NOTE

PAYMENT AS PUNISHMENT: ESTABLISHING COLLEGE ATHLETES AS EMPLOYEES TO SAFEGUARD ATHLETE WELFARE IN THE "SUPER CONFERENCE" ERA

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INTRODUCTION

I write this Note from a place of love for college athletics and the opportunities it offered me to succeed academically, develop critical leadership skills, and pursue soccer at the highest levels collegiately and professionally. In the few short years following my collegiate career, dramatic changes in state legislation and National Collegiate Athletics Association ("NCAA") policy provided even more opportunities for college athletes—notably, compensation for the use of an athlete's name, image, and likeness ("NIL"). However, increased media exposure and compensation from endorsements have yet to address critical athlete welfare issues long existing in college sports. Despite my overall positive college sports experience,[1] athletes were expected to organize academics around unmalleable sports schedules, steered away from majors with considerable lab time, play through injury to secure playing time, expect post-collegiate lingering injuries from years of misdiagnosis or overuse, and understand that college sports prioritizes the "athlete" in "student-athlete."[2] In 2024, the "student" in "student-athlete" shifts further into obscurity as financial opportunities for universities, athletic conferences, and college athletes balloon.[3] Notably in 2023, universities took advantage of lucrative media

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[1] I played alongside and against peers with college athletics experiences ranging from incredibly positive to mentally detrimental. Many peers did not compete on their athletic teams for all four years due to injury or burnout.

[2] *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83 (2006) (arguing that the NCAA uses the term "student-athlete" to masquerade the employment relationship between college athletes and universities, conferences, and the NCAA to limit employment protections); *see also* Memorandum from Jennifer A. Abruzzo, Gen. Couns., NLRB., to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, (Sept. 29, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458356ec26 [https://perma.cc/8UFA-XGYG]. As noted in Abruzzo's Complaint to the NLRB on behalf of college athletes' employment rights, I will also refer to college student-athletes as "athletes" or "college athletes" throughout this Note.

[3] *See generally* Weston Blasi, *These 10 College Athletes Are Making More Than $1 Million a Year From NIL*, MORNINGSTAR (Oct. 13, 2023), https://www.morningstar.com/news/marketwatch/202310131042/these-10-college-athletes-are-making-over-1-million-a-year-from-nil [https://perma.cc/D2KT-ZDR2] (noting ten college athletes who make over $1 million dollars per year via NIL deals). *But see* Steve Berkowitz, *NCAA's Power Five Conferences are Cash Cows. Here's How Much Schools Made in 2022*, USA TODAY, https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/ [https://perma.cc/N9QS-DHU] (last updated May 19, 2023) (reporting that universities and conferences make considerably more money than college athletes based on amateurism eligibility rules).

deals resulting in one of the largest college athletic conference realignments in NCAA history.[4] The over one-hundred year old Pacific-12 Conference ("Pac-12") shrank from twelve schools to two.[5] Member schools departed for other large conferences with better paying television contracts.[6] This shift ultimately has negative implications for academic and athletic balance in Division I athletics.

My concern mounts as to how college athletes will fare in a sports landscape that offers both benefits, like increased media exposure and NIL opportunities, and detriments, like diminished physical recovery and academic absences with increased travel obligations in non-regional athletic conferences. College sports grows larger and larger with each NIL deal, corporate sponsorship, and media partnership announcement. Ironically, the entire industry—which financially benefits universities, athletic conferences, and the NCAA in the billions of dollars per year[7]—rests on the NCAA's persistence that college athletes are amateurs and cannot be compensated based on their athletic contributions. Compensating college athletes is not a new topic, but it is a timely one. Lawsuits are currently making their way through the courts to determine the employment status of college athletes.[8] Yet, these cases have not considered the most recent changes in the composition of major NCAA Division I athletic conferences.

This Note argues the increased profitability and shift toward "super conferences" in Division I college athletics does not comport with the NCAA's "revered tradition of amateurism"[9] and justifies college athletes' classification as employees under

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4 *See* Ralph D. Russo, *AP Sports Story of the Year: Realignment, Stunning Demise of Pac-12 Usher in Super Conference Era*, AP NEWS, https://apnews.com/article/conference-realignment-e0356caa1c9cf5ba2630e7b23a1a06ed [https://perma.cc/K72P-DGF2] (last updated Dec. 18, 2023).

5 *Id.* As this Note was being prepared for publication, the Pac-12 announced the addition of six schools primarily from the Mountain West Conference, further underscoring the drastic nature of recent shifts in conference alignment. *See* Erik Buchinger, *Conference Realignment: What's Next for The Pac-12 And Mountain West?*, FORBES (Oct. 8, 2024, 9:34 AM), https://www.forbes.com/sites/erikbuchinger/2024/10/08/conference-realignment-whats-next-for-the-pac-12-and-mountain-west/ [https://perma.cc/6T36-V8F5].

6 Russo, *supra* note 4.

7 Berkowitz, *supra* note 3.

8 *See* Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024); *see also* Richard Johnson, *Explaining Johnson v. NCAA and What's at Stake in Wednesday's Court Hearing*, SPORTS ILLUSTRATED (Feb. 15, 2023), https://www.si.com/college/2023/02/15/johnson-v-ncaa-court-hearing-employment-status [https://perma.cc/4D8U-2MYL].

9 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

the Fair Labor Standards Act ("FLSA"). Rather than making more traditional compensation arguments rooted in fairness or market value, employment status for athletes aims to prevent the diminishing of academic, athletic, and physical welfare likely to accompany competition in bicoastal conferences. The NCAA and its member universities have long insisted on maintaining athlete amateurism to prevent direct athlete compensation by member schools.[10] The NCAA and member schools also argue there would be detrimental financial impact on universities and the institution of college sports by paying college athletes. However, in 2022, the top five college athletic conferences (the "Power Five") generated more than $3.3 billion in total revenue without compensating the labor generating those dollars.[11] Given likely increases to revenue generation and labor demands arising from Power Five conference realignment in 2024, resistance to structural change in the form of athlete compensation and labor law protections cannot be warranted.[12] Yet instead of arguing for compensation based on the athlete's market value—which poses greater funding issues for universities and primarily benefits major revenue sports—minimum wage compensation under the FLSA tackles an alternative problem in college sports: abusing athlete time demands and welfare. Considering athletes as employees under the FLSA, universities would be financially incentivized to limit the number of hours athletes engage in athletically-related activities. Athletes would receive meager financial benefit compared to a market value model, but they would be entitled to basic labor law protections. Athletic departments would paradoxically be closer to achieving greater athletic and academic balance to truly allow college athletes to be "student-athletes." While implementation presents challenges financially and may require collaboration with lawmakers, this Note firmly establishes that college athletes should be employees under the FLSA and opens the door to creatively solve problems across the college athlete experience.

After this Introduction, Part I of this Note details the history of college sports as a business, provides background on

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10 *See* Associated Press, *NCAA Focused on Employment Status of Athletes at Senate Hearing*, ESPN (Oct. 17, 2023), https://www.espn.com/college-sports/story/_/id/38678809/ncaa-focused-employment-status-athletes-senate-hearing [https://perma.cc/PE2H-74AA].

11 Berkowitz, *supra* note 3.

12 *Bd. of Regents*, 468 U.S. at 120 (1984) (arguing college athletics is built on a foundation of amateurism).

conference realignment and recounts its most recent causality, examines realities of life as a college athlete, and reviews relevant legal arguments and cases made in favor of compensating athletes under labor law frameworks. Part II analyzes how compensating athletes under the FLSA rather than the National Labor Relations Act ("NLRA") attempts to achieve more equitable outcomes for college athletes nationally and how recent conference realignment more clearly establishes an employer-employee relationship between universities and college athletes. Part III argues paying college athletes minimum wage for athletically related activities serves as a welfare safeguarding mechanism because athletic programs will need to be mindful of hours worked to adhere to department budget constraints. Part III also addresses the likely pushback to a plan that may pose financial challenges for many universities and upend the amateurism-centered NCAA as we know it.

I
BACKGROUND

A. College Sports: A Business

Despite later NCAA regulation to promote amateurism in college sports, the first intercollegiate sports competition was frankly commercial.[13] The 1852 regatta between the Harvard and Yale rowing teams drew large crowds, included prize money, and was sponsored by a railroad company.[14] It would not be until 1906 that the member-led NCAA was founded to "regulate the rules of college sports and protect young athletes."[15] Throughout the twentieth century, some universities began investing more in their athletic programs than others, separating themselves financially into "Division I" schools.[16] This financial

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13 Alan Oldham, *"The Race"—How Yale and Harvard Kick-Started US College Sport 170 Years Ago This Month*, WORLD ROWING (Sept. 2, 2022), https://worldrowing.com/2022/09/02/the-race-how-yale-and-harvard-kick-started-us-college-sport-170-years-ago-this-month/ [https://perma.cc/2Y8X-SFL2] (acknowledging the first college sporting event in the United States); Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988–89 (1987) (detailing the commercialization of the first collegiate rowing event).

14 Smith, *supra* note 13.

15 *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/F7PB-JDCS] (last visited Aug. 3, 2024). Some collegiate sports, including men's rowing, pre-date the NCAA and are not regulated by the body. At the founding of the NCAA, serious injuries and death were frequent without standardized rules in intercollegiate football.

16 *Id.*

separation ultimately led to three separate NCAA divisions in 1973.[17] Each division has separate rules governing scholarship and eligibility requirements. Division I is considered the most athletically competitive, provides larger scholarships than other divisions, and has the most financial resources for athletics.[18] Since then, informal division within Division I has separated the wealthiest and most competitive conferences from everyone else. The appropriately named "Power Five" athletic conferences[19]—the highest-earning conferences with the strongest influence on NCAA legislation[20]—generated more than $3.3 billion in total revenue in 2022.[21] This increased from $2.9 billion in pre-pandemic 2019 and is largely composed of revenues from selling media and television rights.[22] On January 4, 2024, the NCAA reached a media coverage agreement with ESPN in which the network will pay the NCAA $115 million

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17 *Our Three Divisions*, NCAA, https://www.ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx [https://perma.cc/KC5A-Y3QA] (last visited Aug. 3, 2024).

18 *See id.*; *but see* Associated Press, *Athletes Sue Ivy League Over Its No-Scholarship Policy*, ESPN (Mar. 8, 2023), https://www.espn.com/college-sports/story/_/id/35812605/athletes-sue-ivy-league-no-scholarship-policy [https://perma.cc/3363-3U4C]. The Ivy League does not offer athletic scholarships to its Division I college athletes. In 2023, Brown University basketball players filed a lawsuit in federal court arguing that not paying athletic scholarships to collegiate athletes constitutes price fixing among Ivy League schools.

19 *What is the Power 5?* Signing Day Sports (June 9, 2023), https://thewire.signingdaysports.com/articles/what-is-the-power-5/ [https://perma.cc/2MWA-Z3QF]. The Power Five refers to the Southeastern Conference (SEC), Big Ten Conference (Big Ten), Big 12 Conference (Big 12), Atlantic Coast Conference (ACC), and the Pacific-12 Conference (Pac-12). These conferences are considered the most influential in shaping NCAA legislation among Division I member schools. *But see* Chris Vannini, *What it Means for Pac-12 to be Classified as 'Nonautonomous FBS Conference'*, The Athletic (Apr. 22, 2024), https://www.nytimes.com/athletic/5437109/2024/04/22/pac-12-nonautonomous-conference/ [https://perma.cc/6UWW-78BF]. After dropping from twelve to two member schools, the Pac-12 lost its seat on the NCAA Division I Board of Directors, which previously granted it legislative power alongside the remaining four "Power Five" conferences.

20 *NCAA Division I 2024–25 Manual*, NCAA https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/5L6F-UCKS] (last visited Aug. 3, 2024) (noting that each NCAA division's members are responsible for creating their own legislation).

21 Berkowitz, *supra* note 3.

22 Steve Berkowitz, *Power Five Conferences Had Over $2.9 Billion in Revenue in Fiscal 2019, New Tax Records Show*, USA Today (July 10, 2020), https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002/ [https://perma.cc/3G56-Y5AH].

per year over eight years in exchange for airing forty national championships domestically.[23]

The catalyst for massive college sports revenue growth and conference realignment began in the courts. In 1984, the U.S. Supreme Court decided *NCAA v. Board of Regents of the University of Oklahoma* ("*Regents*"). At the time, the NCAA did not permit member schools to negotiate their own broadcast television deals for fear that contracting for more televised games would diminish live sports attendance. NCAA-approved contracts offered lower revenues to member schools than separately negotiated contracts. After the NCAA threatened to discipline any schools that opted for outside contracts, including the College Football Association (the "CFA"),[24] the Court held that the NCAA could not prevent universities from negotiating their own media and television contracts on antitrust grounds.[25] The Court reasoned that restricting the number of live football broadcasts would artificially increase live ticket prices and therefore create an unreasonable restriction on free trade in the college football market under the Sherman Act.[26] Post *Regents*, athletic conferences negotiate media contracts directly with networks and universities jockey for membership in conferences with the greatest commercial appeal and market power with major media networks.

B. A Brief History of Sports Conference Realignment

Opportunities for universities to monetize television deals have led to a slurry of athletic conference realignment. Large Power Five conferences, notably the Southeastern Conference (the "SEC") and the Big Ten Conference (the "Big Ten"), have negotiated lucrative television network contracts to broadcast member schools' games, specifically for football and men's basketball.[27] Conference alignment is not new, dating back

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23 Ben Portnoy, *NCAA Inks Landmark Media Deal with ESPN for Coverage of 40 Championships Domestically*, Sports Bus. J., (Jan. 4, 2024), https://www.sportsbusinessjournal.com/Articles/2024/01/04/espn-ncaa-tv-rights-deal [https://perma.cc/HWY4-XLMK].

24 Christian Dennie, *Conference Realignment: From Backyard Brawls to Cash Cows*, 1 Miss. Sports L. Rev. 249, 250 (2012) ("In 1977, sixty-two of the largest college football programs formed the College Football Association ("CFA") to coordinate internal lobby[ing] efforts on behalf of major college football interests.").

25 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 68 (1984).

26 *Id.* at 99.

27 *See* Michael Smith, *Big Ten Officially Agrees to Media Deals with CBS, Fox, NBC*, Sports Bus. J. (Aug. 18, 2022), https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/18/Media/Big-Ten-Media-Deal.aspx [https://perma.cc/

nearly 125 years.[28] Member schools left conferences over disagreements in conference rules, booster-funding scandals, and opportunities to position themselves strategically in lucrative media markets.[29] Dozens of shifts occurred in conference composition for Division I football programs (many shifts included all varsity sports teams) since the landmark *Regents* case in 1984.[30] Athletic conferences had traditionally been organized regionally and televised as such, which started to draw criticism from some CFA members.[31] Schools and conferences began negotiating their own contracts outside of the CFA, further increasing earning potential.[32] For example, in the 1990s, the SEC inked a deal with CBS that both increased the SEC's revenues and increased school exposure on a major television network.[33] Just a year later, four Southwest Conference members would depart for opportunities in the SEC and render the Southwest Conference defunct.[34]

Although there has been consistent movement among both Power Five and smaller conferences since *Regents*, 2022–23 was the first time a Power Five conference nearly dissolved. In June 2022, the University of California, Los Angeles ("UCLA") and the University of Southern California ("USC") surprisingly announced they would depart the Pac-12 for the Big Ten.[35] UCLA cited "a broader national media platform," NIL opportunities, new national partnerships, increased resources for athletes, and the ability to financially maintain its twenty-five athletic teams as reasons the Big Ten was a strategic move for

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ZX25-9XZB]. For example, television rights deals between the Big Ten and Fox, ESPN and CBS are valued at over $1.1 billion per year for the conference. *Id.*

28 Stewart Mandel, *College Football Conference Realignment Timeline: 124 Years of Drama, Money and Bitterness*, THE ATHLETIC (July 14, 2023), https://theathletic.com/4662822/2023/07/14/college-football-conference-realignment-history/ [https://perma.cc/ZS7Y-DSHG].

29 *Id.*

30 Josh Katz & Kevin Quealy, *Visualizing the Latest Wave of N.C.A.A. Conference* Realignment, N.Y. TIMES (Sept. 1, 2023), https://www.nytimes.com/interactive/2023/09/01/upshot/ncaa-college-realignment.html [https://perma.cc/HC6R-PPYH].

31 Dennie, *supra* note 24, at 251.

32 *Id.*

33 *Id.* at 252.

34 *Id.*

35 Peter Thamel & Heather Dinich, *USC, UCLA Moving From Pac-12 to Big Ten in 2024*, ESPN (June 30, 2022), https://www.espn.com/college-sports/story/_/id/34173688/source-usc-ucla-considering-move-pac-12-big-ten [https://perma.cc/W68V-XD4N].

the university.[36] USC stated similar reasons for its departure.[37] Unlike other major conferences who negotiated national television coverage directly with major networks like CBS, FOX, and ESPN, the Pac-12 had created its own television network in 2012, operating primarily in regional markets and unavailable to DirecTV customers.[38] This offered Pac-12 schools limited exposure to national viewers and limited media revenues.[39] After UCLA and USC's departure, the Pac-12 attempted to negotiate media deals for the remaining ten member schools. It notably rejected and countered a $30 million per year per school offer from ESPN at $50 million.[40] ESPN walked away from the deal.[41] By August 2023, the Pac-12 was the only Power Five conference without a media deal through 2031.[42] In its final attempt under pressure, the Pac-12 solidified an approximately $20 million per year per school offer from Apple with incentives for increased subscriptions on the streaming platform. Major League Soccer had a similar streaming contract without any guaranteed games on major television networks.[43] Days before the deal was presented, the University of Colorado announced it was leaving for the Big 12, followed days later by the departures of the University of Washington, the University of Oregon, the University of Arizona, Arizona State ("ASU"), and the

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36 Gene D. Block & Martin Jarmond, *UCLA to Leave the Pac-12 in 2024 and Join the Big Ten Conference*, UCLA Newsroom (June 30, 2022), https://newsroom.ucla.edu/stories/ucla-to-join-the-big-ten-conference#:~:text=After%20careful%20consideration%20and%20thoughtful,for%20the%20next%20two%20years [https://perma.cc/5WBB-SX7X].

37 *USC to Make Historic Move to Big Ten Conference in 2024*, USC Athletics (June 30, 2022), https://usctrojans.com/news/2022/6/30/usc-to-make-historic-move-to-big-ten-conference-in-2024.aspx [https://perma.cc/XG4W-ZGWA].

38 J. Brady McCollough, *Inside the Pac-12 Collapse: Four Surprising Moments that Crushed the Conference*, L.A. Times (Aug. 16, 2023), https://www.latimes.com/sports/story/2023-08-16/pac-12-collapse-decisions-realignment-ucla-oregon [https://perma.cc/UU3K-JRB8].

39 *Id.*

40 Kevin Borba, *Pac-12 School Who Fumbled Media Rights and Expansion Revealed*, Yardbarker (last updated Oct. 7, 2023), https://www.yardbarker.com/general_sports/articles/pac_12_school_who_fumbled_media_rights_and_expansion_revealed/s1_17041_39357467 [https://perma.cc/37UE-ZFUN].

41 *Id.*

42 Shehan Jeyarajah & Dennis Dodd, *Pac-12 Media Deal: Commish Presents Apple Offer with No Agreement Reached by Conference Leaders*, CBS Sports (Aug. 2, 2023), https://www.cbssports.com/college-football/news/pac-12-media-deal-commish-presents-apple-offer-with-no-agreement-reached-by-conference-leaders/ [https://perma.cc/WD22-LZL5].

43 *Id.*

University of Utah.[44] With four schools left to scramble, the University of California, Berkeley ("Cal") and Stanford University joined the Atlantic Coast Conference ("ACC") in September 2023.[45] Washington State ("WSU") and Oregon State ("OSU") are the only remaining Pac-12 schools.[46] Shortly after the ten-school departure, WSU and OSU filed a temporary restraining order against the remaining schools and Pac-12 commissioner George Kliavkoff.[47] The schools argued that Kliavkoff's calling of a conference meeting to discuss the future of the conference violated conference bylaws.[48] The restraining order was granted in November 2023 despite former member schools' protest.[49] This gave WSU and OSU control over Pac-12 assets valued at hundreds of millions.[50] After this December 2023 decision, a settlement was reached between OSU, WSU, and the departing schools to end the litigation.[51] Although multiple

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44 *See* McCollough, *supra* note 38. The University of Washington and the University of Oregon left for the Big Ten, while the University of Arizona, Arizona State, and the University of Utah will join the Big 12 in 2024.

45 Peter Thamel, *ACC Adding Stanford, Cal, SMU as New Members in 2024*, ESPN (Sept. 1, 2023), https://www.espn.com/college-sports/story/_/id/38304694/sources-acc-votes-invite-stanford-cal-smu [https://perma.cc/G4E9-RRQ6]; Kyle Bonagura, *Leaving Pac-12 Schools Oppose Oregon St., Washington St. Motion*, ESPN (Nov. 2, 2023), https://www.espn.com/college-football/story/_/id/38804334/departing-pac-12-schools-oppose-oregon-st-washington-st-motion [https://perma.cc/CF4U-2HQ2].

46 *Id.*

47 Michael McCann, *Washington State Pac-12 Lawsuit Seeks Control of Conference*, SPORTICO (Sept. 9, 2023), https://www.sportico.com/law/analysis/2023/washington-state-pac-12-lawsuit-1234738062/ [https://perma.cc/3TW9-RHLM]. According to Pac-12 bylaws, announcing departure to another conference constituted revocation of each school's board seat. WSU and OSU argued departing schools would not make decisions in the best interest of the Pac-12 and would cause the conference irreparable harm—an important threshold for granting a temporary restraining order.

48 *Id.*

49 Ruling Granting Emergency Motion for Stay, Wash. State Univ. v. The Pac-12 Conf., No. 102562-9 (Wash. 2023) https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/1025629%20Public%20Ruling%20Stay%20Case%20Commissioner%20Ruling%20Granting%20Emergency%20Motion%20for%20Stay%20112823.pdf [https://perma.cc/G68W-7SCB].

50 *See* Ralph D. Russo, *Washington Supreme Court Denies Review of Pac-12 Appeal, Handing Control of Conference to OSU, WSU*, AP NEWS (Dec. 15, 2023), https://apnews.com/article/pac12-conference-realignment-dd0ed3c3c-44b6484eba922ea8dc0cc1d [https://perma.cc/T56T-YQXC].

51 *See* Kyle Bonagura, *Oregon State, Washington State Settle with Departing Pac-12 Schools*, ESPN (Dec. 21, 2023), https://www.espn.com/college-football/story/_/id/39164107/oregon-state-washington-state-settle-departing-pac-12-schools [https://perma.cc/5N5L-SH4L]. The settlement included relieving departing schools of certain liabilities and requiring schools to forfeit portions of revenue to the conference. *Id. See also Washington State, Oregon*

factors played into the dismantling of the Pac-12, increased revenue potential and media exposure for college football were key drivers. For example, the University of Oregon expects to generate an average of $50 million per year in direct media rights by joining the Big Ten in 2024.[52] Conference realignment and media revenues have steadily climbed since *Regents*. The sizable conference shifts in 2023, which pose detrimental side effects to athlete welfare, require reassessment of the long-debated and NCAA-feared structural change in college sports: compensation for college athletes.

C. Life as a College Athlete

There is no doubt that intercollegiate athletics creates an environment for college athletes to build beneficial life skills, including leadership, teamwork, time management, and coachability. It is easy to buy into the spirit of amateurism when watching college athletes score big goals and compete for national championships on major television networks. Personally, there are few things better than working toward a common goal with teammates and wearing your school colors proudly. But broadcasts, universities, and even college athletes do not give viewers the full picture of the life of a college athlete. Despite the wealth of opportunities afforded to college athletes, there are still considerable shortfalls when it comes to protecting athlete welfare, including mechanisms to protect physical and mental health. At the Division I level, an athlete's schedule, and sometimes life,[53] are in the hands of the athletic pro-

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State Settle with Schools Exiting Pac-12, Associated Press (Mar. 25, 2024), https://www.espn.com/college-sports/story/_/id/39808513/washington-state-oregon-state-settle-schools-exiting-pac-12 [https://perma.cc/C9WN-FACK]. Each exiting Pac-12 school will have $5 million withheld during the 2024 fiscal year and pay an additional $1.5 million in supplemental contributions for the remaining schools' use. *Id.*

52 *College's Seismic Shift: Oregon, Washington Outline Reasons for Joining Big Ten*, Sports Bus. J. (Aug. 7, 2023), https://www.sportsbusinessjournal.com/Articles/2023/08/07/oregon-washington-big-ten-move.aspx [https://perma.cc/7D5A-RD6N].

53 *See, e.g.*, Dan Novak, *Pushed Too Far: Overexertion Has Claimed Lives of 22 Division I Football Players Since 2000*, CNS Maryland, https://cnsmaryland.org/interactives/spring-2021/pushed-too-far/ [https://perma.cc/PM3Q-7J4C] (last visited Aug. 3, 2024); *see also* Debby Waldman, *Student-Athletes Aren't Immune from Suicide Risk. Colleges are Taking Notice*, CBS News (March 23, 2023), https://www.cbsnews.com/news/student-athletes-suicide-risk-colleges-mental-health/ [https://perma.cc/7QV8-4826] (showing college athletes are reporting higher rates of mental health issues trying to juggle stressors of school and athletics).

gram: from the major you choose, mandatory drug tests, what you eat, to the media outlets you can talk to.[54]

The NCAA attempts to safeguard college athletes' welfare by enforcing maximum daily and weekly hour requirements for athletically related activities during season and offseason.[55] Countable athletically related activities ("CARA") "include any required activity with an athletics purpose involving student-athletes and at the direction of, or supervised by, one or more of an institution's coaching staff (including strength and conditioning coaches) and must be counted within the weekly and daily limitations."[56] During season, NCAA rules stipulate that Division I athletic programs cannot require athletes to participate in more than (1) twenty CARA hours per week and (2) four CARA hours per day.[57] College athletes must also be given one full day off from CARA activities per week.[58] In addition to CARA hours, college athletes are required to engage in additional required athletically related activities, yet these activities do not count toward weekly countable hours.[59] These activities cannot occur on a designated off-day, but can be considerably time consuming for college athletes managing academics and athletics. Some of these activities include compliance meetings, team building and leadership activities, travel to and from away competitions (including cross-country travel), recruiting responsibilities, and media commitments.[60] Despite CARA restrictions, college athletes report spending upwards of thirty

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54 *See* Billy Witz, *At What Point Should College Athletes Be Considered Employees?*, N.Y. TIMES (Dec. 23, 2023), https://www.nytimes.com/2023/12/23/us/college-athletes-employees-nlrb-hearing.html [https://perma.cc/E8JW-STKS].

55 *Sun Devil Compliance Rules*, ASU SUN DEVIL COMPLIANCE https://sundevilcompliance.asu.edu/coaches-and-athletics-staff/practice-hours/rules [https://perma.cc/5LMB-37KP]. Rules detailed by ASU compliance are fairly standard among athletic conferences in Division I.

56 *Bylaw 17.02.1 Countable Athletically Related Activities*, NCAA, (effective Aug. 1, 2003), https://web3.ncaa.org/lsdbi/bylaw?ruleId=327 [https://perma.cc/4CMH-LLFN] (last visited Jul. 28, 2024).

57 *NCAA Bylaw 17.02.14 Required Athletically Related Activities*, NCAA, (effective Aug. 1, 2017), https://web3.ncaa.org/lsdbi/bylaw?ruleId=100569 [https://perma.cc/T4LH-N78A] (last visited Jul. 28, 2024); *see also* ASU Sun Devil Compliance, *supra* note 55.

58 *NCAA Bylaw 17.02.14*, *supra* note 56; *see also* ASU SUN DEVIL COMPLIANCE, *supra* note 55.

59 *Id.*

60 *A Student-Athlete Guide for: Determining the Difference Between CARA, RARA, VARA*, DUKE ATHLETICS, https://goduke.com/documents/2020/11/12/CARA_RARA_VARA.pdf [https://perma.cc/KQ2X-YN3E] (last visited Jul. 28, 2024).

hours per week on CARA and non-CARA activities.[61] Division I football players playing in bowl and championship subdivisions allegedly spend more than 40 hours per week.[62] In addition to these requirements, it is commonplace in athletic programs for team captains to lead "voluntary workouts" where coaches cannot supervise or direct activity. In many programs, optional trainings are not truly optional as coaches know who attended the trainings and lack of participation may have a negative impact on playing time.[63] In "safety-exception" sports such as wrestling, gymnastics, swimming, water polo, and some track and field events, coaches are permitted to be present at voluntary workouts.[64] Although many college athletes willingly engage in voluntary workouts, others consider the additional time to be difficult to manage physically, mentally, and alongside being a full-time student. Abused time demands also pose increased risk of injury with overuse. When college athletes are pressured by coaching and medical staffs to return to the field before injuries are fully healed, increasing rest time is an important protective mechanism. In a survey conducted by the National Athletic Trainer's Association,[65] nearly twenty percent of surveyed college and university athletic trainers reported that college athletic coaches played medically ineligible athletes.[66] A small portion of respondents reported "receiving pressure from an administrator, coach or member of the coaching staff to make a decision that was not in the best interest of a student athlete's health."[67] Beyond staff pressures, many athletes feel pressure to play through injury and many athletic programs avoid proper medical attention and tests to

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61 Johnson v. NCAA, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021), *aff'd in part, vacated in part, remanded*, 108 F.4th 163 (3d Cir. 2024).

62 *Id.*

63 *See* Decision and Direction of Election, Trustees of Dartmouth College and Service Employees International Union, Local 560, Case 01-RC-325633, NLRB Region 01 (Feb. 5, 2024), https://apps.nlrb.gov/link/document.aspx/09031d4583c5ebe4 [https://perma.cc/G6EN-FTYU]. Evidence was also provided by Dartmouth Men's Basketball who successfully earned status as employees under the National Labor Relations Act in February 2024. *Id.*

64 *NCAA Division I Bylaw 17.2.7 Playing and Practice Seasons*, NCAA, https://web3.ncaa.org/lsdbi/search/bylawView?id=8932 [https://perma.cc/2UDX-736G] (last visited Aug. 3, 2024).

65 *Only Half of Collegiate-Level Sports Programs Follow Medical Model of Care for Student Athletes, Survey Finds*, NAT. ATHLETIC TRAINERS' ASS'N (June 26, 2019), https://www.nata.org/press-release/062619/only-half-collegiate-level-sports-programs-follow-medical-model-care-student [https://perma.cc/BWA4-6U6W].

66 *Id.*

67 *Id.*

keep program costs low.[68] Closely managing the number of hours that college athletes spend physically competing (CARA) and the mental energy dedicated to other athletically related activities offers benefits to both the athlete's health and athletic programs; physically and mentally healthy athletes perform better.[69]

D. Legal Pathways for Compensating College Athletes

Despite numerous litigation battles,[70] college athletes have yet to be compensated for athletic contributions by universities. However, major strides have been made in the past five years as athletes can monetize their name, image, and likeness through sponsored endorsements[71] and education-related benefits beyond athletic scholarships.[72] After the Supreme Court held that college athletes were allowed additional educated-related compensation in *NCAA v. Alston* and multiple NIL laws were on state ballots, the NCAA passed an interim NIL policy in an attempt to regulate athlete compensation.[73] To date, thirty-two states have passed NIL laws, many modeling their laws after California—one of the first states to develop robust NIL

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68 *Madness, Inc. How College Sports Can Leave Athletes Broken and Abandoned*, CHRIS MURPHY U.S. SENATOR FOR CONNECTICUT, https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf [https://perma.cc/HM5G-DFY2] (last visited Aug. 3, 2024).

69 *See generally* Davis L. Rogers, Miho J. Tanaka, Andrew J. Cosgarea, Richard D. Ginsburg & Geoffrey M. Dreher, *How Mental Health Affects Injury Risk and Outcomes in Athletes*, NAT. LIBRARY OF MED. (June 16, 2023), https://doi.org/10.1177/19417381231179678; *see also Mental Health: Impact on Performance*, MONTANA STATE UNIVERSITY BOBCATS ATHLETICS, https://msubobcats.com/sports/2021/2/24/mental-health-influence-on-performance.aspx [https://perma.cc/6JKR-7GYH] (last visited Aug. 3, 2024).

70 *See, e.g.*, Nw. Univ. and Coll. Athletes Players Ass'n (CAPA), 362 N.L.R.B. 1350, 1351 (Aug. 17, 2015) (holding the NRLB did not have jurisdiction over Northwestern University football players' petition to unionize and seek union representation); Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016) (holding college athletes are not employees due to college athletics' "revered tradition of amateurism"); Dawson v. NCAA, 932 F.3d 905, 907 (9th Cir. 2019) (holding college athlete was not employee of NCAA or Pac-12 under FLSA because economic reality did not constitute an employer-employee relationship).

71 Cal. Ed. Code § 67456.

72 NCAA v. Alston, 141 S. Ct. 2141, 2157 (2021) (holding the NCAA could not restrict certain education-related benefits for college athletes as it violates federal antitrust law and clarified that the "revered tradition of amateurism" written in *NCAA v. Board of Regents* is consistent with the Sherman Act).

73 Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/8RN4-XHMB].

legislation.[74] NIL compensation ameliorates some of the pressure to classify college athletes as employees, but also confirms that amateurism is now behind us.[75] Despite years of resistance to compensation, current NCAA president and former Massachusetts governor Charlie Baker recognized this new era of college sports in a 2023 proposal.[76] In December 2023, Baker proposed (1) allowing Division I schools to provide college athletes with any educational benefits they deem appropriate (in line with *Alston*), and (2) creating a subdivision for wealthier institutions within Division I to invest in their student-athletes financially.[77] Notably, he recommended that universities contribute at least $30,000 annually in trust funds for at least half of eligible student athletes.[78] It is unclear what the timeline might look like for a subdivision, which member schools will be included, or the level of resistance universities will exhibit regarding increased financial obligations. However, it is clear that the NCAA feels the pressure to address the compensation issue and offer alternative solutions to avoid federal legal protections for athletes, especially given pending court cases.

Legal arguments for compensating college athletes directly for on-field contributions have largely fallen under two legal theories: (1) antitrust and (2) labor law. Antitrust cases traditionally argue that athlete amateurism, despite considerable revenue generation for the NCAA and member universities, is an unreasonable restraint of trade and therefore violates Section

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74 *See NIL State Laws*, NIL NETWORK, https://www.nilnetwork.com/nil-laws-by-state/ [https://perma.cc/39MH-FTL4] (last updated Aug. 27, 2022); *Your Guide to Federal and State Laws on Name, Image and Likeness Rules for NCAA Athletes*, SAUL EWING LLP, https://www.saul.com/nil-legislation-tracker [https://perma.cc/2WNE-Q8NP]. Alabama repealed its NIL law and South Carolina suspended its NIL law after previously passing legislation. *Id.*

75 *See generally* House v. NCAA, 545 F. Supp. 3d 804, 810 (N.D. Cal. 2021) (arguing student-athletes that competed pre-NIL laws should be retroactively compensated for name, image, and likeness); *see also* Michael McCann, *NCAA Warns of $4B 'Death Knell' in NIL Class Action Appeal*, SPORTICO (Nov. 27, 2023), https://www.sportico.com/law/analysis/2023/ncaa-nil-class-action-appeal-1234747910/ [https://perma.cc/PKG8-LD3Z]. It is suggested retroactively applying NIL laws would result in nearly $4 billion in damages. *Id.* The judge presiding over the case ruled in favor of college athletes in both *O'Bannon v. NCAA* and *Alston v. NCAA*. *Id.*

76 *A letter to student-athletes from Charlie Baker*, NCAA MEDIA CTR. (Dec. 19, 2023) https://www.ncaa.org/news/2023/12/19/media-center-a-letter-to-student-athletes-from-charlie-baker.aspx [https://perma.cc/F7JQ-96UY].

77 *Id.*

78 *Id.*

1 of the Sherman Antitrust Act.[79] *Regents* is the foundational antitrust case that opened the conversation about restraint of trade in college sports. This made way for a landmark settlement in May 2024, where the NCAA settled antitrust class action lawsuits for $2.78 billion in NIL back damages and Division I college athlete educational benefits.[80] The proposed settlement also contemplated significant NCAA policy changes, including increasing NIL benefits, revenue sharing with athletes, and eliminating scholarship limits in favor of capped rosters.[81] Although these changes are substantial, they do not address the employment status of college athletes. On the labor side, cases arguing for college athletes to be considered employees fall under two statutes: (1) the NLRA and (2) the FLSA.

II
Classifying College Athletes as Employees

The NLRA and FLSA offer different protections and vary depending on type of employer, making legal arguments to classify college athletes as employees quite broad. The NLRA was passed to create better working conditions for employees in private-sector workplaces.[82] The Act specifically allows employees to engage in collective bargaining efforts and prevents employers from retaliating when employees engage in activities to improve workers' wages and rights.[83] In the context of college sports, most labor cases are brought under the NLRA as it offers an avenue for college athletes to earn market rate wages via collective bargaining and unionization. In February 2024, the NLRB determined that members of the Dartmouth men's basketball team were employees under the Act and that the team could unionize as a single unit based on compensation received in the form of early college application advising, benefits like athletic gear and game tickets, and the significant control

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79 *See generally* Thomas A. Baker III, Marc Edelman, & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 Tenn. L. Rev. 661, 667 (2018).

80 Michelle Brutlag Hosick, *Settlement Documents Filed in College Athletics Class-Action Lawsuits* NCAA (Jul. 26, 2024) https://www.ncaa.org/news/2024/7/26/media-center-settlement-documents-filed-in-college-athletics-class-action-lawsuits.aspx [https://perma.cc/QDF2-JRBG].

81 *Id.*

82 *National Labor Relations Act*, NLRB, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/3E2A-Z88Q] (last visited Aug. 3, 2024).

83 29 U.S.C. §§ 151–169.

Dartmouth has over its athletes.[84] Notably, the Regional Director argued that because all Ivy League schools are private and subject to the NLRA, there would be no imbalance in labor law stability—a concern raised in previous cases.[85] Although this decision establishes athletes as employees, it does so only under the NLRA framework (as compared to the FLSA). Given this decision, all eyes are on the NLRB case filed in May 2023 against USC, the Pac-12, and the NCAA.[86] The NLRB argues USC basketball and football athletes are employees and that the school's student handbook and conditions on scholarships violate the NLRA.[87] Because Division I football and basketball generate the most revenue in college sports, employment rights are most strongly argued for college athletes participating in these sports. Unlike Dartmouth, USC offers athletes compensation in the form of athletic scholarships in addition to gear and meals.[88] USC also previously competed in and will compete in athletic conferences comprised primarily of public schools, which are not governed by the NLRA. This presents tension in labor law stability, which was an issue previously considered in a case involving Northwestern athletes who competed for the only private school in the Big Ten.[89] Trial in front of an administrative law judge began November 2023 and a result in favor of USC college athletes—Power Five athletes rather than Ivy League athletes—would raise major issues for the future of amateurism across the country.[90] However, the NLRA only applies to private employers and therefore any rights won under

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84 *See* Trustees of Dartmouth College, No. 01-RC-325633, N.L.R.B. Region 01 (Feb. 5, 2024) https://apps.nlrb.gov/link/document.aspx/09031d4583c5ebe4 [https://perma.cc/G6EN-FTYU] (this decision does not bear weight on cases brought under the FLSA).

85 *Id.*

86 *See* Complaint and Notice of Hearing, University of Southern California; Pac-12 Conference; National Collegiate Athletics Association and National College Players Association, No. 31-CA-290326, N.L.R.B. Region 31 (May 18, 2021), https://www.politico.com/f/?id=00000188-3111-d998-ab8f-b35df4740000 [https://perma.cc/8W74-HBVJ].

87 *Id.*

88 Parker Purifoy, *NLRB Targets College Athletes' Busy Schedules in NCAA Trial (2)*, Bloomberg Law (Dec. 19, 2023, 2:43 PM), https://news.bloomberglaw.com/daily-labor-report/nlrb-opening-testimony-details-school-ncaa-control-over-players [https://perma.cc/X3HP-MCT9].

89 *See* Nw. Univ. and Coll. Athletes Players Ass'n (CAPA), 362 N.L.R.B. 1350 (Aug. 17, 2015).

90 Steve Berkowitz, *NCAA, Pac-12, USC Trial Begins with NLRB over Athletes' Employment Status*, USA Today (November 8, 2023, 2:43 PM), https://www.usatoday.com/story/sports/college/2023/11/07/ncaa-pac-12-usc-student-athlete-misclassification-trial/71483085007/ [https://perma.cc/4K6L-4PDU].

the statute would apply only to private university college athletes.[91] Although benefits to private university athletes would be an important first step in opening the employment door, public institutions outnumber private universities, especially at the Division I level.[92]

By contrast, the FLSA is primarily focused on ensuring minimum wage laws, governing overtime pay and maximum hours, setting child labor standards, and mandating employment hours records be kept by employers.[93] The FLSA applies to both private and public institutions across the United States.[94] Securing employment status for college athletes under the FLSA would present more equitable protections across the country for all college athletes in the short-term. Specifically, a commitment to minimum wage, rather than market value, would allow more non-revenue sport athletes, those outside football and basketball, to be compensated for their athletic contributions to the university and indirectly protected from time demand abuses as universities cautiously allocate working hours. Wages based on market value (under the NLRA) are also likely to present Title IX challenges and lawsuits if men's or women's sports are compensated differently. Given this Note's priority in achieving increases to athlete welfare for all college athletes rather than securing compensation based on market value, the remainder of the discussion on employment classification will examine cases and solutions under the FLSA.

To be considered an employee under the FLSA, an employer-employee relationship must exist. The Supreme Court has stated that the FLSA had "no definition that solves problems as to the limits of the employer-employee relationship under the Act . . . . The definition of 'employ' is broad."[95] The Supreme Court has yet to define a uniform test for determining an employer-employee relationship. Under the FLSA, courts look to the "economic realities" of the relationship between a prospective employer and employee in determining employee status

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91 *Power 5 Conference Power Rankings*, ESPN (Sept. 4, 2018, 9:00 AM) https://www.espn.com/college-football/story/_/id/24570980/power-5-conference-power-rankings [https://perma.cc/UL7X-5HJN]. More than 75% of Power 5 athletic conference schools are public institutions.

92 *See Complete List of NCAA Division 1 Colleges*, N.C.S.A. College Recruiting, https://www.ncsasports.org/division-1-colleges (last visited Aug. 3, 2024)

93 29 U.S.C. §§ 201–219.

94 *Id.*

95 Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947).

under the FLSA.[96] This includes examining the entirety of the circumstances and whether "individuals 'are dependent upon the business to which they render service.'"[97] The Supreme Court considers multiple factors as relevant to evaluating economic reality, including (1) expectation of compensation,[98] (2) the power to hire and fire,[99] and (3) evidence of arrangements made with purpose to evade the law.[100] The broad "economic reality" test is consistently analyzed in college athlete employment cases to determine if someone is an employee under the FLSA. This Note applies the tests used in three modern FLSA college athletics cases as the facts and evidence are most relevant to the current experience of college athletes and sentiments toward college athletes' compensation. One such test is the "Glatt test," which defendant universities in *Johnson v. NCAA* argued is the most appropriate of any multi-factor test to determine "economic reality" if a test is used at all.[101] In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit used a non-exhaustive multi-factor test to determine if unpaid interns were employees under the FLSA.[102] This test has since been used in a variety of contexts to determine employment status, including college athletics.[103] The primary focus of the Glatt test is whether the employer or employee is the "primary beneficiary in the relationship."[104] The test looks at what is received in exchange for work, the economic reality of the employer-employee relationship, and recognizes that the employer-employee relationship may not look traditional because, in this case, expecting educational or vocational benefits

96 Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382–87 (3d Cir. 1985) (arguing economic realities test helps determine employment relationship for independent contractors in telephone marketing industry).

97 *Id.* at 1385 (citing Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981).

98 Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

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

100 *Portland Terminal*, 330 U.S. at 153.

101 *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 509 (E.D. Pa. 2021), *aff'd in part, vacated in part, remanded*, 108 F.4th 163 (3d Cir. 2024). This Note analyzes *Glatt* because it was not only used in *Johnson*, but also because (1) defendant schools, the parties most resistant to classifying athletes as employees, determined it was the most relevant to use, and (2) it may be persuasive to courts outside the Third Circuit to test whether college athletes are employees under the FLSA.

102 Glatt v. Fox Searchlight Pictures, 811 F.3d 528 (2d Cir. 2015).

103 *See Johnson*, 556 F. Supp. 3d at 495.

104 *Id.*

does not exist in other employer-employee relationships.[105] The U.S. District Court for the Eastern District of Pennsylvania (the "district court") in *Johnson* also relied on the Ninth Circuit's statements "that the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and . . . is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA."[106] The Glatt test considers:

> (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa. (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions. (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit. (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning. (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern. (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[107]

However, after the NCAA appealed the district court's decision in *Johnson*, the Third Circuit Court of Appeals issued its decision stating that a common law agency economic reality test should be applied instead of Glatt because common law agency doctrine is "largely symmetrical to governing FLSA caselaw . . . [and] also a helpful analytical tool in evaluating college athletes' purported employer-employee relationships."[108] For college athletes to be considered employees under this test, they must "(a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that

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105 *Id.* at 509.

106 *Id.* at 509 (citing Benjamin v. B&H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017)).

107 *Glatt*, 811 F.3d at 536–37.

108 *Johnson*, 108 F.4th, at 179 (alterations in original).

party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'[109] The Third Circuit remanded the case for the district court to apply this test.

In analyzing three modern cases below, including *Johnson*, this Note will recount evidence used in the cases to define the employer-employee relationship of college athletes using economic reality tests as well as present new and additional evidence not mentioned nor contemplated due to recent conference realignment events.

A. Modern Cases in College Athletics

There are three modern and relevant cases where courts have addressed whether college athletes are employees under the FSLA. The two most pertinent are *Berger v. NCAA* and *Johnson v. NCAA* as plaintiffs in both cases argue that the universities, rather than the NCAA or athletic conferences, are employers of college athletes. A key difference between *Berger* and *Johnson* is the representative gender and sports of the plaintiffs. The former was brought by female University of Pennsylvania track and field athletes in the Seventh Circuit in 2016.[110] In *Johnson*, the plaintiffs represent men's and women's sports in college football as well as other "non-revenue" sports. This distinction is particularly important as arguments for employment have typically centered around athletes in revenue-driving sports: football and basketball. In *Berger*, the court declined to apply multifactor tests commonly applied to determine whether an employer-employee relationship exists and held that college athletes are not employees under the FLSA based on "economic reality."[111] The court determined that *Regent*'s "revered tradition of amateurism" and the fact that college sports are entirely voluntary determined that this "long-standing tradition defines the economic reality of the relationship between student athletes and their schools."[112] Citing Adam Epstein and Paul M. Anderson's article, the court justified its conclusion by acknowledging that most courts have

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109 *Id.* at 180 (citing Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944)) (citing Tony & Susan Alamo Found., 471 U.S. 290, 301 (1985)).

110 Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016).

111 *Berger*, 843 F.3d. at 291, 293.

112 *Id.*

found that "student athletes" are not employees.[113] Finally, the court also argued the Department of Labor field operations handbook supported this conclusion as extracurricular intercollegiate athletic activities "conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school."[114] As demonstrated in the next section, an activity simply being voluntary does not bar one from gaining employment status under the FLSA.

B. *Johnson v. NCAA*: Review and Analysis

In 2021, Division I college athletes filed suit against the NCAA and universities arguing they should be considered employees under the FLSA and compensated for time spent related to athletic activities.[115] The district court decided in favor of these college athletes in *Johnson v. NCAA* by applying the *Glatt* multifactor test. The case was then appealed to the Third Circuit, which, in July 2024, decided that (1) college athletes should not be barred from FLSA employment consideration solely based on the "revered tradition of amateurism"[116] and (2) the *Glatt* test should not be applied due to fundamental differences between unpaid interns and college athletes.[117]

However, the *Glatt* analysis is still relevant for this Note. First, while *Glatt* is not binding on the Third Circuit, it is instructive to other courts who may address this Circuit split—including the U.S. Supreme Court.[118] Second, facts considered under the district court's *Glatt* analysis apply to the newly articulated test. For the purposes of this Note, I will first apply the *Glatt* test and then address important considerations for the district court when applying the new test on remand.

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113 *Id.*

114 *Id.* at 292–93.

115 *Johnson*, 556 F. Supp. 3d at 495.

116 *Johnson*, 108 F.4th at 181.

117 *Id.* at 180.

118 *See Berger*, 843 F.3d at 285 (rejecting the premise that college athletes can be employees under the FLSA). *But see Johnson*, 108 F.4th at 180 (affirming that college athletes can be classified as employees under the FLSA). A circuit split exists between the Third and Seventh Circuits as to whether college athletes can be classified as employees under the FLSA, the former recently rejecting the NCAA's "revered tradition of amateurism."

Under both tests, college athletes have strong FLSA arguments, albeit the common law test is likely more challenging to satisfy.

1. *Johnson: The Glatt Test*

In the district court's 2021 decision, it commented directly on arguments made in *Berger* to reach the conclusion that college athletes are employees under the FLSA. First, the court rejected the amateurism argument from *Berger* based on the Supreme Court's reevaluation of *Regents* in *NCAA v. Alston*. In *Alston*, the Supreme Court rejected the NCAA's argument that *Regents* expressly approves limits on college athlete compensation.[119] Justice Brett Kavanaugh stated in *Alston* that amateurism comments in *Regents* were merely dicta and "have no bearing on whether the NCAA's current compensation rules are lawful."[120] Second, the district court addressed *Berger*'s argument that the Department of Labor guidelines bar student-athletes from status as employees. The district court argued that NCAA-sanctioned athletics "provide no educational benefits to students and are not conducted primarily for the benefit of the participants as part of the educational opportunities provided to students."[121] Evidence provided to support this claim speaks accurately to the Division I college athlete experience, including my own. In *Johnson*, plaintiffs argued that academic courses must be scheduled around NCAA activities and athletic events are prioritized when there are conflicts.[122] Despite the NCAA arguing that amateurism defines the economic relationship and college athletes do not expect compensation, the court rebutted by analogizing to *Tony & Susan Alamo Foundation v. Secretary of Labor*. In *Alamo*, the Supreme Court found that volunteers who were compensated with room and board were considered employees under the FLSA despite classifying themselves as volunteers and not expecting to be paid wages.[123] This defeated the defendant university's argument

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119 NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021). College athlete compensation is not at issue in *Alston*, yet the Court stated that "*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject all challenges to the NCAA's compensation restrictions." *Id.*

120 *Id.* at 2167.

121 *Johnson*, 556 F. Supp. 3d at 504.

122 *Id.* at 505.

123 Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290 (1985).

that expectation of compensation is necessary to define an employer-employee relationship.

The district court in *Johnson* also applied the *Glatt* test to assess economic reality in its determination that college athletes are employees. First, it assessed the extent to which college athletes expected compensation beyond athletic scholarships from universities.[124] In accordance with the *Johnson* Complaint and NCAA bylaws, athletes do not have the opportunity to play college sports for wages nor the opportunity to bargain for them.[125] According to NCAA Division I Bylaw 12.1.2, any form of payment in exchange for athletic skills is prohibited and jeopardizes intercollegiate eligibility.[126] Because these NCAA rules are explicit and have been the foundation of college amateurism for decades, both the *Johnson* district court and this Note's analysis reach the conclusion that athletes do not expect to be compensated and therefore do not satisfy this factor of the *Glatt* test. Second, *Glatt* examines the extent to which the position provides training that would be similar to an educational environment and the extent to which the position is limited to the time period in which it provides athletes with beneficial learning. In *Johnson*, the district court was given no evidence to conclude college athletics created an educational environment nor that athletes gained beneficial learning. The court remained neutral on these elements.[127] The NCAA and defendant schools contended that because participation in college athletics teaches athletes "discipline, work ethic, strategic thinking, time management, leadership, goal-setting, and teamwork," intercollegiate athletics does provide training that could be found in educational environments and provides beneficial learning.[128] However, outside of physical education and programs designed specifically for athletic coaching and instruction, the responsibilities and environment created in college athletics do not resemble traditional educational environments. In fact, there are well-documented studies cataloging faculty at U.S. post-secondary institutions who are adamantly opposed to the "presence and commercialization of athletics" on college campuses as it interferes with "academic

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124 *Johnson*, 556 F. Supp. 3d at 510.

125 *Id.*

126 *NCAA Division I Bylaw 12.1.2 Amateur Status*, NCAA, https://web3.ncaa.org/lsdbi/bylaw?ruleId=7300 [https://perma.cc/H9U2-UGG9] (last visited Aug. 3, 2024).

127 *Johnson*, 556 F. Supp. 3d at 510.

128 *Id.*

integrity and educational missions."[129] This conflict has been further complicated by instances of academic fraud revealed under supervision of Division I collegiate athletic programs.[130] Additionally, the skills mentioned by the NCAA in *Johnson* are no doubt valuable to success in many professions. I concur that these skills benefited me and many other athletes. However, it is unclear if these skills constituted beneficial learning throughout the duration of the period, as the *Glatt* factor requires. Unlike classes that follow a syllabus with new modules and are offered on a short-term basis, or an internship program that is typically limited in duration to months or in some cases a year, college athletics is often a four-year commitment in which the objectives and responsibilities of college athletes do not change substantially year over year. One may learn any number of beneficial skills early in their NCAA career and practice them for the remaining time. However, nothing suggests athletes are continually engaging in beneficial learning throughout their collegiate career. Because valid arguments could be made either way, remaining neutral as the district court did on this factor is satisfactory.

Glatt also analyzes the extent to which the position is tied to a formal education program by way of coursework or academic credit. In *Johnson*, the district court determined that intercollegiate athletics is not tied to university coursework as the NCAA and defendant university admitted in another lawsuit.[131] There are individual universities that offer limited academic credit for participation on varsity sports teams, including in my own college coursework at Cal. However, there was no dedicated coursework associated with that academic credit. The NCAA's admission of limited ties to formal education suggests awarding physical education credit is not the norm among Division I universities. Therefore, this factor still favors college athletes being classified as employees.

The fourth *Glatt* factor asks to what extent the position accommodates academic commitments by corresponding to the academic calendar. This is the most glaring factor in favor of employment status due to the imbalance between accommodating

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129 Cherese F. Fine & Joseph N. Cooper, *A Multidimensional View of Faculty Perceptions of Organizational Change at a Division I Football Bowl Subdivision (FBS) Power 5 Institution*, 1 J. HIGHER EDUC. ATHLETICS & INNOVATION 1, 1 (2020).

130 *See generally* Jacob Abrahamian, *The Forgotten "Student" in "Student-Athlete": Why a New Cause of Action is Needed to Remind Universities that Education Comes First*, 52 ARIZ. ST. L.J. 1303, 1304 (2021).

131 *Johnson*, 556 F. Supp. 3d at 510–11.

academics and athletics at the Division I level. Although the NCAA mandates university compliance offices keep track of time spent participating in athletically related activities, provide academic support to athletes, and set restrictions on athletic activities during certain time periods,[132] athletes' schedules are dictated by athletic programs. Not only are athletes expected to commit considerable daily and weekly hours to their sport, but these trainings often conflict with classes that interfere with major and class selection.[133] This evidence was substantial enough to determine that this factor weighed in favor of athletes being employees in *Johnson*.[134] Before considering the forthcoming increased hour demands and class conflicts that athletes will likely face due to conference realignment among Power Five schools, athletes already miss considerable class time due to television schedules and travel days.

For example, Pac-12 women's soccer league matches were typically held on Thursdays and Sundays due to Pac-12 Network scheduling.[135] Approximately half of games were held at home each season. During my final 2017 season, Thursday home gamedays were held before 3:30 pm due to the field not having lights. All players were required to attend a team meal 3.5 hours before the match. After eating, players were expected to receive pre-match medical treatment and physical therapy if necessary. Some players, including myself, would attempt to attend portions of our classes during this window to avoid marks down in attendance. Pre-game team meetings to discuss strategy would occur approximately 1.5 hours before kickoff and then we would proceed to warmup. Home or away, scheduling an afternoon class on Thursdays was challenging, especially with professors being hostile to intercollegiate athletics. But avoiding Thursday afternoons also prevented athletes from taking Tuesday afternoon classes, as many courses offered at Cal ran Tuesdays and Thursdays. For away matches, specifically weekday games, athletic teams typically travel the day before a match. A Thursday game versus the University of Washington and a Sunday game versus Washington State meant that we missed Wednesday, Thursday, and

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132 *Johnson*, 556 F. Supp. 3d at 511 (as argued by the NCAA in *Johnson* and consistent with life as a Division I athlete).

133 *Id.*

134 *Id.*

135 *See, e.g.*, *2023–24 Women's Soccer Schedule*, CAL. GOLDEN BEAR ATHLETICS, https://calbears.com/sports/womens-soccer/schedule/2023 [https://perma.cc/B5MA-LHN3] (last visited Aug. 3, 2024).

Friday classes. An extended trip would typically occur twice per season, however, at least one class was typically missed every week in the fall. Unlike basketball, with a smaller roster and a considerably larger budget for back-and-forth airfare on Thursdays and Sundays, our team would not return home in between matches to attend class. To avoid missing an exam for a core class during one of these long travel trips, I flew home at my own expense to take the exam and then returned Saturday for training. The Thursday/Sunday schedule was not designed to accommodate college athletes' academic obligations and demonstrates how academics are forced to shift around an athletic program's practice and match schedule.

Now let's consider the travel schedule for former Pac-12 schools who have joined large and geographically-wide athletic conferences. The University of Washington, Oregon, USC, and UCLA will join the Big Ten in 2024. In 2023, the Big Ten women's soccer schedule followed a similar Thursday/Sunday format with Friday, Saturday, and Monday games sprinkled in.[136] Because typical Big Ten conference game days did not change in 2024,[137] USC and UCLA, apart from playing each other, will have to travel a minimum of 850 miles to play conference games away.[138] Before realignment, planning a trip to the Bay Area to play Cal or to Phoenix to play ASU meant afternoon flights could be scheduled to avoid disrupting morning classes. Post-realignment, a flight from Los Angeles to Newark, New Jersey to play Rutgers requires a full day of travel, disrupting class time, and athletic performance concerns with travel fatigue and jet lag.[139]

Although travel hours are not considered CARA hours, they are athletically related and will substantially increase the mandatory time commitments that college athletes spend on

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136 *Women's Soccer Composite Schedule*, BIG 10 CONFERENCE, https://bigten.org/calendar.aspx?path=wsoc [https://perma.cc/W3UK-EB7W] (last visited Aug. 3, 2024).

137 *Id.*

138 Driving Directions from Los Angeles, California to Eugene, Oregon, GOOGLE MAPS, https://www.google.com/maps (follow "Directions" hyperlink; then search starting point field for "Los Angeles, California" and search destination field for "Eugene, Oregon") [https://perma.cc/PEW3-7ZBM]. Los Angeles, California to Eugene, Oregon is approximately 850 miles.

139 *See generally* Dina C. Janse van Rensburg et al., *How to Manage Travel Fatigue and Jet Lag in Athletes? A systematic Review of Interventions*, 54 BRIT. J SPORTS MED. 960 (2020) (discussing how jet lag and travel fatigue often developed by movement through time zones and sitting in stationary positions for extended periods can increase risk of injury) [https://perma.cc/L8UQ-TQT4].

activities related to their sports. Athletes can anticipate more restrictions on their class selection and estimates of thirty to forty hours already spent on cross-country athletically related travel will likely increase with increased travel demands. Therefore, college athletics will face considerably more conflicts with academic calendars post-realignment, which weighs even more strongly in favor of classifying athletes as employees under *Glatt*.

With respect to the extent an athlete's work complements, rather than displaces, work of paid employees and provides significant educational benefits, the district court found in favor of the athlete. Even though college athletes do not displace paid work, *Johnson* and this analysis previously acknowledged that college athletics does not provide significant educational benefits. This conclusion was enough to weigh this factor in favor of the athletes in *Johnson*'s district court decision.[140] If the *Glatt* factor had asked solely about displacement of paid work, it would not support employee status. However, this factor requires both displacement and providing significant educational benefits. Because it fails the factor as a whole, it weighs in favor of the athlete.

The final *Glatt* factor considers the extent to which the employer and athlete understand that the position will not lead to a paid job at the end of the athlete's collegiate career.[141] There is no expectation that a college athlete will gain employment from a university at the end of their tenure on an intercollegiate athletic team and therefore this factor does not weigh in favor of employment status. The district court agreed.

Three of the seven Glatt factors favored athletes versus two in favor of universities in *Johnson*'s district court decision. In this Note's analysis, four of seven favor the athletes, with evidence to support that intercollegiate athletics does not provide the instruction of a similar educational environment. Additionally, increased demands on athletes with realignment bolsters support for the factors already satisfied in *Johnson*'s *Glatt* analysis. The court ultimately decided athletes are employees as no one "factor[s] is dispositive and [that] every factor need not point in the same direction."[142] The opinion also speaks to the "billion-dollar Big Business of NCAA sports" and mentions revenue figures through 2019 as additional justification

140 *Johnson*, 556 F. Supp. 3d at 511.

141 *Id.* at 512.

142 *Id.* (alterations in original).

for its decision.[143] Revenue figures for college sports have only increased since 2019. This economic factor, especially when compared to the benefits an athlete receives, demonstrates the primary beneficiary in the relationship: university employers. Building on the district court's analysis with a holistic view of economic reality, conference realignment in 2023 presents an even clearer economic reality than when the case was decided in 2021. Realigning an athletic conference is not inherently problematic. It can increase the athletic competitiveness of a conference, bring together well-resourced institutions to level the playing field, and increases the value of the conference for negotiations with television networks. It becomes problematic when we examine what the purpose and priority of being a "student-athlete" is. The NCAA and its member schools have argued in numerous cases that college athletics is "extracurricular" and therefore does not permit college athletes to be considered employees. *Extracurricular*, according to Merriam Webster, means "not falling within the scope of a regular curriculum . . . specifically: of or relating to officially or semiofficially approved and usually organized student activities (such as athletics) connected with school and usually carrying no academic credit." Activities that fall outside of a regular curriculum suggest they supplement required courses. In this case, academics would take priority over athletics, which are merely supplementary. This contention is supported by the fact that college athletes must maintain minimum grade point averages to compete on NCAA teams.[144] Given the importance of academics in institutions of higher learning, college conference realignment forces academics into the backseat with priorities catered toward improving the financial and competitive positions of university athletic programs. Based on this analysis, athletes should be considered employees of their universities.

2. *Johnson: The Common Law Economic Reality Test*

On appeal, the Third Circuit rejected the district court's application of *Glatt* due to fundamental differences between the "work" of unpaid interns versus college athletes.[145] According to the Court, interns by their very function "all perform work

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143 *Id.* at 505.

144 *See Staying on Track to Graduate*, NCAA, https://www.ncaa.org/sports/2021/2/10/student-athletes-current-staying-track-graduate.aspx [https://perma.cc/DGT3-MLHY] (last visited Aug. 3, 2024).

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

for their employers."[146] As demonstrated by the Circuit split on this issue, this is not conventionally accepted for college athletes. Additionally, *Glatt* compared benefits from internships to educational programs, whereas college athletics is separate from academics entirely.[147] In choosing an economic reality test, the Court indicated that the test must "be able to identify athletes whose play is also *work*."[148] Professional athletes indicate that athletic play as work is possible. This analysis compares the college athlete experience to that of a professional athlete and examines each prong with a focus on realignment for the district court's consideration.

Fortunately, my experience as a professional and collegiate athlete is instructive. As part of being rostered on a team, I (1) signed a contract stipulating the terms by which I would receive funds, (2) underwent a physical and completed semi-regular drug tests, (3) was expected to play at times set by coaching staff or face reduced playing time for my absence, (4) trained approximately 1.5 hours per day in-season (excluding off days), (5) gave interviews and appeared in team-sponsored media events to drive game attendance, (6) had my schedule and diet closely monitored, (7) played games on specific days and times set by television networks, and (8) traveled frequently for matches. I gained personal satisfaction and tangible benefits, such as publicity, free meals and apparel, and game tickets, among other things, as a member of the team. At the same time, our athletic performance dictated coaching staff job security, ticket sales, and team sponsorship opportunities. This experience aptly describes both my college and professional soccer career, which is important because it highlights how even non-revenue college sports teams have almost identical work requirements and experience to professional athletes, minus attending school and being paid wages. Post-realignment, college athletes spend more time performing these activities for universities to generate revenue—namely, increased travel to conference games. Additionally, athletic departments partner with NIL collectives comprised of boosters and fans to fund NIL deals[149] and law schools run NIL clinics

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146 *Id.*

147 *Id.*

148 *Id.* at 178.

149 *See e.g.*, Shamus McKnight, *1890 Nebraska Named Official NIL Collective of Nebraska*, NEB. ATHLETICS, https://huskers.com/news/2024/07/8/1890-nebraska-named-official-nil-collective-of-nebraska [https://perma.cc/8WWJ-HNHL] (last visited Aug. 11, 2024).

representing athletes.[150] These factors further illustrate the professionalization of the modern college athlete in both revenue and non-revenue sports, and should be considered by the district court on remand.

Now examining the common law agency test, the district court must first establish that college athletes perform a service for another party.[151] The Third Circuit did not define "service" and therefore the court must also establish that college athletes' athletic contributions and related activities are a "service."[152] The Third Circuit's concurring opinion noted this, providing the Restatement (Third) of Agency's definition of "servant" for guidance: "a servant is a person employed to perform services for another in his affairs and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."[153] In 2024, playing college sports is an exchange of monetary value: scholarships, indirect compensation, and benefits for athletic performances that generates revenue from tickets and apparel, media rights, sponsorships, and alumni donations.[154]

The "servant" definition also addresses the third prong of the test: whether college athletes are under university control or right of control while performing the service.[155] For on-field performance, it is clear that college athletes are under the control of university-employed coaching staffs, who run trainings, decide rosters and playing time, and impose team rules. As noted in the *Glatt* analysis, teams effectively control your class schedule to avoid athletic conflicts, how you engage with media, how you eat, and directly control how you spend thirty hours per week or more.[156] Again, defendants will argue that these activities are voluntary, but as established in *Alamo*, voluntary work can still be considered employment under the

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150 *See e.g.*, *Talent & Brand Partnerships / Name, Image & Likeness Clinic*, UCLA LAW, https://law.ucla.edu/academics/curriculum/talent-brand-partnerships/name-image-likeness-clinic [https://perma.cc/LM8W-PS2S] (last visited Aug. 11, 2024); *see also Sports & Name, Image and Likeness Clinic–7350*, MINNESOTA LAW, https://law.umn.edu/course/7350/sports-name-image-and-likeness-clinic [https://perma.cc/LU62-4R7F] (last visited Aug. 11, 2024).

151 *Johnson*, 108 F.4th, at 179.

152 *Id.* at 189.

153 *Id.* at 189 (quoting Restatement (Third) of Agency § 220 (2006)).

154 Serena Morones, *Following the Money in College Sports*, MORONES ANALYTICS https://moronesanalytics.com/following-the-money-in-college-sports/ [https://perma.cc/7WNY-5YBH] (last visited Aug. 11, 2024).

155 *Johnson*, 108 F.4th, at 179.

156 *See supra* notes 132-33 and accompanying text.

FLSA.[157] Under this definition, the district court will likely find that college athletes perform a service for another party and are under the control of universities.

However, as the concurring opinion notes, other definitions of "service" refer to labor and work.[158] These terms must be distinguished from non-work *play*.[159] Fortunately, comparison to professional athletes, who perform a service with nearly identical job functions, will aid the district court's analysis. With this comparison, college athletes are still likely to satisfy the first prong.

The second prong requires that college athletes perform "necessarily and primarily for the [other party's] benefit."[160] On its face, this appears challenging to satisfy. Universities can argue that college athletes play sports primarily for personal benefit and universities only indirectly benefit. For example, college athletes may play for the love of sport, educational and athletic development, and to be part of a team environment. However, employees, including professional athletes, may obtain all these benefits (excluding academics) and still primarily benefit the employer as employees. Additionally, the billion-dollar college sports industry only exists by virtue of an athlete's performance of free labor, demonstrating that performance is necessarily and primarily benefiting universities.

Similarities to the volunteers in *Alamo* also support this conclusion. In *Alamo*, a religious organization had a commercial profit-generating operation run by volunteers.[161] The volunteers' performance produced direct economic benefits for the organization and led to the volunteers being considered employees under the FLSA.[162] Similar to the volunteers, college athletes and their teams make direct economic contributions to revenue-generating athletic departments by performing on the field. Universities will likely argue that these benefits are indirect, which would fail this prong. However, the deliberate decision to change athletic conferences to the detriment of athletes' education and welfare, for example, weakens this claim. The economic realities of modern college athletics highlighted throughout this Note make it clear that major Division

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157 Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290 (1985).

158 *Johnson*, 108 F.4th, at 189.

159 *Id.*

160 *Id.* at 180 (citing Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944)).

161 *Alamo*, 471 U.S. at 299.

162 *Id.* at 298.

I universities view athletics as a direct and lucrative source of income.

Finally, to be an employee under the FLSA, college athletes must perform a service "in return for 'express' or 'implied' compensation or 'in-kind benefits.'"[163] It is clear that college athletes do not perform for express compensation. However, Division I college athletes receive implied compensation and in-kind benefits, or non-monetary compensation, in exchange for athletic performance. Volunteers in *Alamo* were considered employees because they received in-kind benefits of food, shelter, clothing, transportation, and medical benefits—or "wages in another form."[164] Even with no desire to be considered employees, these benefits classified them as such. Like *Alamo*, many Division I athletes receive in-kind benefits regularly, including free meals, free athletic gear, free access to medical staff and medicine, priority class selection, and in many cases, like Dartmouth basketball players, preferential treatment in the college admissions process.[165] These benefits are arguably more expansive than those received by *Alamo* volunteers and can be considered indirect compensation or in-kind benefits. Therefore, this prong is likely satisfied.

Based on this analysis, college athletes have a strong argument that they are employees under this new common law economic reality test in addition to the *Glatt* test. However, it is unclear which cases and definitions the district court will rely on to form its decision, and this may affect the outcome. Additionally, as the concurring opinion in the Third Circuit decision notes, the court may also find that the economic reality of the employer-employee relationship differs between revenue and non-revenue sport athletes.[166] This analysis demonstrates that even non-revenue sport athletes, like soccer players, warrant employment status. But, the district court will likely grapple with this issue. It may create inconsistencies in labor rights between different kinds of athletes, which in line with sentiments established on the NLRA front, would be problematic and undesirable.[167]

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

164 *Alamo*, 471 U.S. at 291–93.

165 I was provided each of these benefits as a college athlete at Cal. *See also* Trustees of Dartmouth College, No. 01-RC-325633, N.L.R.B. Region 01 (Feb. 5, 2024) https://apps.nlrb.gov/link/document.aspx/09031d4583c5ebe4 [https://perma.cc/G6EN-FTYU]; Purifoy, *supra* note 88.

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

167 *See supra* note 89.

C. *Dawson*: Focusing on the "Right" Employer

In 2019, the Ninth Circuit determined that college athletes are not employees of the NCAA nor athletic conferences under the FLSA.[168] In *Dawson v. NCAA*, unlike *Berger* and *Johnson*, a USC football player filed suit arguing he was an employee of the NCAA and Pac-12.[169] He did not name the university in the suit.[170] The court used an economic reality test in its analysis, specifically analyzing (1) the extent to which the athlete had expectation of compensation, (2) if the NCAA and Pac-12 have power to hire and fire college athletes, and (3) whether there is evidence of arrangements made with purpose to evade the law.[171] The court determined that there was no expectation of compensation as any scholarship or additional funding is paid out by member schools and any attempts by the NCAA to limit compensation to the cost of attendance do not constitute expectation of compensation as a matter of law.[172] This conclusion supports the analysis from the previous section. Second, Dawson did not satisfactorily show evidence that the NCAA or Pac-12 had the power to hire or fire college athletes. However, similar to *Johnson*, Dawson alleged that "the NCAA/P[AC]-12 assert complete control over the lives of student-athletes, on and off campus, including a student-athlete's: '(a) living arrangements; (b) athletic eligibility; (c) permissible compensation; (d) allowable behavior; (e) academic performance; (f) use of alcohol and drugs; and (g) gambling.'"[173] The court did not deny that the NCAA heavily regulates college athletes, but for the purposes of the economic reality test, the NCAA and conference act as regulators while the university itself enforces the regulations and more appropriately sits in the role to "hire and fire."[174] The court's analysis on this issue is sound, as universities are expected to carry out the regulations of the NCAA. In severe cases, NCAA violations result in loss of scholarship funding from the university and render an athlete ineligible.[175]

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168 Dawson v. NCAA, 932 F.3d 905, 905 (9th Cir. 2019).

169 *Id.* at 907.

170 *Id.*

171 *Id.* at 909.

172 *Id.*

173 *Id.*

174 *Id.* at 910.

175 *NCAA Division I Bylaws, Article 12 Amateurism and Athletics Eligibility*, NCAA, https://web3.ncaa.org/lsdbi/search/bylawView?id=8740 [https://perma.cc/8T9X-RW85] (last visited Aug. 3, 2024).

In these cases, universities effectively "fire" the athlete as they are not permitted to participate on the team.

Finally, the court found no evidence that NCAA rules were created in attempts to evade the law.[176] Additionally and unlike *Johnson*'s district court decision, the court was not convinced by Dawson's argument that college athletes' generation of substantial revenue for the NCAA and Pac-12 alters the economic reality analysis nor defines an employment relationship under the FLSA.[177] Although revenue does not define the relationship, it can and should still be considered to properly analyze the entirety of the circumstances for economic reality. This case is particularly useful to this Note's analysis because (1) it demonstrates that universities themselves are the most proper employer, (2) courts that determine athletes are not employees under the FLSA still recognize the considerable NCAA restrictions placed on college athletes, and (3) the role of hiring and firing appears to fit universities best in the college athlete context. The court ends its opinion by stating that "we need not, and do not, reach any other issue urged by the parties, nor do we express an opinion about student-athletes' employment status in any other context."[178] Although the court does not explicitly argue that universities are the proper employer for this analysis, the opinion implicitly does so by repeatedly mentioning that the university was not named in this case and the court therefore does not need to analyze employment of that relationship.

III
Payment as a Safeguarding Mechanism

Now having established college athletes as employees under the FLSA, college athletes would be entitled to the federal minimum wage and overtime pay as employees. With over 190,000 college athletes competing at the Division I level each year,[179] recording 20-hour CARA and even higher non-CARA schedules each week is expensive for universities. Taking the average of 190,000 athletes across 363 Division I universities, which

176 *Dawson*, 932 F.3d at 910.

177 *Id.*

178 *Id.* at 914.

179 *Our Division I Members*, NCAA, https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx [https://perma.cc/B9P4-UNGH] (last visited Aug. 3, 2024).

is an estimate of approximately 500 athletes per university,[180] universities would spend approximately $3,600 for one hour worked by all college athletes at the university. This assumes universities apply the federal minimum wage of $7.25 per hour. Thirty states and Washington D.C. have minimum wages above the federal level mandated by state law.[181] Unless an exception were carved out for college athletes to adhere to the federal minimum wage across the nation, which does not appear unreasonable given the NCAA's insistence on asking for exceptions on other economic issues, states that pay a higher state minimum wage would put universities at a financial disadvantage compared to schools only required to pay the federal minimum wage. Considering compensating college athletes would provide labor protections that do not currently exist, and universities will vehemently push back on federal and state minimum wages to avoid cutting athletic programs, proposing adherence to the federal minimum wage to even the financial and competitive playing field is worth exploring. $7.25 per hour is a considerable expenditure for athletic departments who currently pay $0 to their athletes. Should universities find this puts substantial pressure on their budget, which it will, universities will be incentivized to reduce the number of hours required by their athletes—ultimately benefiting the athlete academically, physically with increased recovery times, and mentally when juggling life as a full-time student with effectively a full-time job. Using compensation as a financial punishment mechanism for better working conditions equips athletes and advocates with another tool to improve the physical, mental, and academic outcomes for college athletes long-term while simultaneously allowing athletes to monetize off labor currently seen solely by universities, conferences, and the NCAA.[182]

The simplest course of action for universities in response to compensation requirements is to limit the number of hours a college athlete can work in a given week. As a result, athletes

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180 This number is likely to be higher at larger and more well-resourced universities that can offer more varsity sports teams. For example, Cal has approximately 850 college athletes across twenty-eight sports. *See Knowlton's Notes: An Exciting Time of the Year*, CAL. GOLDEN BEAR ATHLETICS (Feb. 2, 2024 10:27 AM), https://calbears.com/news/2024/2/20/athletics-news-knowltons-notes-an-exciting-time-of-year.aspx?print=true [https://perma.cc/377H-25XP].

181 Jennifer Borresen, *25 States are Raising the Minimum Wage in 2024. Here's Where Workers are Getting a Raise*, USA TODAY (Jan. 4, 2024) https://www.usatoday.com/story/graphics/2024/01/04/states-that-raised-minimum-wage-2024/72085573007/ [https://perma.cc/7KTC-VLFF].

182 *See supra* note 8.

benefit from a time demands perspective. Should universities stick to the maximum 20 CARA hours per week, each athlete would receive $145 per week for services rendered in-season. Although athletes are contributing more than 20 hours per week in season when considering CARA, non-CARA, and "voluntary" workouts, athletes would likely only be compensated for CARA—the only hours regulated by the NCAA. Although this does not cover all hours, it still forces a university's hand through limited employment hours or paying the financial consequences. Critics may argue that athletic teams will find creative ways to work around these rules, such as classifying CARA activities as non-CARA or voluntary. This may be true, but now the U.S. government can serve as a larger regulator to audit and oversee activity for accuracy.

This Note recognizes that paying college athletes minimum wage may result in universities cutting non-revenue athletic programs or making fewer expenditures on athletic department programming. This is a very undesirable result. It may also subject college athletes to taxes for wages received. This is where creative thinking like President Baker's proposal for a separate subdivision or trust-like mechanisms could come into play, especially for smaller universities. The NCAA's recent settlement demonstrates the NCAA is capable of creative thinking on the NIL side to benefit athletes and can do so here as well.[183] Strategic plans may look like auditing entire athletic departments to cut costs (many of which could be beneficial to a university's bottom line), offering deferred payment plans to ensure college athletes will be compensated, working closely with donors and alumni, and negotiating with lawmakers to find a plan that best meets the legal requirements of the FLSA and also allows some flexibility for athletic departments to transition from a long history without paying athletes. Like Baker's plan, it may look like finding a common thread among certain classes of college athletes to compensate. Although, this would merely achieve compensation goals and not carry out this Note's aim to protect wider classes of athletes across Division I. But payment as a punishment is merely a starting point for using the legal tools available to combat decades-old issues that make being a college athlete particularly challenging.

183 *See* Brutlag Hosic, *supra* note 80.

Conclusion

Proposing unconventional solutions that would upend the institution of college sports and pose major financial challenges for many universities is no doubt unpopular. Talking about the uncomfortable realities that college athletes live with and look back on well into their adulthood takes away from the magic we watch from the stands or on primetime each week. And being critical of institutions that provide thousands of young people with college degrees and opportunities for post-graduate success will frustrate many. But it serves as an important starting point for thinking about the goals and ideals of intercollegiate athletics. As demonstrated in this Note, changes to college athletics in 2023 resemble the demands of professional sports more than that of regional extracurricular activities. Compensating college athletes, at first, appears to further professionalize college sports, which is beneficial for increased labor protections. But paying student athletes actually falls in line with the "revered tradition of amateurism" the NCAA clings closely to. It allows college athletes to find more balance in their academic and athletic commitments with reduced hours. It creates additional oversight on hours that athletic teams require their athletes to engage in. Looking at myself as a young player, she would have been elated to know she played Division I sports in a Power Five conference. But she also would not have expected or been prepared for the mental and emotional toll that the business of college sports takes on an eighteen-year-old. These enhanced protections create an environment more conducive to physical and mental welfare and tackle it from a novel legal mechanism already being debated in the courts. Protecting the bodies and minds of college athletes is not just the "right thing to do," it is an investment in doing business really well to drive performance and develop tomorrow's leaders.