COLLEGE ATHLETES AS EMPLOYEES: IMPLICATIONS FOR TITLE IX AND (UN)EQUAL PAY

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I. Introduction

Recent legal decisions have rapidly reshaped the world of college athletics. In 2021, the Supreme Court unanimously held in *NCAA v. Alston* (2021) that the National Collegiate Athletics Association (NCAA) cannot limit the education-related benefits colleges offer their athletes, such as postgraduate scholarships and study abroad expenses. Fewer than ten days after *Alston*, the NCAA announced that athletes could profit from their name, image, and likeness for the first time. And later that year, the National Labor Relations Board (NLRB) issued a memorandum establishing its prosecutorial position that certain college athletes are employees.

As the perhaps inevitable next step, last July, the Third Circuit held in *Johnson v. NCAA* (2024) that college athletes may be considered employees under the Fair Labor Standards Act (FLSA).

In his *Johnson* concurrence, Judge David Porter noted a number of "collateral legal issues" that would result from this classification. This Case Note attempts to shed light on one of these issues: how classifying college athletes as employees would implicate Title IX of the Education Amendments of 1972 (Title IX). Title IX requires colleges to provide equal opportunities to male and female athletes, including in scholarships and financial assistance. If wage payments partially or entirely replace scholarships, would this impact Title IX's mandate for equal financial assistance in college athletics?

This Case Note argues that categorizing college athletes as employees would, under a faithful application of Title IX and the court's reasoning in *Johnson*, take wage payments outside the purview of Title IX's equal opportunity requirement for athletes. Instead, Title IX as applied to college *employees* would govern, along with the other relevant employment discrimination laws. Under these statutes, it would likely be permissible for colleges to pay athletes in revenue-generating sports (almost always football and men's basketball) more than those athletes in nonrevenue sports.

The scope of this analysis is narrowed in two ways. First, it focuses on colleges with revenue-generating sports teams. Second, it

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focuses on wage compensation rather than other consequences of employment status, such as unionization and workplace compensation. Nevertheless, examining wage compensation in revenue-generating college sports offers a valuable lens to assess how employment classification intersects with Title IX's provisions.

II. *Johnson v. NCAA*

In *Johnson*, a group of college athletes sued their respective colleges and the NCAA for violating the FLSA by failing to pay them minimum wage. These institutions profit, sometimes significantly, from their athletic programs. Yet the athletes in these programs do not receive payment for their contributions. The defendants argued that while college athletes do not receive wages, they receive payment in other forms, such as increased discipline, a stronger work ethic, and leadership skills.

The plaintiffs responded, and the court agreed, that these soft skill benefits are inadequate compensation. College athletes' academic endeavors suffered, not benefited, as a result of their athlete status. Due to demanding practice schedules and travel requirements, these athletes often could not take their desired courses, missed class periods, and were unable to pursue certain majors.

Drawing on this tension between academics and athletics, the court turned to how to determine the employment status of college athletes. The district court had applied the test from *Glatt v. Fox Searchlight Pictures, Inc.* (2015), which weighed the relative benefits to the employee versus the employer to decide the employment status of student interns. The Third Circuit rejected this approach. *Glatt* compared the benefits of an internship with the benefits of a formal educational program. But for athletes, the benefits from sports participation are more akin to those received in a work environment, given that their academics are compromised by their role as athletes. The court instead drew on common-law agency doctrine to adopt a four-part test, holding that college athletes may qualify as employees when they (a) perform services for another party, (b) necessarily and primarily for the other party's benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits. The court remanded the case, which is now pending before the district court.

In *Johnson*, the Third Circuit split from the Seventh and Ninth Circuits, which have held that college athletes are not employees under the FLSA due to their amateur status, voluntary participation,

and autonomy. However, these decisions were both issued pre-*Alston*, so *Johnson* may be seen as the most updated authority on the issue.

III. The Revenue-Nonrevenue Distinction

The *Johnson* court acknowledged the need to differentiate "college athletes who play their sports for predominantly recreational or noncommercial reasons from those whose play crosses the legal line into work protected by the FLSA." It recognized that the classification of college athletes participating in revenue and nonrevenue sports may differ. Judge Porter agreed that this distinction was likely relevant in determining which athletes tangibly benefit their colleges. But he also noted that the revenue-nonrevenue discussion is complex, given that workers need not work at profitable companies to be employees. The court did not give further guidance on how to navigate this distinction. This distinction matters because potentially only those athletes in revenue sports would receive wages (instead of scholarships) and would additionally be subjected to a range of employment laws. In contrast, those in nonrevenue sports would be subject to an entirely different regime. This distinction would also necessitate that different athletes could flow into and out of the "employee" categorization depending on whether their team is generating revenue.

Another recent decision complicates the question. Last year, an NLRB regional director issued a decision that Dartmouth College basketball players are employees capable of unionizing. While the NLRB board can review the decision, this decision suggests that even those athletes who do not generate revenue may still be considered employees. These athletes benefit their colleges through alumni engagement, publicity, and financial donations. It is ultimately unclear whether employee status would apply to all college athletes, only those in revenue sports, or those defined by some other criterion.

IV. Title IX

Title IX's text is broad. It requires that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." While Title IX contains no mention of "athletics," its implemented regulations explain how the statute applies to athletics as well as a number of other areas like campus employment, sexual harassment claims, and student admissions. Colleges face different requirements for complying with Title IX in the athletics and employment contexts.

A. Title IX Requirements for Athletes

Title IX requires schools to provide equal opportunity in athletics based on sex. "Equal opportunity" extends to three areas: participation, financial assistance, and other benefits. First, male and female athletes must have equal opportunity to participate in sports. Second, male and female athletes must receive athletic scholarships or grants-in-aid proportional to their participation. For example, if 60% of a college's athletes are female, those female athletes should receive 60% of the total financial aid given. Yet, spending need not be proportional; colleges can and do spend more money on men's teams. Third, the provision of benefits like equipment, tutoring, locker rooms, and recruitment must be equal.

To meet the first requirement of equal participation, colleges can take one of three paths. First, a school can provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment of undergraduate students. Second, a school can demonstrate a history and continuing practice of program expansion for the underrepresented sex. Third, a school can fully and effectively accommodate the interests and abilities of the underrepresented sex. Most schools choose to comply under this third option. But because Title IX litigation in this area often stems from cutting a sports team or eliminating certain athletic opportunities, litigation often encompasses the first prong of "substantial proportionality." Thus, schools are often held accountable for offering a roughly equal number of male and female sports teams and roster spots for athletes.

B. Title IX Requirements for Employees

While Title IX requires equal *opportunity* in athletic participation, it requires equal *treatment* in employment. Specifically, no person shall be "subjected to discrimination in employment, or recruitment, consideration, or selection therefor." In terms of compensation, colleges cannot adopt any policy that "results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Unlike in the athletic scholarship context, however, Title IX does not require employee compensation to be proportional across male and female employees. Rather, any unequal compensation that does occur must not be because of sex.

V. Employment Discrimination Laws Applied to College Athletes

Classifying college athletes as employees will take them outside the reach of Title IX's athletics protections. This Section explains how Title IX would apply to college athletes as employees, then briefly considers how this classification would interact with other employment statutes and with the revenue-nonrevenue distinction.

A. Title IX Requirements for Employees Would Apply to College Athlete Wages

Under the logic articulated in *Johnson*, if college athletes are classified as employees, Title IX, as applied to employees, not athletes, will likely control wage payments. Whereas Title IX requires proportionate scholarships in the athletics context, there is no similar requirement for proportional wages in the employment context. The Title IX regulations encompass "financial assistance" in the athletics context, repeatedly referred to as scholarships and grants-in-aid. Employers do not pay wages to assist a student in paying for their education. But they pay wages as compensation for services performed, which students may spend however they wish. In *Johnson*, the court justified wage payments by recognizing that college athletes' commitments to their sports fundamentally interfere with their academic experience, treating athletics as labor rather than an educational opportunity. The purpose of Title IX for athletes is to cover *educational* opportunities and benefits, and under the *Johnson* conception of athletics, it is separate from an educational opportunity.

Under Title IX, colleges must continue to match any scholarship amounts awarded by nature of providing financial assistance. But colleges are unlikely to be required to match wages paid to male and female athletes because they would fall under the application of Title IX to athletes. This conception of Title IX makes sense given the structure of wage payments—for example, it would be irrational to extend overtime pay based on additional hours worked proportionally based on sex. Compounding this problem is uncertainty over whether college athletes would be employees of the NCAA, their respective institutions, or both. In another pending NLRB case against the University of Southern California, athletes argue that they are joint-employees of the university, the PAC-12 Conference, and the NCAA. The Supreme Court has held that Title IX does not apply to the NCAA, making it easier to justify gender disparities at NCAA events. This precedent suggests that gender-based pay disparities in NCAA-controlled compensation structures might not be subject to Title IX scrutiny.

Two other issues arise given this classification. First, Title IX requires that colleges provide an equal opportunity to play, but does not compare between the men's and women's sports teams provided. In other words, Title IX is not concerned with individual sports but with total numbers. This means that colleges can permissibly balance a large number of football roster spots with spots in different women's sports, like women's rowing. On the other hand, Title IX regulations for employees require equal payment only for jobs that are comparable, making it necessary to compare sports. It is hard to argue that other sports are "similar" enough to football and basketball so as to mandate equal pay. This classification opens the door to these comparisons rather than requiring a proportional number of dollars across all male and female athletes.

Second, Title IX, as applied to athletes, requires equal outcomes. In contrast, Title IX only requires equal access to employment. Therefore, as long as the schools are not discriminating in selection based on sex or as long as they can provide a legitimate justification for unequal outcomes, numbers can be unequal. For example, Title IX does not require colleges to have a proportional number of male and female employees, provided that they do not discriminate during the hiring process. And it does not require colleges to pay equal wages to male and female employees, as long as the discrepancy is not because of sex or is due to a legitimate business reason.

B. College Athletes as Employees Under Other Employment Statutes

Designation as employees implicates additional statutes: the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 (Title VII). Employees of colleges, therefore, often bring claims for sex discrimination under Title IX, Title VII, and the EPA. Unlike Title IX as applied to athletes, which provides for equal outcomes regardless of revenue generation, courts have allowed unequal payment of employees under Title IX, Title VII, and the EPA based on revenue production. This is part of what justifies unequal pay between head coaches of male and female sports teams.

While the EPA requires "equal pay for equal work," it allows employers to pay unequal wages if they can show the discrepancy is justified by "any other factor other than sex." Under this defense, different revenue production is often a permissible "factor other than sex" that colleges use to defeat unequal pay claims. Similarly, Title VII allows unequal pay if there is a nondiscriminatory reason for the difference or if justified by a business necessity. Because the framework for Title IX unequal pay claims tracks these other statutes and similarly allows for this type of revenue generation defense, it

would be relatively easy for colleges to cite the revenue of football and men's basketball programs as justifying higher wages for players on those teams.

C. Application to the Revenue-Nonrevenue Distinction

While the previous discussion assumed the scenario in which all college athletes are employees, classifying only those athletes in revenue sports as employees would be equally impactful. Assuming wages would largely replace scholarship money for these athletes, the overall scholarship dollar pool would decrease significantly, taking the wages paid to large football and men's basketball teams outside of the consideration for proportional scholarship awards.

VI. Conclusion

A circuit split now exists with the Supreme Court seemingly willing to accept arguments that college athletes are employees. Women's sports have garnered increased attention, including at the college level, which could impact the "revenue-generating" classification. Congress is considering a statute that would directly specify that college athletes are not employees.

These recent lawsuits suggest that more and more student athletes seek employment status, and the general public seems to favor employee status for college athletes. On the other hand, some colleges and the NCAA have taken strong stances against employee status for their athletes, with some universities even threatening to leave the established structure if such a decision is implemented.

The future of college athlete pay is uncertain. But if college athletes do gain employment status under the rationale articulated in *Johnson*, this classification will likely enable colleges to justify paying their female athletes lower wages.

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