

# Playing for Pay or Playing to Play: Student-Athletes as Employees Under the Fair Labor Standards Act

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# Playing for Pay or Playing to Play: Student-Athletes as Employees Under the Fair Labor Standards Act

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#### INTRODUCTION

The University of Oklahoma gave its quarterback,<sup>1</sup> Baker Mayfield,<sup>2</sup> a full scholarship<sup>3</sup> covering tuition, books, and room and board, as well as an additional scholarship covering the full cost of attendance, which added up to \$140,000 over the span of four years.<sup>3</sup> Suppose, however, the

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1. *Baker Mayfield*, U. OKLA. ATHLETICS, <http://www.soonersports.com/ViewArticle.dbml?ATCLID=209397188> [<https://perma.cc/UV9N-SQAJ>] (last visited Feb. 7, 2019).

2. A full scholarship the University of Oklahoma amounts to roughly \$30,000 an academic year. *Bursar Services*, U. OKLA., [http://www.ou.edu/bursar/tuition\\_fees.html](http://www.ou.edu/bursar/tuition_fees.html) [<https://perma.cc/Z2KD-YT3Y>] (last visited Feb. 7, 2019). This figure includes cost of tuition and fees for a non-resident student and an estimate of the amount needed for room, board, and books. *Id.*

3. The full cost of attendance is “calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.” Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 873 (2016). The full cost of attendance is currently awarded only to student-athletes at Division I institutions. Division I institutions can elect to award scholarships up to \$5,000 per year to each individual athlete to cover the full cost of attendance but do not have to award the maximum amount. *Id.* The \$140,000 total includes the \$30,000 award for tuition as well as the \$5,000 cost of attendance award calculated for four years.

University owed an additional amount to Mayfield for being an employee of the University of Oklahoma—a minimum wage of \$7.25<sup>4</sup> an hour. Hypothetically, this would mean that Mayfield would receive \$44,000 in total compensation for the academic year, not including potential overtime pay.<sup>5</sup> Mayfield would also receive tutoring, gear, and other benefits<sup>6</sup> as a result of his classification as an employee of the University.<sup>7</sup> This is the economic situation with which schools would be faced if student-athletes were classified as employees of their universities. In addition to the great financial burden on universities, scholars<sup>8</sup> believe that allowing college athletes to be classified as employees would “diminish[] the value of an education,” and would shift student-athletes’ focus toward receiving compensation and away from attaining a college degree.<sup>9</sup> Additionally,

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4. *Oklahoma Minimum Wage 2017-2018*, MINIMUMWAGE.ORG, <https://www.minimum-wage.org/oklahoma> [<https://perma.cc/XE97-BYJZ>] (last visited Feb. 7, 2019).

5. This figure estimates the amount of minimum wage earned at \$7.25 an hour based on working 40 hours a week during a 30-week academic calendar year. Any overtime earned would be based on any hours worked over 40 hours in a week. *Academic Calendar*, U. OKLA. (Jan. 8, 2018, 9:06 AM), [http://www.ou.edu/admissions/academic\\_calendar/fall-2017](http://www.ou.edu/admissions/academic_calendar/fall-2017) [<https://perma.cc/SK7U-QPJ2>]. Overtime pay under the Fair Labor Standards Act (“FLSA”) is pay for any work over 40 hours in a work week and must be at least time and a half of the employee’s regular pay rate. *Wage and Hour Division*, U.S. DEP’T LAB., [https://www.dol.gov/whd/overtime\\_pay.htm](https://www.dol.gov/whd/overtime_pay.htm) [<https://perma.cc/C63G-PFUR>] (last visited Feb. 7, 2019).

6. See sources *supra* note 5.

7. See generally Paul Daugherty, *College athletes already have advantages and shouldn’t be paid*, SPORTS ILLUSTRATED (Jan. 20, 2012), <https://www.si.com/more-sports/2012/01/20/no-pay> [<https://perma.cc/8PKN-JPL9>].

8. See, e.g., Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn’t be Paid*, NEW YORKER (Oct. 14, 2015), <https://www.newyorker.com/sports/sporting-scene/why-ncaa-athletes-shouldnt-be-paid> [<https://perma.cc/9HZZ-EQAX>]; Kristi Dosh, *The Problems with Paying College Athletes*, FORBES (June 9, 2011), <https://www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/#6d8cc4ce5f7c> [<https://perma.cc/6BAH-R6QA>]; Malcolm Lemmons, *College Athletes Getting Paid? Here are Some Pros and Cons*, HUFFINGTON POST (Mar. 29, 2017), [https://www.huffingtonpost.com/entry/college-athletes-getting-paid-here-are-some-pros-cons\\_us\\_58cfcee0e4b07112b6472f9a](https://www.huffingtonpost.com/entry/college-athletes-getting-paid-here-are-some-pros-cons_us_58cfcee0e4b07112b6472f9a) [<https://perma.cc/JJY6-UQNW>].

9. Daugherty, *supra* note 7. Sixty-nine percent of the public oppose paying college athletes more money than they already receive to cover their college expenses. Jon Solomon, *NCAA expert: 69 percent of public opposes paying college players*, CBS SPORTS (June 25, 2014), <https://www.cbssports.com/college->

industry professionals argue that the compensation of student-athletes would change the spirit of college sports<sup>10</sup>—the Saturday tailgates, March Madness, longtime traditions, and customs of collegiate athletics that have been in place for years would fade away.<sup>11</sup> Paying student-athletes as employees would destroy the collegiate model that has been in place for decades.<sup>12</sup>

The National Collegiate Athletic Association (“NCAA”) governs and enforces the mandatory regulations for student-athletes.<sup>13</sup> The NCAA principle of amateurism prohibits student-athletes from receiving any compensation beyond academic or athletic scholarships.<sup>14</sup> In 2016, a group of student-athletes brought suit, challenging NCAA amateurism and claiming to be employees under the Fair Labor Standards Act (“FLSA”).<sup>15</sup> In *Berger v. NCAA*, the Federal Court of Appeals for the Seventh Circuit held that student-athletes are not employees under the FLSA and therefore are not entitled to minimum wage and overtime pay.<sup>16</sup> Judge Hamilton’s concurrence questioned the majority’s holding as applied to Division I athletes in revenue-generating sports, suggesting that student-athletes

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football/news/ncaa-expert-69-percent-of-public-opposes-paying-college-players/ [https://perma.cc/C54L-Q6Q8].

10. Sara Ganim, *Paying college athletes would hurt traditions, NCAA chief Emmert testifies*, CNN (June 19, 2014), <http://www.cnn.com/2014/06/19/us/ncaa-obannon-lawsuit-trial/index.html> [https://perma.cc/V732-JZYA].

11. *Id.*

12. “[F]our out of 10 people are less likely to watch or attend college games” if college athletes are compensated. Solomon, *supra* note 9. NCAA President Mark Emmert explains that the customs of college sports, such as the “camaraderie of game day, the tailgating, the atmosphere of a stadium packed with nearly 100,000 fans and the pride of cheering for a university team,” could all go away if we get rid of NCAA amateurism policies and pay student-athletes as employees. Ganim, *supra* note 10.

13. *Division I Governance*, NCAA, <http://www.ncaa.org/governance?division=d1> [https://perma.cc/6WDS-QB6Z] (last visited Feb. 7, 2019); *see also* Scott A. Mitchell, *Hit, Sacked, and Dunked by the Courts: The Need for Due Process Protection of the Student-Athlete in Intercollegiate Athletics*, 19 T. MARSHALL L. REV. 733, 736 (1994).

14. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> [https://perma.cc/VK7V-W4M5] (last visited Oct. 17, 2018).

15. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 290 (7th Cir. 2016); *see also* *Dawson v. Nat’l Collegiate Athletic Ass’n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

16. *Berger*, 843 F.3d at 290.

should be employees.<sup>17</sup> *Berger* alone creates uncertainty as to whether student-athletes are employees under the FLSA and whether courts can reconcile an employee classification with the NCAA amateurism rules.

This Comment proposes that student-athletes of revenue-generating sports are not employees under the FLSA and should not receive minimum wage or overtime pay from schools. Recognizing student-athletes as employees creates serious issues for schools, such as the requirement to pay student-athletes minimum wage, compliance with Title IX,<sup>18</sup> and challenges calculating which student-athletes should receive compensation and for which activities. A feasible solution to this predicament is to amend the NCAA amateurism rules to allow student-athletes to profit from outside revenue sources and endorsements.<sup>19</sup> Student-athletes would be “self-employed” once they commit to an institution and would generate revenue on their own behalves.<sup>20</sup> Allowing student-athletes to benefit from endorsements ameliorates problems associated with classifying student-athletes as employees.<sup>21</sup> Additionally, permitting student-athletes to profit from their generated revenue would decrease litigation, provide clarity in

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17. NCAA Division I institutions are required to sponsor a certain amount of sports, award financial grants to student-athletes, and follow the rules set out in the NCAA Division I Manual. Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 733 (2007); *Berger*, 843 F.3d at 294 (Hamilton, J., concurring).

18. Title IX of the Educational Amendments Act of 1972 requires institutions receiving federal funding to provide equal opportunities and funding to males and females. 20 U.S.C. § 1681 (2012). Failure to comply with Title IX can result in the Office of Civil Rights pulling federal funding from a school. *Id.* If student-athletes were employees, both males and females would have to be paid the same minimum wage and have the opportunity to earn pay for the same number of hours. *Id.* See also Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326 (2012); see *infra* Part IV.C.

19. This Comment proposes amending the NCAA amateurism policies to allow student-athletes to receive endorsements, but not create a free-market situation in which players are recruited and paid their fair market value to attend a university as is currently proposed in *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 14-cv-02758-CW (D.N.J. Mar. 17, 2014).

20. Self-employed in this context analogizes student-athletes to “independent and thriving contractors [and] small business owners.” Jayesh M. Rathod & Michal Skapski, *Reimagining the Law of Self-Employment: A Comparative Perspective*, 31 HOFSTRA LAB. & EMP. L.J. 159, 159 (2013).

21. See generally Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’s Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 415 (2012).

determining student-athletes' employment status, and establish a modern version of NCAA amateurism rules more in accord with the current state of collegiate athletics.

Part I of this Comment provides a general overview of FLSA and the NCAA. Part II explains how the NCAA prohibits student-athletes' classification as employees and analyzes the National Labor Relations Act ("NLRA") and workers' compensation in relation to the NCAA amateurism principles barring student-athletes' employee status. Part II also examines *Berger v. NCAA* and the uncertainty Judge Hamilton's concurrence creates regarding the applicability of the protections of the FLSA to student-athletes. In addition, Part II addresses *Dawson v. NCAA*, a more recent suit brought in the wake of *Berger*. Part III concludes that under the "economic realities" test, student-athletes are not FLSA employees. Finally, Part IV offers three potential solutions to decrease the amount of litigation regarding the compensation of student-athletes. This Comment argues specifically that the best solution to decrease litigation is a revision of the NCAA amateurism policies, allowing student-athletes to profit from endorsements and outside revenue sources.

#### I. MINIMUM WAGE FOR COLLEGE PLAY: THE FAIR LABOR STANDARDS ACT AND THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

The FLSA dramatically altered the American worker's life in 1938.<sup>22</sup> Not only did the FLSA guarantee a minimum wage, but it also improved working conditions for many people.<sup>23</sup> Individuals who petition to be covered employees<sup>24</sup> under the FLSA can gain the benefits of employee status that would not otherwise be afforded to them.<sup>25</sup> Student-athletes are unable to gain employment status under the FLSA because the NCAA does not allow student-athletes to be classified as employees.<sup>26</sup>

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22. Anna P. Prakash & Brittany B. Skemp, *Beyond the Minimum Wage: How the Fair Labor Standards Act's Broad Social and Economic Protections Support Its Application to Workers Who Earn A Substantial Income*, 30 ABA J. LAB. & EMP. L. 367, 368 (2015).

23. *Id.*

24. A "covered employee" under the FLSA must be paid federal minimum wage and overtime rates for any work over 40 hours a week. *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. WAGE & HOUR DIVISION (July 2009), <https://www.dol.gov/whd/regs/compliance/whdfs14.htm> [<https://perma.cc/XR6C-K47H>].

25. Prakash & Skemp, *supra* note 22, at 368.

26. NCAA amateurism principles do not allow for student-athletes to be employees of the school they attend. *Amateurism*, *supra* note 14.

*A. Minimum Wage and a Safer Workplace: History of the Fair Labor Standards Act*

The FLSA is a federal employment act Congress passed in 1938 that regulates minimum wage, overtime pay, recordkeeping, and child labor standards to ensure fair treatment of employees.<sup>27</sup> The Act defines employer as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>28</sup> In an equally ambiguous fashion, the Act defines an employee as “any individual employed by an employer.”<sup>29</sup> To qualify as an employee under the FLSA one must perform work for an employer;<sup>30</sup> the FLSA does not define “work,” however.<sup>31</sup> Employees covered under the Act benefit from the assurance that they will be paid a guaranteed minimum salary and reasonable hours.<sup>32</sup>

Federal Courts use various methods to determine if an individual is an employee under the FLSA.<sup>33</sup> Although there is no single test courts must

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27. 29 U.S.C. § 201 (2012); Prakash & Skemp, *supra* note 22, at 368; Daniel B. Abrahams et al., *Introduction to The Fair Labor Standards Act*, in EMPLOYER’S GUIDE TO THE FAIR LABOR STANDARDS ACT 100 (1993). Under the FLSA, employers must pay employees no less than the minimum wage, currently set at \$7.25 an hour. *Id.* Overtime must be paid at time-and-a-half of an employee’s regular pay rate for hours worked beyond 40 hours in a seven-day work week. *Id.* at 110. A covered employee under the FLSA is guaranteed a salary, a guaranteed minimum for services performed, and reasonable work hours. Sherrie Scott, *What Are The Benefits of the Fair Labor Standards Act?*, CHRON, <https://smallbusiness.chron.com/benefits-fair-labor-standards-act-2957.html> [<https://perma.cc/7GSK-WXSP>] (last visited Feb. 7, 2019).

28. 29 U.S.C. § 203(d).

29. *Id.* § 203(e)(1).

30. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 290 (7th Cir. 2016). This Comment uses the Meriam-Webster definition of “work”: an “activity that a person engages in regularly to earn a livelihood.” *Work*, MERIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/work> [<https://perma.cc/4NDH-G2EB>] (last visited Feb. 7, 2019).

31. *Berger*, 843 F.3d at 290.

32. Scott, *supra* note 27. “Prior to the FLSA’s enactment, working conditions were deplorable” and employees “worked long hours in unsafe environments,” “earn[ing] wages too small to secure even the most modest living standards.” Prakash & Skemp, *supra* note 22, at 368.

33. For example, the Ninth Circuit Court of Appeals uses a four-factor test to guide courts, which asks “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” *Bonnette v. Cal. Health & Welfare Agency*,

apply,<sup>34</sup> the Supreme Court “has instructed courts to construe the terms ‘employee’ and ‘employer’ expansively, [but with some] limits.”<sup>35</sup> Courts must assess the “totality of circumstances rather than on any technical label.”<sup>36</sup> This totality of circumstances analysis requires the courts to look at the economic reality of the working relationship between employees and employers.<sup>37</sup> Conducting a totality-of-circumstances analysis allows courts to consider whether the FLSA was intended to apply to a particular relationship.<sup>38</sup> Congress intended for some relationships, but not all, to be characterized as “employment relationships” under the FLSA; it remains unclear whether Congress had student-athletes in mind in enacting the law.<sup>39</sup> The United States Department of Labor (“DOL”) provides a list of relationships it does not classify as employment relationships, such as prison inmates, medical residents, and foster parents.<sup>40</sup> If Congress had intended to include all employment relationships, Congress would not have produced a handbook detailing all of the relationships that are not provided coverage under the FLSA.<sup>41</sup>

Although there is no rigid test, the “economic realities” test is the most widely used and accepted method to determine whether there is an economic relationship present; namely, it assesses whether an employer intended an employment relationship with a particular worker.<sup>42</sup> The DOL

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704 F.2d 1465, 1470 (9th Cir. 1983). Courts may determine employee status as a determination of the circumstances of the whole activity. *Id.*

34. Abrahams et al., *supra* note 27, at 240.

35. Dawson v. Nat’l Collegiate Athletic Ass’n, 250 F. Supp. 3d 401, 405 (N.D. Cal. 2017) (citing Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 295 (1985)).

36. Berger, 843 F.3d at 286.

37. *Id.* at 290.

38. *Id.* (citing Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992)).

39. See generally Jonathan L. Israel, *Repeat After Me: College Athletes Are Not School Employees Under the FLSA*, NAT’L L. REV. (Nov. 6, 2017), <https://www.natlawreview.com/article/repeat-after-me-college-athletes-are-not-school-employees-under-flsa> [<https://perma.cc/S5TR-2KGL>].

40. See Department of Labor Field Operations Handbook, *Chapter 10 FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits*, U.S. DEP’T LAB. (Mar. 8, 2018), [https://www.dol.gov/whd/FOH/FOH\\_Ch10.pdf](https://www.dol.gov/whd/FOH/FOH_Ch10.pdf) [<https://perma.cc/Z55B-J6K6>].

41. See generally *id.*

42. See Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961); Rutherford Food Corp. v. McComb, 331 U.S. 722, 727 (1947); see generally United States Department of Labor Wage and Hour Division, Opinion Letter Fair Labor Standards Act (FLSA), 2015 WL 4449086, at \*1 (describing the economic realities test that has developed as an alternative to the common law control test).

enumerates guiding factors for courts to determine the “economic reality” of the employment relationship: (1) the permanency of the relationship; (2) the amount of the worker’s individual investment and employer’s investment in facilities and equipment; (3) the opportunities for the worker to experience profit and loss; (4) the worker’s skill and initiative; (5) the degree of control by the employer; and (6) the extent to which the work is an essential part of the employer’s business.<sup>43</sup>

The permanency or indefiniteness of a working relationship can suggest that an employment relationship exists and can dictate when the worker is an employee or an independent contractor.<sup>44</sup> The more permanent the relationship, the more likely there is an employment relationship.<sup>45</sup> The amount of work an individual invests in facilities, equipment, and tools, compared to the amount an employer invests, may also help determine whether an employment relationship exists.<sup>46</sup> If an individual personally invests in tools and equipment to complete a job, it may signify that he is in business as an independent contractor and not an employee of the employer.<sup>47</sup> Courts normally consider an independent contractor an employee if he has the ability to make managerial decisions and experience the effects of those decisions on profits and losses, as

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Although the common law control test was popular when drafting the FLSA, Congress did not include the test in the statute. Since the drafting, courts have shifted to applying the “economic realities” test. *Id.* “The U.S. Supreme Court has . . . indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls.” *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB. WAGE & HOUR DIVISION (July 2008), <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf> [<https://perma.cc/7D6N-ZHR6>].

43. *Fact Sheet #13, supra* note 42; *see also* Abrahams et al., *supra* note 27, at 240. The factors are a guideline and are not required to be followed by courts when analyzing an employment relationship. *Id.*

44. *Fact Sheet #13, supra* note 42. Independent contractors are not employees, are economically independent, and are in business for themselves. *Id.* *See also* Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1442 (10th Cir. 1998) (explaining that independent contractors often have fixed employment periods whereas employees usually have a continuous and indefinite relationship with an employer).

45. *Fact Sheet #13, supra* note 42.

46. *Id.* *See also* Chao v. Mid-Atl. Installation Servs., Inc., 16 F. App’x 104, 107 (4th Cir. 2001) (holding that cable installers who had to provide their own trucks, specialized tools, uniforms, pagers, and automobile insurance were not employees, rather independent contractors).

47. *Fact Sheet #13, supra* note 42.

opposed to a worker who does not make managerial decisions for a business.<sup>48</sup> An independent contractor demonstrates independent business judgement and has specialized skills, granting him economic independence from a putative employer.<sup>49</sup> An independent contractor's specialized skills indicate that he is in business for himself, in contrast to an employee working for an employer.<sup>50</sup> The more control an employer has over a worker—including the time and manner of the work to be performed—helps the courts determine whether an employment relationship exists.<sup>51</sup> More control usually indicates the presence of an employer–employee relationship.<sup>52</sup> Likewise, a worker is ordinarily found to be an employee if his performance or service is vital to the business's success.<sup>53</sup> In contrast, an independent contractor provides temporary services that do not generally impact a business's overall profitability.<sup>54</sup>

In addition to the DOL's suggested factors, courts have developed a variety of multifactor tests to help with the “economic realities” analysis.<sup>55</sup> The Seventh and Second Courts of Appeals have articulated factors that are useful in determining the economic reality of employment relationships.<sup>56</sup> Other circuits—like the Ninth Circuit—have strayed away

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48. *Id.* See also *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989) (explaining that cake decorators working at a bakery had no control over advertising, quality of the work, quality of the cakes, ingredients in the cakes, and therefore no input or control of any determinants of profits of the business).

49. *Fact Sheet #13*, *supra* note 42. Independent contractors are not employees, are economically independent, and are in business for themselves. *Id.* See also *Herman v. Mid-Atl. Installation Servs., Inc.*, 164 F. Supp. 2d 667, 675 (D. Md. 2000), *aff'd sub nom. Chao*, 16 F. App'x 104 (holding that cable installers were independent contractors due to their highly specialized skills and trade, similar to electricians and carpenters).

50. *Fact Sheet #13*, *supra* note 42.

51. *Id.* See also *Dole*, 875 F.2d at 810 (finding that having no control over decisions indicates a lack of an employment relationship).

52. *Fact Sheet #13*, *supra* note 42. One factor is not more indicative of an employment relationship and all factors must be assessed. *Id.*

53. *Id.*

54. *Id.* See also *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (holding that services provided by nurses constituted an integral part of the business—to provide health care—finding that the nurses were employees).

55. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016).

56. *Id.* at 290 (citing *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535–38 (7th Cir. 1987)). In *Secretary of Labor v. Lauritzen*, the secretary sought declaration as a matter of law that migrant farm workers were employees of the farm. The seven factors the court used in determining whether migrant laborers were employees are: (1) the amount of control the landowner had over the migrant

from any multifactor tests and have held that circumstances of the entire activity must be considered when making the ultimate determination of employee status.<sup>57</sup> Each circuit is free to develop its own approach to determine if an employment relationship exists based on circumstances and factors that best fit the factual situation.<sup>58</sup>

To further assist the courts in determining whether an employment relationship exists, the DOL Field Operations Handbook (“FOH”) provides “interpretations regarding the employment relationship required

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workers; (2) the possibility for the migrant workers to receive profit and incur losses; (3) the degree of skill required from each worker; (4) the amount of capital the workers invested; (5) the permanency and duration of the relationship; (6) whether the service of the migrant workers was an integral part of the business; and (7) the economic dependence of the migrant workers on landowners. *Lauritzen*, 835 F.2d at 1535–38. In *Glatt v. Fox Searchlight Pictures*, unpaid interns brought a class action suit against the motion picture distributor claiming compensation as employees. *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528, 536–37 (2d Cir. 2015). The court listed the following factors as a non-exhaustive list to help determine if an intern is an employee: (1) the extent to which the intern understands there is no expectation of compensation; (2) the extent to which the internship provides training similar to what one would receive in an educational setting; (3) the extent to which the internship is tied to the intern’s formal education program and course work; (4) the extent to which the internship accommodates the academic calendar; (5) the extent to which the internship’s duration is limited to provide the intern with beneficial learning; (6) the extent to which the intern’s work complements, rather than displaces, the work of paid employees; and (7) the extent to which the intern and the employer understand that the internship is conducted without promise of a paid job upon completion of the internship. *Berger*, 843 F.3d at 290 (citing *Glatt*, 811 F.3d at 536–37). The Second Circuit held that interns who brought a claim for employment status were not employees; they participated knowing that they would not be paid, and the internship was conducted primarily for educational and training purposes. *Glatt*, 811 F.3d at 536–37.

57. *Dawson v. Nat’l Collegiate Athletic Ass’n*, 250 F. Supp. 3d 401, 405–06 (N.D. Cal. 2017).

58. *See generally Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Donovan v. Sabine Irrigation Co.*, 695 F.2d 194, 195 (5th Cir. 1983); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984).

for the [FLSA] to apply.”<sup>59</sup> The FOH<sup>60</sup> provides that college students who participate in extracurricular activities are not employees within the meaning of the FLSA because the DOL considers collegiate athletics an extracurricular activity in which participation is purely voluntary—an activity that the FLSA intends to exclude.<sup>61</sup> Thus, according to the DOL, reasons unrelated to immediate compensation motivate participation in athletics, and participation does not qualify as sufficient “work” to qualify for minimum wage and overtime pay under the FLSA.<sup>62</sup> The NCAA shares the same view as the DOL and also agrees that student-athletes are not employees under federal employment statutes.<sup>63</sup>

*B. The National Collegiate Athletic Association and the Development of Amateur Athletics*

When evaluating the economic reality of the employment relationship, courts must also consider the underlying policies of the NCAA controlling student-athletes’ status as employees.<sup>64</sup> The NCAA makes, enforces, and interprets the rules preventing student-athlete compensation beyond any academic or athletic scholarships.<sup>65</sup> President Theodore Roosevelt founded the NCAA in 1906 “to protect young people from the dangerous and exploitive athletics practices of the time” and to regulate the rules and

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59. Department of Labor Field Operations Handbook, *supra* note 40. The DOL guidelines and handbook assisted courts in determining whether student-athletes, interns, and prisoners were employees for FLSA purposes. *See generally* *Berger*, 843 F.3d at 291; *Dawson*, 250 F. Supp. 3d at 405–06; *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015); *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).

60. Department of Labor Field Operations Handbook, *supra* note 40.

61. *Berger*, 843 F.3d at 293.

62. *Id.* The majority decision in *Berger* looks at the DOL FOH as persuasive authority and uses its interpretation to determine that student-athletes are not employees under the act. *Id.*

63. *See* Donald Remy, *NCAA Responds to union proposal*, NCAA, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> [<https://perma.cc/N6RL-7HDW>] (last visited Feb. 7, 2019).

64. *Berger*, 843 F.3d at 293.

65. Remy, *supra* note 63.

competition of intercollegiate football.<sup>66</sup> Gradually, the NCAA expanded its jurisdictional control to cover all intercollegiate athletic departments.<sup>67</sup>

The NCAA's jurisdictional control allows the organization to act as the governing body of member athletic departments and to enforce rules.<sup>68</sup> Member institutions elect to be part of the NCAA, which allows institutions to receive monetary support and guidance from NCAA, and to propose regulations for all other member schools to adopt and follow.<sup>69</sup> Once a regulation is adopted, the NCAA ensures the compliance of all member institutions and departments.<sup>70</sup> Noncompliance may result in NCAA sanctions,<sup>71</sup> such as limiting the number of athletic scholarships a school can award or potentially banning coaches from coaching for a substantial amount of time.<sup>72</sup>

The NCAA subdivides member institutions into three divisions—Divisions I, II, and III<sup>73</sup>—based on the number of sports each school is able to support financially.<sup>74</sup> Division I schools have the largest athletic

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66. Dan Treadway, *Why does the NCAA Exist?*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility\\_b\\_3020985.html](https://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html) [<https://perma.cc/JS6A-V4TM>]; *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/National-Collegiate-Athletic-Association> [<https://perma.cc/72UF-DVQ7>] (last visited Feb. 7, 2019).

67. See generally Gordon S. White, *N.C.A.A. Telecast Rights on Football Struck Down*, N.Y. TIMES (Sept. 16, 1982), <http://www.nytimes.com/1982/09/16/sports/ncaa-telecast-rights-on-football-struck-down.html> [<https://perma.cc/H8L-5H3Y>] (explaining that the NCAA was operating as a “Classic Cartel” in the operation of controlling the number of television appearances each collegiate football team could participate in and the price for each appearance).

68. *Division I Governance*, *supra* note 13; see also Mitchell, *supra* note 13, at 736.

69. Mitchell, *supra* note 13. See also *What We Do*, NCAA, <http://www.ncaa.org/about/what-we-do> [<https://perma.cc/6V4X-K3QQ>] (last visited Feb. 7, 2019).

70. *Id.*

71. *Infractions Phases and Parties*, NCAA, <http://www.ncaa.org/sites/default/files/EnforcementHandout%20-%20Infractions%20Phases%20and%20Parties.pdf> [<https://perma.cc/X2XH-SCRK>] (last visited Oct. 17, 2018).

72. *Enforcement Process: Penalties*, NCAA, <http://www.ncaa.org/enforcement/enforcement-process-penalties> [<https://perma.cc/K6KT-T2P3>] (last visited Feb. 7, 2019).

73. Katherine McClelland, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 171 (2004).

74. Terrill L. Johnson, *The Antitrust Implications of the Divisional Structure of the National Collegiate Athletic Association*, 8 U. MIAMI ENT. & SPORTS L.

budgets, provide full athletic scholarships, and enroll the greatest number of students.<sup>75</sup> Division II schools may award only partial athletic scholarships, and Division III schools may not award any athletic scholarships.<sup>76</sup> Additionally, each division is subject to specific rules regulating the number of sports schools must sponsor and the amount and type of financial aid the school may award.<sup>77</sup> In exchange for giving up discretion in awarding scholarships and relinquishing control over sports in general, the NCAA provides support to its members.<sup>78</sup>

The NCAA's current interpretation of its rules provides that no employment relationship exists between student-athletes and the NCAA or its member institutions.<sup>79</sup> The NCAA's principle of amateurism,<sup>80</sup> therefore, prohibits student-athletes from receiving any type of salary for

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REV. 97 (1991); *Divisional Differences and the History of Multidivisional Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivisional-classification> [https://perma.cc/W3HP-3TX9] (last visited Feb. 7, 2019).

75. *Recruiting Facts*, NCAA (Mar. 2018), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> [https://perma.cc/FK7M-TLYM]. This Comment focuses on Division I schools because they produce the most revenue and award the most athletic scholarships. See *NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances> [https://perma.cc/XSV7-CU6L] (last visited Feb. 7, 2019).

76. Parasuraman, *supra* note 17, at 733; *Divisional Differences and the History of Multidivisional Classification*, *supra* note 74. Institutions classified as Division I must be able to financially sponsor seven sports for men and seven sports for women, two of those being team sports for each gender, and are allowed to award full athletic scholarships. *Id.* Division II institutions must sponsor at least five sports for men and five for women, with two team sports for each gender, and may give partial athletic scholarships. *Id.* Division III institutions must sponsor five sports for men and five for women, with two team sports for each gender, and may not award any scholarships based on athletic ability. *Id.*

77. *Divisional Differences and the History of Multidivisional Classification*, *supra* note 74.

78. *Id.* *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [https://perma.cc/T8L4-8NFY] (last visited Feb. 7, 2019). The NCAA provides monetary support, medical care, academic support services, and training opportunities to student-athletes at member institutions. *What We Do*, *supra* note 69.

79. Remy, *supra* note 63.

80. See *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 286 (7th Cir. 2016); see also *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017) (football player challenged the NCAA prohibition of paying student-athletes as employees under the FLSA); see generally *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

participating in a sport.<sup>81</sup> If student-athletes receive any extra compensation or benefits, they are ineligible to compete in NCAA athletics.<sup>82</sup> Amateurism<sup>83</sup> is “a bedrock principle of college athletes and the NCAA,”<sup>84</sup> both ensuring that student-athletes focus on attaining a quality education and preserving the idea that student-athletes do not play for pay.<sup>85</sup> The NCAA stresses that student-athletes are competing as amateur athletes and are “students first, athletes second.”<sup>86</sup> In light of the current reality of the collegiate model,<sup>87</sup> amateurism presents an area ripe for litigation.<sup>88</sup> To limit the potential litigation over compensation of

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81. *Amateurism*, *supra* note 14. Student-athletes may receive athletic scholarships, but may not be paid compensation similar to that which an employee would receive. *Id.* Student-athletes may not receive any employee benefits. *Id.*

82. If a student-athlete is deemed ineligible, he is not allowed to compete in any competitions for his respective school. *Id.*

83. See TAYLOR BRANCH, *THE CARTEL: INSIDE THE RISE AND FALL OF THE NCAA* 279 (2011); see also Joshua Senne, *A Review of the NCAA's Business Model, Amateurism, and Paying the Players*, SPORT J. (Jan. 8, 2018, 11:24 AM), <http://thesportjournal.org/article/a-review-of-the-ncaas-business-model-amateurism-and-paying-the-players/> [<https://perma.cc/35D8-Q7DJ>]; see also Marc Edelman, *How Young American Athletes Can Best Challenge a Bureaucracy that Prevents them from Earning a Living*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 135, 146 (2013).

84. *Amateurism*, *supra* note 14.

85. *Id.*

86. *Id.*

87. “In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.” *Id.* The reality is that student-athletes are now being treated as athletes first, and students second. See generally Shane Battier, *Let Athletes be Students*, PLAYERS TRIB. (Nov. 3, 2017, 4:12 PM), <https://www.theplayertribune.com/shane-battier-ncaa-let-athletes-be-students/> [<https://perma.cc/JAT8-D759>].

88. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016); see also *Jenkins v. NCAA*, No. 14-cv-02758-CW (D.N.J. Mar. 17, 2014) (ongoing litigation seeking the open-market recruitment of players and the ability to pay players what schools think is appropriate for players name, image, and likeness). See also *Livers v. NCAA*, 2:17-cv-04271-MMB (E.D. Penn. 2017) (a suit filed in October 2017 in the Eastern District of Pennsylvania, seeking the right of compensation under the FLSA for scholarship athletes that involves specific schools who employ staff such as trainers and coaches who “control” the student-athletes on scholarship and create an employment relationship). See *infra* Part III.A; *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016); see also *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

student-athletes,<sup>89</sup> the FLSA should not grant student-athletes employee status. Rather, the NCAA Division I member institutions should revise the NCAA amateurism policies to allow student-athletes compensation through endorsement deals.

## II. STUDENT-ATHLETES AS EMPLOYEES UNDER THE NLRA, WORKERS' COMPENSATION, AND FLSA

Many litigants have challenged the student-athlete compensation rules.<sup>90</sup> *O'Bannon v. NCAA*, *Berger v. NCAA*, and *Jenkins v. NCAA* are the most prominent cases placing the compensation of student-athletes at the forefront.<sup>91</sup> Notwithstanding the increasing number of cases brought to challenge the status of student-athletes, courts hold consistently that student-athletes are not employees under any legal standard, including workers' compensation, the NLRA, and the FLSA.<sup>92</sup>

### *A. Student-Athletes Not Considered Employees Under Employment Statutes*

The NCAA contends that student-athletes are not employees within any definition of the NLRA.<sup>93</sup> In 2014, the Northwestern University football team petitioned the National Labor Relations Board ("NLRB") to unionize as employees under the NLRA.<sup>94</sup> The players sought to establish a collective bargaining agreement to regulate the "working" conditions and benefits of their alleged employment.<sup>95</sup> The NLRB chose not to assert

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89. See *supra* discussion Part I.A.

90. See *O'Bannon*, 802 F.3d 1049 at 1053; *Jenkins*, No. 14-cv-02758-CW; *Livers*, 2:17-cv-04271-MMB; *Berger*, 843 F.3d at 294; *Dawson*, 250 F. Supp. 3d at 403.

91. See *supra* note 90.

92. *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000); *Berger*, 843 F.3d at 294; Northwestern Univ., Employer & Collegiate Athletes Players Ass'n, 362 N.L.R.B. 167, 2015 WL 4882656 (Aug. 17, 2015); see also Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 297 (2016).

93. See Remy, *supra* note 63; see also Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 507 (2015).

94. *Northwestern Univ.*, 2015 WL 4882656; Patrick C. Johnston, *Northwestern Football and College Athletes: Be Careful What You Wish For*, 49 J. MARSHALL L. REV. 655, 660 (2015).

95. Northwestern players sought to establish a Collective Bargaining Agreement through the players' organization College Athletes Players

jurisdiction in the matter, ultimately failing to address whether the players were employees under the NLRA.<sup>96</sup> Had the NLRB asserted jurisdiction and considered the question of student-athletes employment status, perhaps there would be more clarity as to why classifying student-athletes as employees would not effectuate the policies of the NLRA and instead would cause instability in labor relations.<sup>97</sup>

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Association in which pay, health insurance, hours, and other conditions and benefits associated with employment would be established in a contractual agreement between the players and the university. *Northwestern Univ.*, 2015 WL 4882656. “Collective bargaining consists of negotiations between an employer and a group of employees so as to determine the conditions of employment. The result of collective bargaining procedures is a collective agreement. Employees are often represented in bargaining by a union or other labor organization.” *Collective Bargaining*, LEGAL INFO. INST. (Nov. 3, 2017, 4:20 PM), <https://www.law.cornell.edu/wex/collectivebargaining> [https://perma.cc/A4R5-NULR]. See generally Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627, 1635 (2017).

96. To collectively bargain, the Northwestern team had to bring a claim under the NLRA and file it with the NLRB. The NLRB may refuse to assert jurisdiction over a matter that would disturb the balance of labor practices. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players Union Bid*, N.Y. TIMES (Nov. 3, 2017, 4:26 PM), <https://www.nytimes.com/2015/08/18/sports/ncaaf/football/nlrbsays-northwestern-football-players-cannot-unionize.html> [https://perma.cc/2VQ3-BWK5]; *Northwestern Univ.*, 2015 WL 4882656. The Regional Director for Region 13 issued a decision in the case, finding that the University’s grant-in-aid scholarship football players were statutory employees under the NLRA and directed an election to take place on April 25, 2014. *Northwestern Univ., Employer & Collegiate Athletes Players Ass’n*, 198 L.R.R.M. (BNA) 1837, 2014 WL 1246914 (Mar. 26, 2014). Another recent NLRB decision involving Columbia University challenged the status of collegiate teaching students rather than student-athletes. *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).

97. The NLRB dismissed the case on the basis “that asserting jurisdiction in the case would not effectuate the policies of the NLRA to promote stability in labor relations” and instead would create more instability by allowing student-athletes of private institutions to unionize, but prohibiting student-athletes of public institutions from unionizing. Under the NLRA, only private employers are allowed to join unions, meaning student-athletes of private universities would be able to unionize, while student-athletes at public universities would be prohibited from unionizing. *Northwestern Univ.*, 2015 WL 4882656; *Northwestern University Decision*, NLRB (Sept. 12, 2017, 3:45 PM), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node3034/Northwestern%20Fact%20Sheet%202015-08.pdf> [https://perma.cc/PB8R-7LWS].

The Northwestern football team's unionization attempt was not the only time student-athletes were denied employment status.<sup>98</sup> In addition to rejecting the employee status of student-athletes under the NLRA, the NCAA also maintains that student-athletes are not employees for purposes of workers' compensation.<sup>99</sup> Even when a student-athlete has received an athletic scholarship, courts find that such a student-athlete is not an employee for the purposes of workers' compensation because there is no contractual employer–employee relationship.<sup>100</sup>

Likewise, courts have denied workers' compensation benefits when a student-athlete has signed a Letter of Intent and a Financial Aid Agreement.<sup>101</sup> Courts have held that the agreement to play a sport in exchange for financial assistance does not constitute a contract for employment;<sup>102</sup> consequently, student-athletes do not receive workers' compensation benefits.<sup>103</sup>

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98. See *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288 (1957); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (1983).

99. See *supra* note 98.

100. See *Waldrep*, 21 S.W.3d at 698. Kent Waldrep, a football player at Texas Christian University ("TCU") was severely injured and paralyzed while playing football. *Id.* Waldrep considered his injury a "work place accident," filed for workers' compensation, and was awarded workers' compensation benefits. *Id.* The Texas Employers Insurance Association, the workers' compensation insurer, appealed the award to the district court. *Id.* A jury concluded that Waldrep was not an employee of TCU when he was injured and denied him workers' compensation benefits. *Id.* See also *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983) ("Scholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by the [u]niversity for their skills in their respective areas.").

101. *Waldrep*, 21 S.W.3d at 698. A National Letter of Intent is a letter a student-athlete signs committing him to attend a NCAA Division I or II for one academic year. See *Recruiting*, NCAA (Mar. 7, 2018, 10:17 PM), <http://www.ncaa.org/student-athletes/future/recruiting> [<https://perma.cc/JU4A-C6Y7>]. A financial aid agreement is a scholarship agreement between a student-athlete and an institution detailing the amount of scholarship and aid the student-athlete will receive from the institution. *Frequently Asked Questions about the NCAA*, NCAA (Mar. 7, 2018, 10:25 PM), <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> [<https://perma.cc/9BT2-YUKR>].

102. *Waldrep*, 21 S.W.3d at 700.

103. See *generally id.*

*B. Berger, Dawson, and the Compensation of Student Athletes Under the FLSA*

The lack of a concrete definition of employee under the FLSA creates uncertainty, prompting challenges as to whether student-athletes are FLSA employees and thus guaranteed the Act's protections.<sup>104</sup> Only two cases have asserted claims against the NCAA under the FLSA: *Berger v. NCAA* and *Dawson v. NCAA*.<sup>105</sup> *Berger* and *Dawson* are the first cases challenging student-athletes' right to receive a minimum wage.<sup>106</sup> In both cases, the courts held that student-athletes do not qualify as employees and thus cannot receive the benefits the FLSA provides.<sup>107</sup> Despite the consistent holdings, *Berger* and *Dawson* indicate that there may be potential changes regarding the compensation of NCAA Division I student-athletes by casting doubt on NCAA amateurism principles.<sup>108</sup>

*1. Running to the Bank: Berger v. NCAA*

In *Berger*, two female Division I track athletes from the University of Pennsylvania brought suit against the NCAA, claiming that student-athletes are employees under the FLSA and thus entitled to minimum wage and overtime pay.<sup>109</sup> The student-athletes did not receive any athletic scholarships because the University of Pennsylvania does not offer athletic

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104. Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1005 (1999); see also *Livers v. Nat'l Collegiate Athletic Ass'n*, 2:17-cv-04271-MMB, (E.D. Penn. 2017).

105. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

106. This Comment specifically focuses on the compensation of NCAA Division I student-athletes. The recent litigation involving the compensation of student-athletes has been brought solely by Division I student-athletes. *Berger*, 843 F.3d at 286; *Dawson*, 250 F. Supp. 3d at 403. The pending appeal of *Dawson v. NCAA* has the potential to qualify student-athletes as employees, contradicting the prevailing view that student-athletes are generally not employees in any context. See generally *Dawson*, 250 F. Supp. 3d at 401, 403.

107. *Berger*, 843 F.3d at 286; *Dawson*, 250 F. Supp. 3d at 406.

108. *Berger*, 843 F.3d at 286; *Dawson*, 250 F. Supp. 3d at 403.

109. The plaintiffs brought suit in the U.S. District Court for the Southern District of Indiana seeking compensation based on the fact that their involvement and time spent on their sport constituted work for the university, rendering them employees and a right to be paid minimum wage and overtime. *Berger*, 843 F.3d at 286.

scholarships.<sup>110</sup> After examining the totality of the circumstances, the district court found that the student-athletes failed to establish an employment relationship.<sup>111</sup> Accordingly, the court dismissed the student-athletes' petition for failure to state a claim, reasoning that because student-athletes are not employees, they are not entitled to the protections of the FLSA.<sup>112</sup>

The plaintiffs appealed to the Seventh Circuit, requesting the court to use the factors the Second Circuit articulated to evaluate student-athletes' status.<sup>113</sup> The court reasoned that the Second Circuit intern "test" failed to capture the relationship between the plaintiffs as student-athletes and the university, as well as the NCAA's tradition of amateurism.<sup>114</sup> Rejecting the application of the rigid test, the Seventh Circuit opted instead for a more flexible approach.<sup>115</sup> The court evaluated the economic reality of the relationship between the student-athletes and the university, finding that the evaluation of student-athletes as employees better encapsulates the NCAA tradition of amateurism.<sup>116</sup>

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110. The University of Pennsylvania is consistent with all other Ivy League schools and does not offer athletic scholarships. *Id.* See also Vernon M. Strickland & David J. Santeusano, *Court Rules That Student-Athletes are not Employees Under the FLSA*, LEXOLOGY (Jan. 8, 2010, 4:20 PM), <https://www.lexology.com/library/detail.aspx?g=7f18fe26-11cf-45bc-8b24-fdedbdae5f7e> [<https://perma.cc/DY8H-KKCG>].

111. *Berger*, 843 F.3d at 294.

112. *Id.* at 289.

113. Appellant *Berger* brought suit on behalf of herself and similarly situated persons. The appellant in *Berger* likened interns to athletes and argued that the factors should have been applied to determine whether student-athletes are employees under the FLSA. *Id.* at 290 (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015)). See *Glatt*, 811 F.3d at 536–37 (listing factors).

114. *Berger*, 843 F.3d at 291 (“The multifactor test . . . simply does not take into account [the] tradition of amateurism or the reality of the student-athlete experience.”).

115. *Id.*

116. *Id.* See also *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (“Because status as an ‘employee’ for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the ‘economic reality’ of the working relationship between the alleged employee and the alleged employer to decide whether Congress intended the FLSA to apply to that particular relationship.”). The Seventh Circuit followed the reasoning of the district court and “followed the reasoning of *Vanskike* and held that the ‘factors used in the trainee and private-sector intern context fail to capture the nature of the relationship between the Plaintiffs, as student-athletes and Penn.’” *Berger*, 843 F.3d at 291 (citing *Vanskike*, 974 F.2d at 808).

The court also relied on persuasive authority from the DOL's FOH, which indicates that student-athletes are not employees under the FLSA.<sup>117</sup> College athletics are generally recognized as extra-curricular activities in which participation is voluntary.<sup>118</sup> According to the FOH, voluntary participation in athletics does not constitute work, and therefore, student-athletes are not employees within the meaning of the FLSA.<sup>119</sup>

Additionally, the court looked to legal scholarship and jurisprudence for guidance.<sup>120</sup> A majority of the relevant cases held that student-athletes are not employees.<sup>121</sup> Primarily citing workers' compensation cases, the Seventh Circuit decided that student-athletes were not, and have not been, recognized as employees within *any* employment context, let alone under the FLSA.<sup>122</sup> The court also agreed with the premise that legislation has consistently failed to recognize student-athletes as employees under any other employment statute.<sup>123</sup>

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117. *Berger*, 843 F.3d at 291. The DOL FOH “is an operations manual that provides Wage and Hour Division . . . investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.” *Field Operations Handbook (FOH)*, U.S. DEP'T LAB., (Jan. 17, 2018, 2:33 PM), <https://www.dol.gov/Whd/FOH/index.htm> [<https://perma.cc/P5GJ-X6V9>]. The Seventh Circuit has cited the FOH as persuasive authority several times. *See Driver v. Apple Ill., LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007).

118. *Berger*, 843 F.3d at 292.

119. *Id.* at 293.

120. *Id.* at 291–92 (citing Epstein & Anderson, *supra* note 92, at 297 (collecting cases and concluding that “the courts have been consistent finding that student athletes are not recognized as employees under any legal standard, whether bringing claims under workers' compensation laws, the NLRA or FLSA”)).

121. *Id.* *See also* *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983); *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288 (1957); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (1983).

122. *Berger*, 843 F.3d at 292 (citing *Rensing*, 444 N.E.2d at 1170); *State Comp. Ins. Fund*, 314 P.2d at 288; *Waldrep*, 21 S.W.3d at 692; *Coleman*, 336 N.W.2d at 224. “Although two courts reached the opposite conclusion over fifty years ago, they did so, at least in part, because the student athletes in those cases were also separately employed by their universities.” *Berger*, 83 F.3d at 292 (citing *Univ. of Denver v. Nemeth*, 257 P.2d 423 (1953); *Van Horn v. Indus. Accident Comm'n*, 219 Cal. App. 2d 457 (1963)).

123. *Berger*, 843 F.3d at 292 (citing *Rensing*, 444 N.E.2d at 1170; *State Comp. Ins. Fund*, 314 P.2d at 288; *Waldrep*, 21 S.W.3d at 692; *Coleman*, 336 N.W.2d at 224); *see also* Epstein & Anderson, *supra* note 92, at 297.

The majority affirmed the district court's decision to dismiss the case and held as a matter of law that student-athletes have no legal basis for FLSA claims.<sup>124</sup> Basing its decision on the NCAA principles of amateurism, the FOH, and the economic reality of student-athletes as employees,<sup>125</sup> the court concluded that "student-athletes' 'play'" is completely voluntary and not the type of work necessary to trigger the minimum wage and overtime requirements of the FLSA.<sup>126</sup> The long-standing tradition of amateurism "shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation," and play knowing they will not be paid.<sup>127</sup>

## 2. *Concurring but Creating Instability*

Judge David Hamilton did not agree with the entirety of the Seventh Circuit majority's reasoning in *Berger*.<sup>128</sup> In his concurrence, Judge Hamilton recognized that the student-athletes were not employees under the FLSA but specified that the same analysis does not necessarily apply to all student-athletes.<sup>129</sup> Judge Hamilton emphasized that *Berger et al.* were non-scholarship athletes and were members of a non-revenue-generating sport.<sup>130</sup> Although the tradition of amateurism weighed in favor of dismissal, Judge Hamilton suggested that amateurism may not result in a dismissal of claims athletes of revenue-generating sports pursued.<sup>131</sup>

In revenue-generating sports such as football and men's basketball, Judge Hamilton continued, the economic reality should not always result in dismissal of claims.<sup>132</sup> Student-athletes in those sports are more analogous to employees because their play is similar to employees who "work" and produce revenue for a business.<sup>133</sup> Football and basketball

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124. *Berger*, 843 F.3d at 294.

125. *Id.* at 293.

126. *Id.* See *supra* note 30 (providing a definition of "work").

127. *Berger*, 843 F.3d at 293.

128. *Id.* at 294 (Hamilton, J., concurring).

129. *Id.*

130. *Id.* at 293.

131. *Id.*

132. *Id.*

133. See generally Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should be Allowed to Unionize*, FORBES (Oct. 8, 2017, 9:28 AM), <https://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/#14b03e9c8d05> [https://perma.cc/XY8H-EUB6].

generate billions of dollars in revenue for universities;<sup>134</sup> yet student-athletes do not receive any of this revenue and are limited in the financial assistance they may receive.<sup>135</sup> Although he explained that “there may be further room for debate” in cases addressing the employment status of student-athletes, including the possibility of granting student-athlete’s employment status, Judge Hamilton used the economic reality as a guide to cast doubt on the employment status of student-athletes.<sup>136</sup>

### 3. *Running with Judge Hamilton’s Concurrence: Dawson v. NCAA*

As a result of Judge Hamilton’s concurrence in *Berger*, Lamar Dawson, a former NCAA Division I football player from University of Southern California (“USC”), initiated a class-action lawsuit against the Pacific-12 (“PAC-12”) Conference<sup>137</sup> and the NCAA.<sup>138</sup> Dawson alleged violations of the FLSA and a state law equivalent.<sup>139</sup> Dawson claimed

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134. See generally Cork Gaines, *The 25 Schools That Make the Most Money in College Sports*, BUS. INSIDER (Oct. 8, 2017, 9:20 AM), <http://www.businessinsider.com/college-sports-revenue-leaders-2015-9/#1-university-of-oregon--1960-million-1> [<https://perma.cc/SUC6-CHQU>].

135. *Berger*, 843 F.3d at 293 (Hamilton, J., concurring). See Sheetz, *supra* note 3 (explaining the full cost of attendance). Division I student-athletes may receive academic and athletic scholarship as well as a stipend through which the full cost of attendance is awarded. See generally *Scholarship*, NCAA (Nov. 5, 2017, 9:25 PM), <http://www.ncaa.org/student-athletes/future/scholarships> [<https://perma.cc/4P8E-BFVA>]. See also *Cost of Attendance Q&A*, NCAA (Oct. 8, 2017, 9:23 AM), <http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> [<https://perma.cc/2ZG3-EU6V>].

136. *Berger*, 843 F.3d at 293 (Hamilton, J., concurring).

137. The PAC-12 consists of a group of 12 universities that compete amongst each other in intercollegiate athletics to decide a conference champion. *About the Pac-12 Conference*, PAC-12 (Oct. 8, 2017, 9:46 AM), <http://pac-12.com/content/about-pac-12-conference> [<https://perma.cc/X2MJ-NTUN>]. The conference must be in compliance with NCAA regulations. *Id.* A member conference may set its own rules, but those rules must also be in compliance with NCAA regulations. *Id.* See also *Member Conference*, NCAA (Oct. 8, 2017, 9:47 AM), <http://www.ncaa.org/governance/membership> [<https://perma.cc/SCA3-HC9P>].

138. *Dawson v. Nat’l Collegiate Athletic Ass’n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

139. Dawson’s class action suit was brought on behalf of an “FLSA Class” of all “Division I FBS football players in the United States” and Dawson sought to establish employee status under the FLSA for the entire class. *Id.* See also Brandon Lilly, *College Football Explained*, GUARDIAN (Nov. 6, 2017, 7:52 AM), <https://www.theguardian.com/sport/blog/2012/oct/10/college-football-explained-ncaa> [<https://perma.cc/3JQP-6NB7>].

denial of pay for hours worked and overtime pay as well as failure to receive the appropriate minimum wage.<sup>140</sup> Dawson further alleged that the NCAA and PAC-12 were “joint employers” because the NCAA established the rules governing student-athletes, and the PAC-12 adopted and carried out the NCAA’s rules.<sup>141</sup> Further, Dawson argued that he was a member of a revenue-generating sport that earned “massive revenue” for USC, differentiating him from the plaintiffs in *Berger*.<sup>142</sup> Dawson relied on Judge Hamilton’s *Berger* concurrence to support his argument that athletes of revenue-generating sports, like USC football, are employees under the FLSA.<sup>143</sup> In response, the NCAA argued the student-athletes lacked standing<sup>144</sup> and asked the District Court of Northern California to dismiss the suit, arguing that Dawson’s claim was based on an untenable legal theory.<sup>145</sup>

The district court granted the NCAA’s motion to dismiss the suit and held that the student-athletes are not employees under the FLSA.<sup>146</sup> The court chose, however, not to apply the Ninth Circuit’s rigid test.<sup>147</sup> Rather, like the Seventh Circuit, the district court looked to the economic reality of the relationship between student-athletes and the school.<sup>148</sup> The court held that it was unclear whether the NCAA or PAC-12 were employers and also unclear whether student-athletes were employees;<sup>149</sup> that is, the four-factor test failed to provide an answer or assess the “true nature of the relationship.”<sup>150</sup> Analyzing the true nature of the relationship led the court to consider NCAA amateurism when making its decision.<sup>151</sup>

The district court’s reasoning in *Dawson* mirrored that of *Berger*—the court found the NCAA tradition of amateurism to be highly influential and important.<sup>152</sup> The court viewed participation in athletics as completely

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140. *Dawson*, 250 F. Supp. 3d at 403.

141. *Id.* See also *About the Pac-12 Conference*, *supra* note 137; *Member Conference*, *supra* note 137.

142. *Dawson*, 250 F. Supp. 3d at 406.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 403. The Northern District of California sits in the Ninth Circuit Court of Appeals. See *What Is the Ninth Circuit*, U.S. CTS. (Mar. 3, 2018, 10:37 PM), [https://www.ca9.uscourts.gov/judicial\\_council/what\\_is\\_the\\_ninth\\_circuit.php](https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php) [<https://perma.cc/Z5A7-WE92>].

149. *Dawson*, 250 F. Supp. 3d at 403.

150. *Id.*

151. *Id.*

152. *Id.* at 405.

voluntary without any expectation of earning an income, relying on the FOH as persuasive authority.<sup>153</sup> Dawson argued that *Berger* was distinguishable because *Berger*'s claim involved athletes of non-revenue-generating sports but *Dawson*'s claim involved Division I football players who earned "massive revenues" for the school.<sup>154</sup> Dawson heavily relied on Judge Hamilton's concurrence and the idea that *Berger*'s broad holding should not necessarily extend to all student-athletes.<sup>155</sup> Dawson further cited a regional decision in *Northwestern* in which the Northwestern University football players were determined to be employees under the NLRA.<sup>156</sup>

Dawson argued that football should not fall into the "extracurricular activities" excluded from coverage in the FOH because college athletes play football for the economic benefit of the NCAA, which creates an employment relationship.<sup>157</sup> Dawson claimed that "revenue-generating sports are like work-study programs" covered under the FLSA.<sup>158</sup> After distinguishing between "work-study programs, which exist for the benefit of the school, and football programs, which exist for the benefit of students and, in some limited circumstances, also benefit the school," the district court ultimately rejected Dawson's argument.<sup>159</sup> Relying on the FOH, the court found that interscholastic activities are primarily an educational opportunity provided to benefit participants and not the type of work that results in an employment relationship the FLSA contemplates.<sup>160</sup>

Although Dawson argued that his generation of revenue for the school distinguished him from the *Berger* plaintiffs, the district court refused to accept generation of revenue as determinative of employment, thereby rejecting Judge Hamilton's suggestion.<sup>161</sup> In examining the economic

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153. *Id.* at 406. The DOL FOH provides that students who participate in extracurricular activities are generally not employees under the FLSA. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (citing *Northwestern Univ., Employer & Collegiate Athletes Players Ass'n*, 198 L.R.R.M. (BNA) 1837, 2014 WL 1246914 (Mar. 26, 2014)). The NLRB ultimately chose not to assert jurisdiction over the *Northwestern* case and did not decide if student-athletes were employees for unionization purposes. *Northwestern Univ., Employer & Collegiate Athletes Players Ass'n*, 362 N.L.R.B. 167, 2015 WL 4882656 (Aug. 17, 2015).

157. *Dawson*, 250 F. Supp. 3d at 406. See Department of Labor Field Operations Handbook, *supra* note 40 (explaining athletics are not covered as extracurricular activities under the FLSA).

158. *Dawson*, 250 F. Supp. 3d at 406.

159. *Id.*

160. *Id.*

161. *Id.*

reality of the relationship between student-athletes and their schools, courts have consistently rejected the relevance of profitability.<sup>162</sup> The district court determined that participation in intercollegiate athletics does not constitute work and that there is no difference between sports that generate money and those that do not.<sup>163</sup>

Ultimately, the district court held that Division I football players have no legal basis to be considered employees under the FLSA and granted the NCAA's motion to dismiss without leave to amend.<sup>164</sup> Although both the *Berger* and *Dawson* courts determined that student-athletes are not employees, the question remains as to whether certain athletes—particularly those of revenue-generating sports—should be deemed employees under the FLSA.<sup>165</sup> Judge Hamilton's concurrence in *Berger* creates doubt regarding whether athletes should be employees.<sup>166</sup> Judge Hamilton failed to provide a test to determine the employment status of student-athletes; rather, he proposed the idea that the employment relationship is up for debate and should be based on the factual record of

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162. *Id.* at 407 (citing *Jochim v. Jean Madeline Educ. Ctr. of Cosmetology*, 98 F. Supp. 3d 750, 759 (E.D. Pa. 2015)).

163. *Id.* at 407. Dawson further argued that the Ninth Circuit in *O'Bannon v. NCAA* characterized the relationship between the NCAA and student-athletes as "labor for in-kind compensation" that established an employment relationship under FLSA. *Id.* In *O'Bannon v. NCAA*, the plaintiffs brought an anti-trust suit challenging the NCAA's rules, banning players from receiving compensation for the use of their name, image and likeness. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1052 (9th Cir. 2015). Ed O'Bannon brought an anti-trust lawsuit challenging the NCAA policy that prevents student-athletes from receiving any money for the use of their names, images, and likenesses in video games, promotional items, marketing etc. *Id.* The court in *O'Bannon* held that the NCAA's compensation rules were subject to anti-trust scrutiny and allowed for student-athletes to be paid the full cost of attendance. *Id.* The Ninth Circuit held that the NCAA compensation rules were subject to an anti-trust rule-of-reason analysis, but did not address the determination of student-athletes as employees. *Id.* The district court in *Dawson* relied on the fact that the *O'Bannon* opinion failed to mention anything about the employment relationship of student-athletes and the NCAA and found that Dawson failed to establish that the opinion had any weight on student-athletes being classified as employees for FLSA purposes. *Dawson*, 250 F. Supp. 3d at 407–08.

164. *Dawson*, 250 F. Supp. 3d at 408. Following the district court decision, Dawson appealed to the Ninth Circuit. *See Dawson v. NCAA*, No. 17-15973 (9th Cir. 2017).

165. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

166. *Id.*

the case at hand.<sup>167</sup> Ambiguity surrounding this test led to the debate in *Dawson* and will continue to prompt litigation if a court does not clarify whether student-athletes are employees under the FLSA.<sup>168</sup>

### III. APPLICATION OF THE ECONOMIC REALITY TEST TO NCAA DIVISION I STUDENT-ATHLETES

The economic reality of a Division I student-athlete's relationship with his respective school results in the absence of an employer–employee relationship and, consequently, the disqualification of the student-athlete as an employee under the FLSA.<sup>169</sup> Upon review of the DOL factors assessing the economic reality and totality of the circumstances of the employment relationship, the courts in *Berger* and *Dawson* were correct in holding student-athletes are not employees.

The economic reality test provides a helpful analysis to determine whether student-athletes should be given employee status and FLSA protections.<sup>170</sup> Using the DOL's illustrative factors for economic reality, it is clear that there is no employment relationship between a student-athlete and his school, and student-athletes are not employees under the FLSA.<sup>171</sup>

#### A. *The Permanency of the Relationship of Student-Athletes and Their Respective Schools*

The permanency and length of time one person works for another can help determine the existence of an employment relationship.<sup>172</sup> A longer and more permanent relationship between a worker and employer suggests existence of an employment relationship.<sup>173</sup> A student-athlete is limited in

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167. *Id.*

168. *Dawson*, 250 F. Supp. 3d 401, 407–08; Jared Walch, *Should athletes be paid to play?*, DAILY UTAH CHRON. (Oct. 12, 2017, 11:06 AM), <http://college.usatoday.com/2016/10/20/should-athletes-be-paid-to-play/> [https://perma.cc/28ED-G893].

169. This economic analysis focuses solely on Division I student-athletes of revenue-generating sports. *See generally Berger*, 843 F.3d at 293 (7th Cir. 2016); *Dawson*, 250 F. Supp. 3d at 407–08.

170. *Dawson*, 250 F. Supp. 3d at 405.

171. *Id.* *See supra* Part I.A; *see also* Abrahams et al., *supra* note 27, at 240; *Fact Sheet #13*, *supra* note 42. The factors listed determine if someone is an employee or independent contractor for FLSA purposes. *Id.*

172. *Fact Sheet #13*, *supra* note 42.

173. According to the DOL's regulations, “[p]ermanency or indefiniteness in the worker’s relationship with the employer suggests that the worker is an

the amount of time he may compete for his institution and does not have a permanent relationship with the university like an employee does.<sup>174</sup>

For example, Division I student-athletes may compete in four seasons within five calendar years.<sup>175</sup> If for some reason a student-athlete hits the five-year mark and has not competed in four seasons, the athlete loses that season of eligibility and can no longer compete.<sup>176</sup> The relationship between student-athletes and their schools expires after five years or upon the exhaustion of their eligibility.<sup>177</sup>

This requirement results in a short-term relationship between a student-athlete and his school, weighing against the existence of an employment relationship.<sup>178</sup> Although temporariness can be a product of the industry in which a person is employed, the lack of a permanent relationship between student-athletes and their schools supports the conclusion that student-athletes are not employees.<sup>179</sup>

*B. The Amount of the Worker's Individual Investment in Facilities and Equipment*

A worker's individual investment in facilities and equipment, such as supplies and tools needed to complete a job, also aids in determining if a worker is an independent contractor or, alternatively, an employee.<sup>180</sup> If a worker invests in materials or tools needed to perform a job, this generally indicates that he is an independent contractor.<sup>181</sup> According to the DOL, "The worker [must] make some investment [compared to the employer's investment] (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is an independent [contractor

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employee." *Fact Sheet #13*, *supra* note 42; *see also* *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998).

174. *See National Collegiate Athletic Association, Transfer Terms*, NCAA (Oct. 8, 2017, 1:23 PM), <http://www.ncaa.org/student-athletes/current/transfer-terms> [https://perma.cc/S84W-P7J2].

175. Although there are two other divisions—Division II and Division III—this Comment focuses solely on Division I. *See id.*

176. *Id.*

177. *Id.*

178. The short nature of the relationship between student-athletes and their schools suggests a lack of an employment relationship. *See generally Fact Sheet #13*, *supra* note 42; *see generally Baker*, 137 F.3d at 1442.

179. *See generally* sources cited *supra* note 178.

180. *See generally* sources cited *supra* note 178.

181. *See generally* sources cited *supra* note 178. *See also Chao v. Mid-Atl. Installation Servs., Inc.*, 16 F. App'x 104, 107 (4th Cir. 2001).

in] business [for himself or herself].”<sup>182</sup> The fact that a worker makes an investment into materials, however, does not itself render him an independent contractor.<sup>183</sup>

Student-athletes generally make no personal monetary investment into facilities or equipment needed to play or practice.<sup>184</sup> The schools provide shoes, clothing, and gear needed for competition to each student-athlete.<sup>185</sup> In addition, student-athletes do not invest in the practice facilities, workout rooms, or stadiums in which they train and compete.<sup>186</sup>

The limited amount of a student-athlete’s individual investment in facilities and equipment weighs in favor of student-athletes being classified as employees.<sup>187</sup> Student-athletes do not have to personally invest like an independent contractor must.<sup>188</sup> Nonetheless, solely providing gear to student-athletes does not create an employment relationship between the athletes and their universities.<sup>189</sup> Student-athletes are not provided an employment contract, employment benefits, or other essential benefits considered in assessing an employment relationship.<sup>190</sup> A student-athlete’s investment into facilities and equipment is not conclusive, and other factors should be considered to determine whether an employment relationship exists.

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182. *Fact Sheet #13*, *supra* note 42; *see generally* *Chao*, 16 F. App’x at 107.

183. *Fact Sheet #13*, *supra* note 42.

184. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Bylaw 16.8 Expenses Provided by the Institution for Practice and Competition*, in *NCAA DIVISION I MANUAL* 209 (2017).

185. *Id.*

186. *Id.* Student-athletes should not have to invest in these items because they do not receive any income with which they could contribute to defray equipment costs. *See generally* *Frequently Asked Questions about the NCAA*, NCAA (Jan. 9, 2018, 10:02 AM), <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> [<http://perma.cc/9BT2-YUKR>].

187. *See generally* *Fact Sheet #13*, *supra* note 42.

188. *See generally* Matthew Kish, *See what your university gets from Nike, Adidas or Under Armour (Database)*, PORTLAND BUS. J. (Jan. 9, 2018, 10:14 AM), [https://www.bizjournals.com/portland/blog/threads\\_and\\_faces/2013/12/database-nike-adidas-under-armour-ncaa.html](https://www.bizjournals.com/portland/blog/threads_and_faces/2013/12/database-nike-adidas-under-armour-ncaa.html) [<http://perma.cc/58JG-5HN7>]; *see also* Scott Cacciola, *Shoes, Shirts, You Name It, College Basketball Players Get It. Free.*, N.Y. TIMES (Jan. 9, 2018, 10:07 AM), <https://www.nytimes.com/2017/03/25/sports/ncaa-march-madness-shoes-adidas-nike.html> [<https://perma.cc/UEX4-GFVU>].

189. *See generally* *Fact Sheet #13*, *supra* note 42.

190. Charles J. Muhl, *What Is an Employee? The Answer Depends on Federal Law*, U.S. DEP’T LAB. MONTHLY LAB. REV. (Nov. 10, 2019, 3:12 PM), <https://www.bls.gov/opub/mlr/2002/01/art1full.pdf> [<https://perma.cc/4ZG6-QMWA>].

C. *The Opportunities for the Worker to Experience Profit and Loss*

The opportunity for a person to experience—and have a direct impact on—a business’s profits and losses, such the ability to make critical business decisions, is a strong indication of an employment relationship.<sup>191</sup> The opportunity to experience profits and losses focuses on “whether the worker exercises managerial skills and[, if so,] whether those skills affect [that] worker’s opportunity for both profit and loss.”<sup>192</sup> Student-athletes do not experience profits or losses. This factor, therefore, weighs in favor of student-athletes being classified as independent contractors and not employees.<sup>193</sup>

Student-athletes do not make critical business decisions for a university athletic department and do not exercise any managerial control as employees of the university.<sup>194</sup> University presidents and athletic directors make the business decisions that impact the profitability of an athletic department.<sup>195</sup> Although student-athletes may have an effect on profits and losses based on their success on the field, student-athletes do not make any direct business decisions that would be representative of an employment relationship.<sup>196</sup> As a result, student-athletes are more similar to independent contractors than employees.

D. *The Worker’s Skill and Initiative*

An employee or independent contractor is hired based on his ability to perform a job to a certain standard.<sup>197</sup> Both independent contractors and employees can be highly skilled.<sup>198</sup> A worker is more likely to be classified as an independent contractor when “the worker’s skills . . . demonstrate

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191. *Fact Sheet #13, supra* note 42.

192. *Id.* See also *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989).

193. *Fact Sheet #13, supra* note 42.

194. See generally Jason Belzer, *How Do Athletic Directors and University Presidents Manage To Get Along?*, FORBES (Jan. 9, 2018, 9:44 AM), <https://www.forbes.com/sites/jasonbelzer/2016/01/26/how-do-athletic-directors-and-university-presidents-manage-to-get-along/#3237567c3fbb> [<https://perma.cc/MEQ7-MSUH>].

195. *Id.*

196. *Id.* See also *Dole*, 875 F.2d at 810.

197. See generally Susan Adams, *The 10 Skills Employers Most Want In 20-Something Employees*, FORBES (Nov. 10, 2017, 3:37 PM), <https://www.forbes.com/sites/susanadams/2013/10/11/the-10-skills-employers-most-want-in-20-something-employees/#3e4d6f286330> [<https://perma.cc/R8ZM-8PF6>]; see also jurisprudence cited *supra* note 49.

198. *Fact Sheet #13, supra* note 42.

that he or she exercises independent business judgment.”<sup>199</sup> A student-athlete is similar to an independent contractor because his skills and specialization allow him to make “business judgements” and use his talents as leverage when being recruited by schools.<sup>200</sup> Like independent contractors, universities seek out student-athletes for a unique set of desirable skills.<sup>201</sup> These skills give student-athletes the initiative to operate similarly to an independent contractor whom a school “hires” for his temporary duration and skill set.<sup>202</sup> A more specialized athlete may receive multiple offers to play and can choose to use his skills to benefit a school that offers the best education and college experience.<sup>203</sup> A highly specialized athlete is similar to an independent contractor who can choose with whom to do business.<sup>204</sup> The high level of skill for which student-athletes are sought out thus weighs in favor of classifying student-athletes as independent contractors.<sup>205</sup>

*E. The Nature and Degree of Control by the Employer*

An employer has a high degree of control over employees; he sets hours, stipulates pay, and controls the manner in which the work is performed.<sup>206</sup> An independent contractor, in contrast, typically works relatively free of employer control.<sup>207</sup> Despite this general rule, an

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199. *Id.*

200. *See generally* George Anders, *How Student Athletes Get Full-Ride Scholarships*, FORBES (Oct. 8, 2017, 3:55 PM), <https://www.forbes.com/sites/georgeanders/2015/10/03/good-at-sports-experts-tell-how-2-of-teens-get-scholarships/#7d53c9e35b5d> [<https://perma.cc/DW6Z-VRBW>].

201. *Id.* *See also* Herman v. Mid-Atl. Installation Servs., Inc., F. Supp. 2d 667 (D. Md. 2000).

202. *See generally* Anders, *supra* note 200.

203. *See generally* Michael Felder, *A Behind-the-Scenes Look at How College Football Coaches Recruit Players*, BLEACHER REP. (Oct. 8, 2017, 3:50 PM), <http://bleacherreport.com/articles/1485807-a-behind-the-scenes-look-at-how-college-football-coaches-recruit-players> [<https://perma.cc/A449-DT93>].

204. In addition to athletic ability, coaches look to mental and physical toughness, academic ability, coachability, and character. *Id.* *See also* *Fact Sheet #13*, *supra* note 42.

205. *Fact Sheet #13*, *supra* note 42.

206. *Id.* *See also* Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1441 (10th Cir. 1998) (holding that the plaintiff rig workers lacked independence over hours, details of work, and other items that indicated an employment relationship, not independent contractor status).

207. *See generally* *Fact Sheet #13*, *supra* note 42.

employer can control an independent contractor to some extent.<sup>208</sup> Though college coaches wield great control over student-athletes and their schedules, this alone does not render student-athletes' employees.<sup>209</sup> Control by the employer alone is not determinative of an employment relationship.<sup>210</sup>

Because of the nature of collegiate athletics, college coaches have a considerable amount of control over student-athletes.<sup>211</sup> Although the nature and degree of control weighs in favor of an employer–employee relationship, it fails to encompass other important realities of a student-athlete's relationship with his school.<sup>212</sup> For example, student-athletes attend school knowing that they will be subject to certain rules and control by their coaches, such as mandatory study hall hours and training sessions.<sup>213</sup> Coaches dictate student-athletes' day-to-day activities, communicate where to be and when, and determine what needs to be accomplished for the student-athlete to participate in his sport.<sup>214</sup> Student-athletes, however, know that coaches' control does not make them employees of the school.<sup>215</sup> Further, although there is a high level of control of student-athletes, the control factor “does not hold any greater weight than the other factors.”<sup>216</sup> Other factors—such as the NCAA rules

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208. *Id.*

209. Control is not a determinative factor of the employment relationship, just one factor to consider in the assessment of the entire relationship. *Id.*

210. The DOL explains that this factor alone does not indicate employment and does not have more weight than any of the other factors. *Id.* Control is a factor that must be balanced along with the other factors. *Id.*

211. Under NCAA Bylaw 11.1.1.1 college coaches are responsible for ensuring that student-athletes, assistant coaches, and staff members are not violating NCAA rules, and therefore have a large amount of control over what happens in their individual programs. *Responsibilities of Division I Head Coaches*, NCAA, [https://www.ncaa.org/sites/default/files/2018DIEnf\\_HeadCoachResponsibilites\\_20180411.pdf](https://www.ncaa.org/sites/default/files/2018DIEnf_HeadCoachResponsibilites_20180411.pdf) [<https://perma.cc/3KNP-QLRQ>] (last visited Feb. 7, 2019). *See also* Ian Crouch, *Are College Athletes Employees?*, *NEW YORKER* (Mar. 27, 2014), <https://www.newyorker.com/news/sporting-scene/are-college-athletes-employees> [<https://perma.cc/BFL5-FMU8>].

212. *Id.*

213. *Id.*

214. *Division I Time Demands Study Summary of Findings*, NCAA (Nov. 10, 2017, 4:06 PM), [https://www.ncaa.org/sites/default/files/2016RES\\_DI-Time-Demands-Summary\\_20160506.pdf](https://www.ncaa.org/sites/default/files/2016RES_DI-Time-Demands-Summary_20160506.pdf) [<https://perma.cc/9KXQ-3RV4>].

215. Crouch, *supra* note 211; *see generally* Epstein & Anderson, *supra* note 92, at 294.

216. *Fact Sheet #13*, *supra* note 42.

and regulations—must be considered when determining the employment status of student-athletes.<sup>217</sup>

*F. The Extent to Which the Work Performed is an Integral Part of the Employer's Business*

The importance of an individual's work to the success of a business can impact whether that individual is an employee or an independent contractor.<sup>218</sup> A person is more likely to be considered an employee of a business when their work is integral and vital to the success of the business. Work is considered integral if the business's success depends on the completion of the work.<sup>219</sup> Although student-athletes provide a service—entertainment—the overarching goal of a university athletic department is to uphold the university's commitment to education.<sup>220</sup> Athletic departments differ from general businesses in that their first priority is not to turn a profit, but rather to provide student-athletes with a quality educational experience that prepares them for life after college.<sup>221</sup>

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217. *Id.* See also *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (explaining that one factor alone is not dispositive of an employment relationship). See generally John Niemeyer, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 887 (2015).

218. *Fact Sheet #13*, *supra* note 42; see also *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (holding that picking pickles is an integral part to the pickle picking business and vital to the success of the business).

219. *Fact Sheet #13*, *supra* note 42.

220. See generally Jason Belzer, *How Do Athletic Directors and University Presidents Manage to Get Along?*, FORBES (Jan. 9, 2018, 9:44 AM), <https://www.forbes.com/sites/jasonbelzer/2016/01/26/how-do-athletic-directors-and-university-presidents-manage-to-get-along/#3237567c3fbb> [<http://perma.cc/MEQ7-MSUH>] (nothing that university presidents and athletic directors work together and make decisions to benefit the overall mission of the University); see generally *Mission Statement for Athletics at Duke*, DUKE U., [http://www.goduke.com/ViewArticle.dbml?DB\\_OEM\\_ID=4200&ATCLID=152723](http://www.goduke.com/ViewArticle.dbml?DB_OEM_ID=4200&ATCLID=152723) [<https://perma.cc/58V9-FPW4>] (last visited Feb. 7, 2019); see also *Grizzly Policies and Procedures*, U. MONT., <http://www.umt.edu/self-study2010/std3/Std3Exhibits/RE3-01/AthleticsManual-MissionandPhilosophy.pdf> [<https://perma.cc/Q3UK-J88R>] (last visited Feb. 7, 2019); see also *MSU Athletics Department Mission Statement and Core Values*, MICH. ST. U., <https://msu.edu/~msuncaa/mission.html> [<https://perma.cc/NX5G-WTZJ>] (last visited Feb. 7, 2019).

221. See generally Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321 (2003). “The purpose of the [NCAA] . . . is to maintain intercollegiate

Student-athletes' "work" is not vital to the mission and overall success of the university because it does not further the university's commitment to education.<sup>222</sup>

Student-athletes' work is not an integral part of the university business model, and therefore, student-athletes should be classified as "independent contractors."<sup>223</sup> Student-athletes' work product is not the main service universities set out to provide.<sup>224</sup> Rather, universities focus is on providing students a quality education.<sup>225</sup> Participation in collegiate athletics is an added benefit students may enjoy, but it is not the main service that universities were established to provide.<sup>226</sup> The overall analysis of the economic reality of the relationship between student-athletes and their schools compares student-athletes more similarly to independent contractors than employees.

*G. Other Factors Necessary to Assess the Economic Reality*

Courts must evaluate the totality of circumstances of the working relationship; all facts relative "to the total activity or situation" must be considered when determining if student-athletes are employees.<sup>227</sup> Although the analysis of the economic reality factors help classify student-athletes, other factors remain that should be addressed to clearly establish the presence of an employment relationship. The factors the DOL provide do not fully capture the relationship between student-athletes and their schools.<sup>228</sup> The factors fail to take into consideration that the NCAA stipulates that student-athletes are not employees.<sup>229</sup> The longstanding principle of amateurism, which requires that student-athletes may not

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athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." *Id.*

222. *Id.*

223. *Fact Sheet #13, supra* note 42.

224. *See generally* Eric T. Vanoever & Michael M. DeBowes, *The Impact of Intercollegiate Athletics in Higher Education*, 1 HIGHER EDUC. POLS. & ECON. 44-6 (2013).

225. Rosenthal, *supra* note 221, at 343.

226. *Id.* *See also* Belzer, *supra* note 220 (explaining that university presidents and athletic directors want to stay competitive in all aspects of the university including education and academics).

227. *Fact Sheet #13, supra* note 42.

228. The factors fail to take into consideration the impact of amateurism, the NCAA's express provision that student-athletes are not employees, the economic feasibility of student-athletes as employees, and other important factors. *See generally* Niemeyer, *supra* note 217, at 887.

229. *See generally id.*

receive any type of compensation and will be deemed ineligible to play if they violate this rule, supports the NCAA's stance that student-athletes are not employees.<sup>230</sup> Taking this principle into consideration would represent a clearer picture of the totality of the circumstances when analyzing whether student-athletes are actually employees.<sup>231</sup> The fact that the NCAA prohibits student-athletes from being paid as employees indicates that there is no employment relationship between the employer and student-athlete.<sup>232</sup> Collegiate student-athletes voluntarily commit to play sports without any expectation of payment and understand they are not signing an employment contract with the university.<sup>233</sup>

The economic reality of paying all Division I student-athletes minimum wage and overtime is something that many schools would not be able to financially manage,<sup>234</sup> which is a relevant factor to address when determining the employment status of student-athletes. Looking at other factors beyond those the DOL suggests, such as the financial difficulties and the determination of whom gets paid and for what type of work, the economic reality and totality-of-circumstances tests confirm that student-athletes are not employees.<sup>235</sup>

#### IV. DEAL OR NO DEAL: PERMIT STUDENT-ATHLETES TO PURSUE ENDORSEMENT DEALS

The totality of circumstances makes clear that student athletes are not employees; this does not mean, however, that student-athletes should not receive compensation. In addition to the increased costs of compensation, classifying student-athletes as employees would lead to an increase in litigation.<sup>236</sup> To reduce the amount of litigation regarding the compensation

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230. *Id.*

231. *Id.*

232. If an employee is covered under the FLSA, an employer must pay that employee at least the federal minimum wage and no less. *Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues*, U.S. DEP'T LAB. WAGE & HOUR DIVISION (Nov. 2009), <https://www.dol.gov/whd/regs/compliance/whdfs70.pdf> [<https://perma.cc/E57G-J2WR>].

233. Niemeyer, *supra* note 217, at 887.

234. See generally Ryan McCready, *Can Schools Actually Support Paying College Athletes? It's Complicated*, VENNGAGE (Sept. 13, 2016), <https://venngage.com/blog/paying-college-athletes/> [<https://perma.cc/3AKP-V6S4>].

235. See generally *Fact Sheet #13*, *supra* note 42.

236. In 2013, 25 Division I schools operated with a budget deficit. *Id.* Paying every Division I student-athlete would amount to almost \$51,040,000 per week—176,000 athletes at \$7.25 an hour. Sheetz, *supra* note 3, at 884. This figure does

of student-athletes, a solution needs to be reached that is acceptable to all parties. This solution should clarify that student-athletes are not employees under the FLSA but are still able to receive some type of compensation. There are a few ways to accomplish this goal, such as amending the FLSA and providing athletes with trusts to access after graduation.<sup>237</sup> Ultimately, the best way to limit litigation over student-athlete compensation is to allow student-athletes to receive endorsement deals and generate their own personal income.<sup>238</sup>

*A. Amend the FLSA and Develop a Concrete Definition and Test to Determine Who Qualifies as an FLSA Employee*

One possible way to compensate student-athletes is to amend the definition of employee under the FLSA. The FLSA definition is circular and fails to provide guidance to courts as to whom exactly should receive employment status under the statute.<sup>239</sup> The statute describes an employee as anyone an employer employs;<sup>240</sup> this broad definition provides little guidance as to what it means to be an employee.<sup>241</sup> If the definition is refined to an enumerated test,<sup>242</sup> it would be easier to determine if student-athletes are included as employees and thus may receive the protections of the FLSA. Federal appellate courts have developed their own tests to apply

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not include the full cost of attendance schools may award. *Id.* Many schools would not be able to afford the cost of paying student-athletes as employees. McCready, *supra* note 234. Paying student-athletes could create further problems because institutions would have to potentially funnel money that would otherwise be used on academic endeavors to supplement the cost to pay student-athletes minimum wage. *Id.* See also *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 14-cv-02758-CW (D.N.J. Mar. 17, 2014); *Livers v. Nat'l Collegiate Athletic Ass'n*, 2:17-cv-04271-MMB (E.D. Penn. 2017); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017); Daniel L. Fulk, *Revenues and Expenses 2004-2014*, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 8 (2015), <http://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf> [https://perma.cc/W3QQ-7E5D].

237. See generally *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).

238. See generally *Corgan*, *supra* note 21, at 420.

239. 29 U.S.C. § 203(e)(1) (2012) (defining employee as “any individual employed by an employer”).

240. *Id.*

241. Goldstein et al., *supra* note 104, at 1005 (describing the circular definition of employee under the FLSA).

242. The Second Circuit and Seventh Circuit have developed such enumerated tests. See *supra* Part I.A.

when deciding whether an individual is an employee.<sup>243</sup> Providing a concrete test for all circuits to follow would create consistency and reduce the amount of litigation because student-athletes would know whether the FLSA protects them, regardless of where they file suit.

Although amending the FLSA is a potential solution, Congress intentionally created a broad definition of employee because it was “necessary to effectuate its humanitarian goals.”<sup>244</sup> The broad definition of employee does not limit coverage to a specific working relationship or specific people; rather, it includes many different employment relationships and provides rights to those deemed not to have an employment relationship prior to the enactment of the FLSA.<sup>245</sup>

Amending the FLSA is an impracticable solution to decrease the amount of litigation involving the compensation of student-athletes without recognizing them as employees.<sup>246</sup> Redefining “employee” under the FLSA would not provide the necessary relief within an efficient time period. Because the FLSA is a federal statute, Congress must make any amendments.<sup>247</sup> The likelihood that Congress will take the time to amend the Act to clarify whether student-athletes are employees is unrealistic and impracticable.<sup>248</sup> Arguably, an amendment to the FLSA could best solve the problem but is impracticable.

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243. Goldstein et al., *supra* note 104, at 1010. For example, the Eleventh Circuit has eight factors it applies when determining who is an employee, but the Ninth Circuit has a four-factor test. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). *See also supra* Part I.A for the Second Circuit and Seventh Circuit tests.

244. Richard J. Burch, *A Practitioner’s Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L.J. 393, 400 (2002).

245. *Id.* The goal of the FLSA was to eliminate substandard working conditions; limiting the definition of employee would not further the goal of promoting improved working conditions because it would create concrete barriers to who is covered as a FLSA employee with no fluidity for change. H.R. 913, 93rd Cong. (1974) (noting the expansive scope of the Act was vital to the goal of eliminating substandard working conditions).

246. *See generally* Burch, *supra* note 244, at 400 (noting the definition of employee was left intentionally broad to leave room for interpretation).

247. Abrahams et al., *supra* note 27, at 110.

248. As it has been nine years since Congress amended the FLSA, it is impractical to think Congress will take the time to do this, especially when they have other pressing matters. *See generally* Julia Horowitz, *It’s been 10 years since Congress raised the minimum wage*, CNN MONEY (May 25, 2017), <http://money.cnn.com/2017/05/25/news/economy/minimum-wage-bill-democrats/index.html> [<https://perma.cc/8CBK-55WZ>]; *see also* Tiffany Kobel, *7 Facts About the Minimum Wage*, WHITE HOUSE BLOG (July 25, 2016), <https://obama>

*B. Establish Trusts for Student-Athletes to Access After Graduation and the Exhaustion of Eligibility*

Another possible solution to help compensate student-athletes to some degree is to create trusts for student-athletes. The trusts would provide additional monetary awards, above any scholarships a student-athlete may receive, after the completion of college or the exhaustion of eligibility, and help financially support a student-athlete. Creating trusts for student-athletes from which to draw after college would be a reasonable amendment to the NCAA rules of amateurism barring the compensation of student-athletes.<sup>249</sup> Creating trusts was a solution the court proposed in *O'Bannon v. NCAA*; the district court found that this “would . . . enable the NCAA to achieve its goals in a less restrictive manner, provided the compensation was limited and distributed equally among team members.”<sup>250</sup> Establishing trusts creates a balance that does not completely eradicate the principle of amateurism.

Trusts, however, present the same type of financial problems associated with student-athletes' payment as employees.<sup>251</sup> In *O'Bannon*, the plaintiff sought the payment of trusts up to \$5,000 per year, for four years, for a total of \$20,000.<sup>252</sup> If universities paid every Division I student-athlete \$5,000 per year, it would result in a total of \$880,000 a year or \$3.5 million every four years.<sup>253</sup> Considering how few athletic departments generate a profit, these trusts would be very difficult for schools to fund directly from athletic revenue.<sup>254</sup> Student-athlete compensation would have to come from outside funds, such as the institutions' general fund, which is an infeasible solution to the problem.<sup>255</sup>

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whitehouse.archives.gov/blog/2016/07/25/7-facts-about-minimum-wage [https://perma.cc/B673-HYPA].

249. John T. Wolohan, *What Is Reasonable: Are the NCAA's Restraints on Athlete Compensation Reasonable?*, 67 SYRACUSE L. REV. 515, 539 (2017) (citing *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014)).

250. *Id.*; see also *supra* Part III.B; *supra* note 163 (explaining *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015)).

251. McCready, *supra* note 234 (explaining the costs associated with paying student athletes).

252. Wolohan, *supra* note 249, at 539 (citing *O'Bannon*, 7 F. Supp. 3d at 983).

253. This number was calculated by multiplying \$5,000 times the total number of student-athletes, 176,000, to calculate a per year rate, and a four-year rate.

254. See generally Cork Gaines, *The 25 Schools That Make the Most Money in College Sports*, BUS. INSIDER (Oct. 3, 2015), <http://www.businessinsider.com/college-sports-revenue-leaders-2015-9> [http://perma.cc/SUC6-CHQU].

255. Universities already face many tough budgetary choices and restrictions, and would have to cut programs to afford paying student-athletes from the general

The Ninth Circuit rejected O'Bannon's proposal to create trusts, finding that the NCAA would have to completely surrender its amateurism principles and turn a "unique brand of sport into a minor league"; the college sports that we know would no longer exist.<sup>256</sup> If the trusts were "untethered to education" and the money had to be used to attend graduate school or some type of post-secondary education, the trust solution could work.<sup>257</sup> But the financial ability of schools to pay all student-athletes' trusts is economically infeasible.<sup>258</sup> Instituting trusts could help with some alterations, but it is not the best solution to limit the litigation connected to the compensation of student-athletes because of the financial difficulties it would present universities.

*C. Amend the NCAA Amateurism Policy and Allow Student-Athletes to Receive Endorsements*

The third and most sensible solution to the issue of compensation is to allow student-athletes to pursue their own endorsement deals and revenue. Allowing student-athletes to profit as "self-employees" is the most practical solution because it does not completely abolish NCAA amateurism principles and provides compensation to student-athletes for their athletic endeavors.<sup>259</sup> "[P]aying [student] athletes a substantial *formal salary* for their play" clearly conflicts with the NCAA principle of amateurism.<sup>260</sup> Allowing student-athletes to profit on their own, however, does not require schools to pay athletes a formal salary; rather, allowing student-athletes to be "self-employed" authorizes athletes to generate their own sources of income.<sup>261</sup> This solution permits a student-athlete to play for his own success—rather than purely for the success of the team—

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fund. Matt Krupnick, *Would Your Tuition Bills Go Up If College Athletes Got Paid?*, TIME MAG. (Nov. 28, 2014), <http://time.com/money/3605591/college-athletes-sports-costs-students/> [<https://perma.cc/B5PV-C852>].

256. Wolohan, *supra* note 249, at 545.

257. Sheetz, *supra* note 3, at 876.

258. Fulk, *supra* note 236 (reporting Division I athletic department revenues for the 2014 Fiscal Year and the few schools that turn a profit from athletic endeavors).

259. In this context, the term "self-employee" is someone who is self-employed and does not work for an employer. This is someone who is a sole-proprietor and earns an income based on his own personal work and endeavors. See generally *Self-Employed*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/self-employed.asp> [<https://perma.cc/R9R3-65D2>] (last visited Feb. 7, 2019).

260. Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 579 (2009) (emphasis added).

261. Corgan, *supra* note 21, at 417.

because he is compensated based on his own individual talent.<sup>262</sup> Allowing student-athletes to profit on their own would require member institutions' amendment to the NCAA amateurism policy.<sup>263</sup>

*1. Compensation Based Directly on Athletic Abilities and Personal Success*

If the NCAA allows student-athletes to profit on their own and receive money from other outside revenue sources, the money earned would be based directly on their own athletic abilities.<sup>264</sup> As a result, universities would not face the issues of funding the payment of athletes as employees and determining whom the school should pay.<sup>265</sup> Which students the school would compensate would depend solely on the performance of the individual athlete, removing the school from the decision.

Student-athletes would be technically "self-employed" and earn their own money.<sup>266</sup> The amount earned would be based on how successful the athlete is in the personal performance of his sport. As "self-employees," student-athletes would be similar to individual business owners making profits for products they produce; student-athletes' performances would be services they offer as self-employees. Amending the NCAA's amateur policy to allow this practice would provide a middle ground between student-athletes as employees and prohibiting student-athletes from profiting at all.<sup>267</sup>

*2. Eliminating the Difficulty*

Determining whom the school pays, how much, and for how many hours would result in many administrative issues for university athletic departments.<sup>268</sup> Trying to determine whether only athletes of revenue-generating sports are employees and what activities count as "work" could

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262. *Id.*

263. *Division I Governance*, *supra* note 13.

264. The revenue earned would be based on a student-athlete's individual athletic abilities because the endorsement deals would be based on the athlete's performance on the field. *See generally* Corgan, *supra* note 21, at 417.

265. *See generally* Gary Parrish, *Everybody Wins if the NCAA Allows Players to Accept Endorsements*, CBS SPORTS (Apr. 12, 2016), <https://www.cbssports.com/college-basketball/news/everybody-wins-if-the-ncaa-will-allow-players-to-accept-endorsements/> [<https://perma.cc/K8EB-MRQA>].

266. Corgan, *supra* note 21, at 420.

267. *Id.*

268. *See generally id.* at 418.

lead to many other subsequent problems, including lawsuits for unequal pay or Title IX violations.<sup>269</sup>

Football and men's basketball are typically the only sports that generate revenue for an athletic department.<sup>270</sup> Within each team, some players influence more fans to attend games because of their athletic abilities and the excitement generated when watching them play. Theoretically, it would make sense to pay these players more than other players.<sup>271</sup> Determining which players most positively influence attendance, sell the most jerseys, and cause the most season tickets to be sold would be very difficult for a collegiate athletic department to evaluate.<sup>272</sup> Further, paying some players more than others is not a viable solution because it would not support team unity,<sup>273</sup> could result in few athletes receiving compensation, and could cause problems with providing equal opportunities to female athletes.<sup>274</sup>

### 3. *Complying with Title IX*

In addition to eliminating the problems associated with determining which student-athletes to pay, allowing students to pursue their own endorsement deals would eliminate the problems associated with Title IX compliance.<sup>275</sup> Title IX of the Education Amendments Act of 1972 protects individuals from being discriminated against on the basis of sex

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269. Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (2012); *see also* Anderson, *supra* note 18, at 326.

270. *See* Gaines, *supra* note 134.

271. *See generally* Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html> [<https://perma.cc/2ZRC-SFCS>].

272. *Id.* (explaining how student-athletes of revenue-generating sports play a different role on campus than other student-athletes and how only paying athletes of revenue-generating sports is a concept that most likely would have to be litigated).

273. Allowing student-athletes to receive their own endorsements would not present the same issues stemming from a school paying student-athletes directly based on their performance on the field. Revenue from endorsements would come from outside third parties, not the school favoring certain athletes over others. Corgan, *supra* note 21, at 420.

274. Title IX is still an issue that would need to be addressed when paying only athletes of revenue-generating sports. *Id.*

275. *See* 20 U.S.C. § 1681 (2012).

in any activity receiving federal funding.<sup>276</sup> To receive federal funding, all schools must be in compliance with Title IX.<sup>277</sup> To comply, an institution must provide equal opportunities and funding to members of both sexes.<sup>278</sup> If student-athletes of Division I revenue-generating sports are employees under the FLSA, schools will be burdened with complying with Title IX because men's sports, such as football and basketball, typically are the only sports that generate revenue for a school.<sup>279</sup>

Paying student-athletes as "self-employees" allows student-athletes to be paid at "the fair market value of their services" and does not violate Title IX.<sup>280</sup> Because the compensation comes from private individuals and businesses, not directly from the institution, there is no requirement to award males and females equal funding.<sup>281</sup> If a player is very talented, he or she has an equal opportunity to profit and receive endorsement deals based on his or her athletic abilities, regardless of gender.<sup>282</sup> Self-employment of student-athletes would generate opportunities for both

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276. *Id.*; see also *Title IX and Sex Discrimination*, U.S. DEP'T EDUC. (Apr. 2015), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [<https://perma.cc/A729-ZYEW>]. To ensure the growth of opportunities for women, the Office of Civil Rights ("OCR") requires that all universities that receive federal funding be in compliance with Title IX and continue to provide equal opportunities and financial assistance to all genders. *Id.* If schools fail to provide equal funding to both males and females, OCR may remove an institution's federal funding for violations. Anderson, *supra* note 18, at 342.

277. Anderson, *supra* note 18, at 326.

278. *Id.*

279. Paying athletes that participate in revenue-generating sports would result in unequal funding to male and female athletes. See generally Jane McManus, *Pressure to pay student-athletes carries question of Title IX*, ESPN (Apr. 19, 2016), <http://www.espn.com/espnw/culture/feature/article/15201865/pressure-pay-student-athletes-carries-question-title-ix> [<https://perma.cc/82VU-CZ7X>]; see also Gaines, *supra* note 134. Women's sports rarely generate revenue for a university.

280. Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 885 (2002).

281. There is no concern regarding equal pay to both males and females because there are no federal ties to the money. This eliminates concerns of Title IX compliance. See generally Corgan, *supra* note 21, at 417; see also Edelman, *supra* note 280, at 885. Athletes could receive endorsement deals from companies such as Nike, Under Armour, Gatorade, and McDonald's. See generally *5 Olympic Athletes with Insanely Big Endorsement Deals*, TIME MAG. (Aug. 19, 2016), <http://time.com/money/4459824/2016-rio-olympics-endorsement-deals/> [<https://perma.cc/9REV-794H>].

282. Corgan, *supra* note 21, at 417.

males and females to seek their own endorsement deals on an equal playing ground.<sup>283</sup>

Allowing student-athletes to seek endorsements allows both men and women to pursue opportunities based on their own personal athletic performance. Additionally, it may provide an opportunity for women to make money that they may not have had otherwise.<sup>284</sup> Professional female athletes have proven they are marketable and can receive endorsement deals like professional male athletes.<sup>285</sup> Like their professional counterparts, female collegiate athletes could take advantage of this opportunity to pursue their own endorsement deals, receiving compensation in the process. Permitting all athletes to profit on their own would relieve schools from the challenges of paying athletes and compliance with Title IX and provide all student-athletes with the opportunity to generate money, not just those in revenue-generating sports.

#### *4. Student-Athletes Unable to Generate Income to Support Themselves*

Because of their demanding schedules, student-athletes are not able to hold jobs like other students.<sup>286</sup> Permitting student-athletes to receive endorsements would allow student-athletes to generate income needed to support themselves during and after college. Some student-athletes are financially unstable and incapable of working because of their demanding schedules.<sup>287</sup> For example, NCAA Division I football players “dedicate an average of 43.3 hours per week to their sport.”<sup>288</sup> They do not have enough time to work a job, go to school, and participate in a Division I sport.<sup>289</sup> Football players at Division I schools who receive a cost of attendance stipend often use that money to pay for groceries, rent, car repairs, and

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283. *Id.*

284. *Id.*

285. *Id.*

286. Chris Isidore, *Playing college sports: A long, tough job*, CNN MONEY (May 31, 2014), <http://money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/index.html> [<https://perma.cc/AVF2-LB2D>].

287. See generally Ray Glier, *Pets, Car Repairs and Mom: How College Football Players use their Stipends*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/sports/ncaafootball/pets-car-repairs-and-mom-how-football-players-use-their-stipends.html> [<https://perma.cc/ZUP4-UHRY>].

288. Michael S. McLeran, *Playing for Peanuts: Determining Fair Compensation for NCAA Student-Athletes*, 65 DRAKE L. REV. 255, 285 (2017).

289. Division I football players spend “an average of 36 hours a week” on their sport. Isidore, *supra* note 286.

even send money home to support families.<sup>290</sup> Most of the reported uses of the stipends are spent on basic and essential expenses needed to live.<sup>291</sup> Through endorsement deals, student-athletes could earn income they otherwise would not be able to generate.<sup>292</sup> All other students who attend college have the opportunity for employment and generate income; student-athletes should not be denied the same opportunity.<sup>293</sup>

Student-athletes should not be limited in their efforts to make money to financially support themselves. Most student-athletes attend college with hopes of playing professionally, but the reality is that many do not and instead leave college without any financial means to support themselves.<sup>294</sup> The NCAA estimates that only 1.5% of college football players and 1.1% of college basketball players will play professionally.<sup>295</sup> Many athletes who do not play professionally have a hard time adjusting to life after college because all they have known for four-to-five years is the daily activities required of the sport.<sup>296</sup> The post-college adjustment can involve depression, financial difficulties, and other serious problems.<sup>297</sup> The majority of players receive a degree and are able to get a job after college, but others leave college with no job and no financial means to support themselves.<sup>298</sup> Self-employment of student-athletes would help reduce the number of students who leave school without financial support. Granting student-athletes the ability to be “self-employed” and receive endorsement deals provides a practical and rational means for allowing student-athletes to receive some type of compensation without completely destroying NCAA amateurism.<sup>299</sup>

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290. Glier, *supra* note 287.

291. *Id.*

292. Corgan, *supra* note 21, at 418.

293. *See generally* Isidore, *supra* note 286.

294. Patrick Gleeson, *The Likelihood of Someone Becoming a Professional Sports Player*, CHRON (June 27, 2018), <http://work.chron.com/likelihood-someone-becoming-professional-sports-player-26110.html> [<https://perma.cc/Y4XQ-4CFL>].

295. *Estimated probability of competing in professional athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [<https://perma.cc/M7S5-KQ8B>] (last visited Feb. 7, 2019).

296. *See* Interview with Ramogi Huma, Founder of the National College Players Association (explaining how hard the transition is for some student-athletes and the problems experienced post college); Paul Soloman, *Is the NCAA failing its college athletes?*, PBS NEWS HOUR (Mar. 21, 2016), <http://www.pbs.org/newshour/making-sense/is-the-ncaa-failing-its-college-athletes/> [<https://perma.cc/6UJX-5N2K>].

297. Soloman, *supra* note 296.

298. *Id.*

299. There are technical details that legislators would need to explore for this solution to work efficiently, including: limiting how many endorsements a player can receive, when he is able to start receiving endorsements, and what types of

## CONCLUSION

*Berger* and *Dawson* have created uncertainty in classifying student-athletes as employees under the FLSA.<sup>300</sup> Allowing student-athletes to be employees would produce many negative consequences member institutions would not be equipped to handle, such as financial challenges and difficulties in complying with Title IX.<sup>301</sup> Collegiate athletics would not be able to operate in the same way that it has for years, and total reform would be required.<sup>302</sup> Although student-athletes should not be classified as employees under the FLSA, they should be able to make money on their own through endorsements and outside revenue sources. Allowing student-athletes to do so would provide an equal opportunity to all student-athletes to produce their own revenue based on personal athletic endeavors. Modifying the NCAA amateurism rules to accommodate “self-employment” creates a solution that is attractive to the NCAA, member institutions, and student-athletes. The litigation involving the compensation of student athletes indicates the need for change within the NCAA legislation and governance of Division I athletics.<sup>303</sup> The NCAA must modernize its amateurism bylaws and adapt to the collegiate model so that players are compensated for their athletic endeavors.

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endorsements he can accept. For example, only allowing an athlete to receive money once he commits to an institution would help with the recruiting concerns that could arise when giving certain athletes endorsements to attend a certain school. In addition, limiting the amount of endorsements students-athletes may receive would help to make sure that student-athletes do not shift too much of their focus away from the classroom and toward the playing field. Parrish, *supra* note 265.

300. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 286 (7th Cir. 2016); *Dawson v. Nat’l Collegiate Athletic Ass’n*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

301. See generally Kristi Dosh, *The Problems with Paying Student Athletes*, FORBES (June 9, 2011), <https://www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/2/#738a79976d97> [https://perma.cc/E T4N-PNAW].

302. *Id.*

303. “Litigation surrounding compensation of student-athletes is indicative of the need for a change in the governance of the NCAA, rather than for a complete change of the entire college sports industry.” Sheetz, *supra* note 3, at 893.

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