

# How Dartmouth Ruling Fits In NLRB Student-Athlete Playbook

By **Jennifer Cluverius and Patrick Wilson** (February 9, 2024, 3:02 PM EST)

Although it is not yet March, some colleges and universities may nevertheless find themselves in the midst of a new kind of "madness" as they face the reality that certain collegiate athletes are employees who can unionize under the National Labor Relations Act.

## The NLRB Calls Foul

On Feb. 5, the National Labor Relations Board Boston office director Laura Sacks issued a **groundbreaking decision** in Trustees of Dartmouth College. [1] Rejecting Dartmouth's argument that the players are not "employees" under the NLRA, Sacks found Dartmouth's men's basketball team — which consists of 15 student-athletes — to be an appropriate unit under the NLRA, and directed that a union election be held.

Specifically, the ruling concluded that Dartmouth's right to control the work performed by the players, coupled with the compensation that the players received for this work, rendered them employees under the NLRA who were entitled to its protections, including, without limitation, the right to vote on a union to serve as their collective bargaining representative.

Notably, Sacks found that the compensation the players receive doesn't necessarily need to include scholarship funds. Here, it included athletic equipment, clothing, lodging and a streamlined admissions process that provides athletes with an estimate of their financial aid, known as an early read.

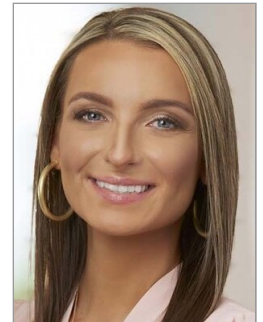
If successful in its union election, the player's unit would be represented by the Service Employees International Union, Local 560, and would generally consist of "all players on the men's varsity basketball team ... but excluding managers, guards, and professional employees and supervisors" as those positions are defined by the NLRA.

## The Board's Playbook on Student-Athletes

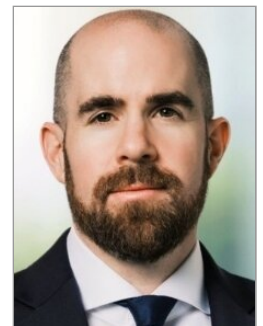
This groundbreaking decision marks the latest development in the NLRB's push to define certain players at academic institutions as "employees" under the NLRA. In September 2021, NLRB General Counsel Jennifer Abruzzo issued a memorandum that reinstated guidance from 2017 and warned that institutions who misclassify statutory employees as student-athletes risk drawing a Section 8(a)(1) unfair labor practice charge.[2]

Under Abruzzo, the NLRB has sought to extend the board's holdings in Boston Medical Center and Columbia University, finding that the Section 2(3) definition of "employee" is subject to only a few exceptions, which do not include college athletes.

The push to bring student-athletes within the ambit of the NLRA is not new. During the Obama administration in 2015, the board reviewed a bid by football players at Northwestern University who received grant-in-aid scholarships. The board considered whether those players were employees



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subject to the NLRA, specifically weighing:

- Whether the athletes performed a service for the university and NCAA that generated a profit and/or conferred a benefit of publicity, goodwill or other positive impacts that improved the institution's reputation, thereby driving up student applications and financial donations;
- Whether the athletes received compensation in some form; and
- Whether the NCAA or the institution controlled terms and conditions of the athletes' employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players could accept, and ensured compliance with those rules through its Compliance Assistance Program.[3]

Ultimately, the board unanimously declined to assert jurisdiction over the case, but, critically, reached no determination regarding whether the players were employees under the NLRA. The board sidestepped this issue by concluding that its asserting jurisdiction in this context would not promote labor stability across the conference as a whole given the nature and structure of NCAA Division I football.

Specifically, while Northwestern was a private institution, the balance of the Big Ten conference consisted of state-run schools over which the board lacks statutory jurisdiction. The board cautioned that its decision was narrowly focused, leaving the door cracked for future reconsideration of this issue.

Abruzzo's 2021 memo apparently pushed that door open, spurring the regional directors to find a similar case to take before the Biden board for reconsideration.

In addition to Dartmouth, in May 2023, the NLRB's Los Angeles Region **issued a complaint** against the University of Southern California, the Pac-12 conference and the NCAA, alleging that these entities were joint employers of the men's football players, as well as players on the men's and women's basketball teams. The NLRB alleged that the three entities unlawfully misclassified college athletes as student-athletes, rather than employees, in violation of Section 8(a)(1).

The hearing in this case began in November 2023 and will conclude this month. Its outcome could lead to further dramatic changes in the status quo for student-athletes under the NLRA.

### **The Dartmouth Play-By-Play**

Back on the East Coast, Dartmouth, a private school, did not face all of the same hurdles as Northwestern University and the University of Southern California. As such, after reviewing the petition that Dartmouth received from the varsity men's basketball team back in September 2023, Sacks concluded that the players could proceed to a unionization vote.

In reaching this conclusion, the ruling made the following findings.

The players performed work that benefited Dartmouth by generating revenue for the university through broadcast rights, ticket sales, and driving alumni engagement and financial donations through meet and greets and exclusive events where the price for admission could be up to \$5,000 per ticket.

Dartmouth exercised significant control over the players' work, including by requiring them to provide their services to Dartmouth exclusively. Tellingly, the ruling equated Dartmouth's student-athlete handbook to an employee handbook, in that it detailed tasks that athletes had to complete and the regulations they could not break.

The ruling also noted that Dartmouth determined when the players practiced and played, reviewed film, engaged with alumni, and took part in other team-related activities. When the basketball team participated in away games, Dartmouth determined when and where the players would travel, eat

and sleep.

Perhaps the most concerning issue for other academic institutions, the ruling found that the players — despite not receiving athletic scholarships — received compensation.

As evidence of such compensation the ruling cited the players' receipt of an early read for admission prior to graduating high school; equipment and apparel each year that was valued in excess of \$1,000; tickets, lodging and meals; and the benefits of Dartmouth's Peak Performance student-athlete program, which provided "academic support, career development, sports and counseling psychology, sports nutrition, leadership and mental performance, strength and conditioning, sports medicine, integrative health and wellness, and sports science and innovative tech."

Critically, while the players did not receive compensation from Dartmouth in the traditional sense due to NCAA regulations, the ruling nonetheless concluded that they were compensated in exchange for performing specific tasks, including practicing and attending games. This, coupled with Dartmouth's possession of and exercise over the right to control the work performed by the players, led Sacks to conclude that the players are employees.

### **The Season Outlook**

Whether the Dartmouth decision will affect other NLRB initiatives aimed at challenging the student-athlete designation across the country remains to be seen. For now, Dartmouth will likely appeal Sacks' ruling to the NLRB. If this board takes up that appeal, it may very well reconsider past rulings like the Northwestern University decision — wherein it ultimately declined to exercise its jurisdiction over the players at issue — and make a finding on whether certain student-athletes may be employees covered by the NLRA.

The outcome of an appeal in Dartmouth therefore, is worth monitoring for representatives of institutions within the NLRB's jurisdiction, so they are not exposed to potential labor law violation claims in the event of any changes to the employment status of their student-athletes.

As a practical point, the Dartmouth decision emboldens advocates for player units and may stimulate additional unionization efforts in certain athletic programs across the country. Athletic directors nationwide would be wise to take note of the Northwestern and Dartmouth rulings — considering what labor defense and education planning they have in place and whether implementation of additional training or financial planning would be prudent.

Though real change may not occur until the NLRB engages in rulemaking, Congress takes action or a court issues a decision on the status of athletes as employees, institutions should keep their eye on the ball as the game progresses.

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[1] <https://apps.nlr.gov/link/document.aspx/09031d4583c5ebe4>.

[2] <https://apps.nlr.gov/link/document.aspx/09031d458356ec26>.

[3] Northwestern University, 362 NLRB 1350, 1356 (2015).