine the conundrum created if a private school had the NCAA established penalties for an escort service and prostitution ring for basketball players at the University of Louisville.\(^ {365}\)

Under NLRB caselaw and provisions of the NLRA, current scholarship athletes playing prominent roles on the team would be able to speak directly to the media without a university filter and without university veto power.\(^ {366}\) The existence of disputed facts in highly charged circumstances does not alter the protection. Because Section 7 protections extend to student-athlete communications with others beyond their teammates, ethics-free social media bloggers or the NCAA could interview current students without permission. Of course, some non-journalists could be students, overzealous fans, or individuals who have violated a school policy. Such individuals could implicate the student-athletes. These “interviews” could be at late-night venues that are breeding grounds for adversity for the student-athlete and the school.

Certainly, the NCAA and the private schools with scholarship athletes have various rules designed to provide orderly administration of athletics, with protections for the welfare of the athletes and reputational interests.

---

364. The boilerplate language used by the NLRB to describe Northwestern’s Handbook provisions was that the rule “would reasonably be construed as prohibiting Section 7 activity.” See Advice Memorandum, supra note 31, at 5.

365. See Tracy, supra note 1.

of the institution. The GCM and the Advice Memorandum, however, require that those institutions carefully parse which rules interfere with Section 7 protected activity. Handbook drafting historically has not had to include those considerations. For private D-1 institutions, the need now exists for drafting clarity in light of Section 7.

The heightened ability of student-athletes to discuss programmatic issues freely does just that—heightens awareness of the programmatic issues and the potential NCAA violations. The public, armed with social media exposure, could become an even earlier and more dominant court of public opinion. The potential adverse impact could be varied and significant, including, but not limited to, losses and opportunity costs in the following contexts: (1) the image and reputation of the school; (2) the careers of the coaches and staff; and (3) the financial fortunes of the school.

This new confluence of NLRB proclamations could adversely affect all of the above. The root cause of those maladies is not necessarily the broadcasting of those circumstances. If the allegations are true, the problem is rooted in the errors and violations themselves. Therefore, private institutions have increased the pressure to avoid errors and violations because the potential for public exposure of transgressions is greater and is disseminated from a high profile source: star athletes.

E. Policy Considerations and Institutional Strategies to Overcome Them

Institutions that enact regulations for student-athletes now must consider that the relationship between management and the workforce is

367. The D-1 NCAA Manual commences with overriding principles, including the language:

It is the responsibility of each member institution to conduct its athletics programs and manage its staff members, representatives and student-athletes in a manner that promotes the ideals of higher education and the integrity of intercollegiate athletics. Member institutions are committed to encouraging behavior that advances the interests of the Association, its membership and the Collegiate Model of athletics.

(emphasis added). 2017–2018 DIVISION I MANUAL supra note 351, at xii; see also YASSE ET AL., supra note 2, at 2–5 (summarizing NCAA structure, responsibilities, and rules in its Division I Manual, Section 2.5).

368. The adverse impact referenced above is contrasted with the fact that football and basketball success historically has increased student applications, student selectivity, royalty income, donor contributions, non-revenue sports subsidization, and facility upgrades. See generally William Berry, Enhancing “Education”: Rebalancing the Relationship Between Athletes and the University, 78 LA. LAW REV. 197 (2017).
not a legally level playing field. The NLRA policy promotes self-organizing activity by employees,\textsuperscript{369} which is why overbroad or ambiguous provisions affecting employee rights are construed against the employer.\textsuperscript{370} That is why provisions that are not direct prohibitions but only tend to chill self-organizing activities are still unlawful.\textsuperscript{371} Even rules or policies that could have another reasonable construction still can be unlawful.\textsuperscript{372}

The private institution’s model for drafting, therefore, must focus diligently on scrubbing handbook provisions of any semblance of an unlawful motive, that is, an intent to chill or prohibit self-organizing expressions or activity for the mutual protection or aid of scholarship student-athletes.\textsuperscript{373} Durham, however, also illustrates that even language that is benign on its face potentially can be a pretext for interfering with protected activity.\textsuperscript{374}

Despite the numerous favorable factors for student-athletes, private institutions do have pathways to sustainable rules without violating the Act’s policies or violating Section 7 of the Act. Assume that student-athletes seek a representation election to select or retain a union. Assume too that the school has rules that restrain or prohibit that activity. The institution has the viable defense that it would have imposed the same action even in the absence of the protected conduct.\textsuperscript{375} Private institutions should have best practices for drafting student-athlete rules that contemplate whether disciplinary actions flow from the rule based on circumstances wholly apart from self-organizing activities of its student-athletes.

The well-drafted handbook for private institutions with scholarship athletes should start with a big picture view of what the NLRB now requires of those institutions. In a far more serious context, the congressional autopsy after the terrorist attacks on September 11, 2001 concluded that part of what

\textsuperscript{369} Section 7 of the Act protects employee efforts to form or join labor organizations or other concerted activity for mutual aid or protection. 29 U.S.C. § 157 (2012).

\textsuperscript{370} Durham, 360 N.L.R.B. at 705.

\textsuperscript{371} Id. at 704.

\textsuperscript{372} Id.

\textsuperscript{373} Id.

\textsuperscript{374} In Durham, the Board found that the employer’s claim that the employee’s termination was from a failed driver recertification was a pretext for retaliating against her voting in a representation election and her union activities related thereto. Id. at 701.

allowed the tragedy to happen was the United States’ defense infrastructure’s “failure[ of] imagination” to envision what could go wrong.\(^{376}\)

As minor as handbook rules may seem, Section 7 protections allow for the publicizing of potentially sordid and highly damaging allegations. In light of the guidance from the memoranda of the General Counsel and Regional Director, rule drafters must engage in a balancing act. They must navigate labor caselaw to protect the university and student privacy while also protecting the student-athlete discussion of grievances and self-organizing activities for their mutual aid and protection. The school must permit the activities even if student-athletes are responding to alleged abuses or improprieties by the institution that could cause NCAA sanctions.

**F. Analytical Construct for Drafting Provisions: Incorporating Competing Interests from Multiple Legal Subject Areas**

In light of the myriad potential adverse consequences for the institutions, this Article suggests an analytical construct containing two objectives: (1) imagine future issues that the school has yet to confront in this new legal context; and (2) build the exact language of the provisions based on a sequence of inquiries. The result should be a handbook that withstands NLRB scrutiny.

Below is a spreadsheet with columns for each stage of the drafting process. Necessarily, the first step envisions the types of adverse circumstances that give rise to the rule or policy. The process starts with imagining all student-athlete actions sought to be regulated by the institution, regardless of whether the actions are protected Section 7 activity. In a separate column, those facts are analyzed with the appropriate NRLB test and governing law to record which activities are protected by Section 7. Only after the facts are analyzed under the applicable law would the drafters create the actual language of the rule or policy. Next, the drafters should remember that finding the language unlawful often is the punishment imposed under the rule.\(^{377}\) Therefore, a separate column allows the drafter to scrutinize each potential disciplinary action, sanction, or adverse consequence. The spreadsheet should remind the drafters to examine not only direct sanctions but also clauses that the NLRB may deem

---


377. See, e.g., Advice Memorandum, supra note 31.
ambiguous, coercive, or chilling on protected activities of the student-athletes.

As a double check on the legality of such provisions, the final spreadsheet column is for potential adverse consequences. It follows a pro-con analysis. The purpose is to determine if the risks are greater than the rewards and whether the rule accomplishes the intended objectives. This determination would include an analysis, for example, of whether a benign provision on its face may have substantial risk that the NLRB will label it a pretext for an improper motive to chill, coerce, or prohibit self-organizing, protected activities.

Below is a chart that depicts the spreadsheet columns.

| COMPREHENSIVE STUDENT-ATHLETE ACTIONS TO BE REGULATED | SECTION 7 PROTECTED ACTIVITY (Y/N) | DRAFT LANGUAGE WITHOUT SANCTIONS | DISCIPLINARY SANCTIONS | PRO-CON AND LITIGATION RISK |

Itemize each factual circumstance

It is worth reiterating that this model’s success is mostly dependent on the ability of drafters to anticipate as many negative scenarios as possible, such as institutional actions that prompt pushback from a collection of students. Even the unsubstantiated appearance of impropriety may give rise to common complaints and grievances among student-athletes and then, to the point of this Article, the use of social media and other activities to address the concern collectively.

1. Multiple Legal Subject Sources for Protected Rights and Liabilities

Legal imagination also is required to finalize the modeling of rules and policies. A handbook with social media rules and broad policies for communications and activities of the student-athletes has potential legal pitfalls beyond labor laws. Class action lawsuits involving former and current student-athletes have occurred regarding publicity rights and antitrust law.378 Successes for those student-athletes to date are likely to embolden athletes to mobilize on other legal issues. Schools need to rethink and redraft rules because these cutting-edge legal issues are

378. See O’Bannon v. NCAA, 802 F. Supp 3d 1049 (9th Cir. 2015) (discussing publicity rights victories for former student-athletes in Keller and Hart and antitrust limitations imposed on the NCAA and member institutions).
redefining the relationship between students-athletes and the schools for which they perform.

Well-drafted compilation of rules and policies should incorporate the legal principles of various potential causes of action. Each area of law impacts the rights of the parties and the rules that govern those rights. The causes of action all represent ways in which the law defines those relationships. Each cause of action shows the competing interests of the athlete versus the institution. Therefore, a state-of-the-art social media and student-athlete activities rule should balance the interests of both parties. The recent litigation highlights volatile student interests ripe for future court challenges, which emanate from student-athletes who feel wronged by a prohibition from college handbook rules and which are rooted in the following competing interests: (1) publicity rights of student-athletes; (2) First Amendment rights of both parties; (3) antitrust law limitations on the right of institutions to prevent student-athletes from profiting from their own NILs; and (4) the employee status of student-athletes.

Two examples, which are interrelated but legally distinct theories, are particularly noteworthy. Both examples involve the claim by student-athletes that they should be able to profit from their NILs. As applied to social media and student activity prohibitions by schools, if the schools ignore the direction provided by the courts as to the rights of student-athletes, they face the danger of creating rules and polices that unlawfully abridge those rights.

2. Student-Athlete Publicity Rights

One issue is whether a scholarship athlete’s publicity rights, that is, the rights to profit from his NIL, renders an NCAA or school rule unenforceable if it prevents the student-athlete from using social media to profit from his NIL.

Federal circuits have ruled twice that former student-athletes can have publicity rights that trump the First Amendment rights of the NCAA and its agents. In both cases, however, the court adopted a “transformative use test” that balanced whether the use by the unauthorized user of a player’s NIL “transformed” the NIL rather than merely recreated it. In


380. See Roger M. Groves, “Can I Profit from My Own Name and Likeness as a College Athlete?” The Predictive Legal Analytics of a College Player’s Publicity Rights vs. First Amendment Rights of Others, 48 INDIANA L. REV 369, 390–404 (2015) (discussing the Transformative Use Test as employed in both
both cases, the evidence was critical to the determination. Differing facts could bring different results.\(^{381}\)

The hypotheticals in this Article involved a player using Facebook or Twitter to send images to teammates and the public. The player obviously would be using his NIL if he receives public acclaim from such items as a signature headband, hairstyle, or tattoos. The player also may decide to use his NIL when encouraging teammates to mobilize around issues such as concussions, abusive practice schedules, or the need for more flexibility to schedule important classes. A rule that flatly prohibits all social media posts or other content creation by a scholarship player because of the First Amendment rights of the school may be unlawful. The activities in the hypothetical probably are organizing activities protected under Section 7 of the NLRA.

Competing interests are important to the rule formulation because Keller and Hart do not restrict the ability of student-athletes to create or distribute NIL content through social media. The well-conceived rule should consider that the NIL rights of the player are superior to the school’s First Amendment rights, unless the school or third party has a transformative use. The rule, therefore, should include language that protects the player’s NIL rights. Conversely, based on the knowledge of those two cases, the drafter should define the uses that are sufficiently transformative to authorize limitations on student-athlete social media posts.

3. **Antitrust Limitations on the NCAA and Member Institutions**

In *O’Bannon*, the Ninth Circuit opined that NCAA D-1 institutions could retain earnings from the NIL of student-athletes in trust for when their eligibility expires as long as the disbursement is tethered to educational purposes.\(^{382}\) In the court’s view, agreements between the NCAA and member institutions to prevent student-athletes from ever receiving proceeds from the use of their NIL’s was an unreasonable restraint of trade.\(^{383}\)

The importance of balancing competing interests in drafting is akin to the balancing of interests performed by a court. In *O’Bannon*, the court balanced the interests of both parties.\(^{384}\) The standard used by the court

\(^{381}\) See supra notes 379–380 and accompanying text.

\(^{382}\) See O’Bannon, 802 F.3d at 1078.

\(^{383}\) See id.

\(^{384}\) See id. at 1059.
compares the procompetitive effects of such a school rule with the rule’s anticompetitive effects. The relevance is that this Article’s model for drafting student-athlete rules and policies also should balance respective interests. If the rule that restricts the communications and activities of the student-athlete is anticompetitive without sufficient pro-competitive justification, the rule may be unlawful on antitrust grounds even if the rule could withstand labor law scrutiny.

VII. APPLICATION BEYOND STUDENT-ATHLETES

The issues discussed herein are not as narrow as they seem. Although this Article focuses on student-athletes, the NLRB’s Office of the General Counsel has applied employee status to medical residents and paid graduate students as well. The NLRB’s actions are in response to a growing movement of graduate students seeking bargaining power at their respective institutions.

Even since the General Counsel disseminated the GCM, graduate students have advocated for multiple bargaining units within university departments. The lead case regarding this advocacy is Yale University and Unite Here Local 33. Yale University is a significant case because it is one of the first to follow Columbia University, and it provides guidance on how the Board will apply the holding that students are statutory employees. In Yale University, the union sought to represent nine different bargaining units within nine different departments. The

385. See id. at 1078–79.
386. A more detailed modeling of how to balance these competing interests in future NCAA or member institutions rules is beyond the scope of this Article. It is, rather, the subject of a forthcoming companion article. That article also will discuss unanswered questions from the NLRB pronouncements discussed in this Article. The author recognizes, for example, that the NLRB pronouncements affect only scholarship student-athletes at D-1 NCAA private schools. The NLRB did not address whether the employee status inures to students with partial scholarships, be they in D-1 programs or D-II schools. Nor is there clarity on how this increased legal overlay for private institutions as opposed to public institutions unaffected by NLRB rulings will be resolved harmoniously.
387. See discussion supra Part III.A.
388. A recent example is Yale University and Unite Here Local 33, Decision and Direction of Election, request for review denied, 365 N.L.R.B. No. 40 (Feb. 22, 2017).
390. Id.
391. See id.
392. Id. at 2.
Board granted that request, directing separate elections for each of the units. In so holding, the Board rejected Yale’s two-pronged contention that the Columbia University decision was wrong and that even under Columbia University, teaching fellows were distinguishable from student-assistants and thus were not statutory employees.

The Board’s rationale provides greater assurance that Columbia University is viable and, therefore, so do both the GCM and Advice Memorandum that follow Columbia University as controlling precedent. Yale argued, as did Northwestern, that the educational relationship excluded employee status for student-workers. The Board reaffirmed that, under the common law definition of employee, the employment relationship co-exists with an educational relationship.

Thus, the most recent iterations of Columbia University foretell both a growing list of union classifications among student-workers and a growing list of separate bargaining units at the institution. Yale, for example, has over 800 teaching fellows and 56 academic curricula that offer Ph.D. programs. Future courts may analyze requests for multiple bargaining units within departments at Yale and other private institutions of higher learning by the same broad common law definition of employee and community of interest standard. There is the very real potential for similar mobilizing efforts by student-workers at other schools.

In Yale University, the Board also decided an issue with implications for the D-1 athletic programs at private schools. The Board determined that there was a sufficient “community of interest” among teaching fellows in each of the nine departments to justify a separate bargaining unit for each of the departments. The factors analyzed to make that determination involved whether the proposed unit members had distinct skills, training, and functions from other classifications of employees. Significantly, the Board emphasized that Yale bore the burden of establishing a lack of a community of interest.

The application of multiple bargaining units to an athletic program is a game yet to be played and may have unanticipated repercussions. Under certain circumstances, the NCAA allows students who have graduated from one school to transfer and play an additional year at another.

393. Id. at 2.
394. Id.
395. Id. at 1–2.
396. Id. at 26–27.
397. Id. at 2 n.3, 4 n.7.
398. Id. at 29–30.
399. Id. at 30.
400. Id. at 33.
program. What if two or more transfer graduate students believe the new school is treating them unfairly relative to other multi-year scholarship players? If they wanted to organize separately from those students who have multi-year scholarships, would the Board decide they had a sufficiently distinct community of interest to establish their own bargaining unit? What about those students who have partial scholarships? The schools have the burden of convincing the Board that non-scholarship student-athletes’ skills, training, and oversight are common to all other scholarship athletes, and the schools appear to possess the better argument when compared to the Board’s argument. That too is a legal analysis for another article.

From the student-athlete’s perspective, smaller units can be advantageous. Obviously, no union exists until a requisite number of eligible people cast affirmative votes, but, as a general proposition, the smaller the group to organize, the easier it can be to assemble. In more visceral terms, getting a small number of people to agree is easier to achieve than getting a larger number to agree. If one of the above groups meets the community of interest standard, getting requisite votes in an election may be achievable.

In February 2017, one month after the Board decided Yale University, six academic departments at Yale University voted to join graduate student union Local 33. Yale University challenged the legality of department-by-department union elections. The NLRB dismissed the challenge, despite Yale reportedly hiring high-powered outside counsel known for anti-union representation, Proskauer Rose LLP. At the time of this Article, the NLRB left unresolved eligibility questions. According to Dan Bowling, labor professor at Duke School of Law, “Local 33 will likely seek to begin the bargaining process with Yale as soon as possible.”

The Yale controversy is also just one exhibit in a growing trend. A link can exist between social activism and self-organizing activity protected under

---

405. Swain & Yafee-Bellany, supra note 403.
406. Id.
Section 7. Some socially engaged graduate students might have heightened self-awareness of what they perceive to be inequities imposed by the institution upon working graduate students. The graduate student-workers may use their activism to mobilize for a cause. That mobilization implicates Section 7 protections and any institutional policies affecting their actions.

As to the activism, respected publications have noticed the trend. The Wall Street Journal chronicled the uptick in protests among graduate business schools, despite often being the “quietest quad in times of turbulence.”\textsuperscript{407} Regarding campus politics, Peter Johnson, Dean of the M.B.A. program at the University of California, Berkeley, observed, “I can’t remember a time when our graduate students have been as involved.”\textsuperscript{408} Harvard Business School, University of Chicago’s Booth School of Business, and the University of Pennsylvania’s Wharton School experienced student protest marches, fundraisers, and participation in political debates in reaction to President Donald Trump’s positions on immigration and environmental regulation.\textsuperscript{409} Some of those students may turn their focus from others to themselves. Likely, some of the protesting students will learn to employ Section 7 to protect their rights to act collectively for their mutual benefit if they fall within the employment setting described in this Article. The Wall Street Journal article’s author termed this level of student engagement “a new reality.”\textsuperscript{410} The comment corroborates the point that organizing activities at the collegiate level, even if initially rooted in social activism, cuts across a sufficiently broad swath of students to justify heightened attention by private colleges and universities and the attorneys who represent them. Some of the best practice models in this Article may have application for other categories of student workers in the near future.

**CONCLUSION**

Private colleges and universities should reexamine their rules and policies and establish new paradigms to meet the challenge of NLRB pronouncements that student-athletes are employees under the National Labor Relations Act. Fortunately, Northwestern University has provided the test case for antiquated rules found to be unlawful under Section 7 of the Act while also furnishing curative language that assists other private colleges and universities in navigating the new legal minefield.


\textsuperscript{408} *Id.*

\textsuperscript{409} *Id.*

\textsuperscript{410} Id.
Hypotheticals in this Article sensitized the reader to the wide range of circumstances currently without legal resolution when institutions draft rules and policies regulating student-athlete social media expressions and other activities off the court or field. Student-athlete use of social media and self-organizing activities are trending, not passing, and there may be grave consequences to the institution.

The Article also highlights the complexity of drafting a comprehensive set of rules and policies for student-athletes with application to multiple categories of student workers. A confluence of cases have generated myriad competing interests that protect the rights of college athletes rooted in antitrust law, publicity rights law, and now, labor law. Best practices in drafting should include a systematic, multi-layered build-out of rule provisions. Such a build-out should incorporate the rights of both parties from the recent caselaw and NLRB pronouncements.

Best practices also should instill a process that triggers the imagination to anticipate increased social media activism and other self-organizing activities by student-athletes. Drafters then should reexamine existing rules and policies, fully cognizant of the broad definition of self-organizing activities for mutual aid and protection under Section 7 of the Act. Finally, the Article advocates proactive efforts of institutions to cure potential ills before the ills become fatal. The drafting squeeze is worth the juice.