



PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 56: On the horizon: Student athletes as employees? | Oct. 6, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Thank you so much for tuning in to the Protecting Your Possibilities podcast. I'm your host, Luke Fedlam. And man, we have a lot to talk about today. So as you all know, we record sometimes, the day before we launch, sometimes it's a few days before. And so I just want to share with you some news that occurred recently that made headlines across the country.

I know my listeners are tuned into all that comes up in the business side of sports and thinking about the protection of student athletes. And so I'm sure you've already heard about it, read about it. But it was the idea that the National Labor Relations Board General Counsel, so the head lawyer for the NLRB issued a memorandum where she said that she views college athletes, as employees of their schools under this National Labor Relations Act.

Now, let's break that down for a second. What that means is that when you think about the idea of student athletes, unionizing, this might clear the path for that to happen. And then for student athletes to be able to collectively bargain for a whole host of benefits, and opportunities as student athletes.

So you know, I can't just break this one down myself, I had to bring in a colleague, and if you are a fan of the podcast, you might remember from one of our very early episodes, my colleague and friend Jyllian Bradshaw, who is joining us, Jyllian, how are you?

Jyllian: I am so good. It's so good to see you. It's so good to be here. Thanks so much for asking me to join you today.

Luke: Absolutely. And I'll tell you, for all of our listeners, this is possibly the first podcast episode where we have everyone here in one place. So shout out to Christina Miller, who's handling us on the technical side. Jillian is here, I'm really excited. It's great to be back together and talk about this really important issue that has come up here recently. And so just to help provide some context, Jyllian concentrates her practice of law in education, law, collective bargaining, administrative proceedings, policy advisement, employment issues, and labor relations. So you can imagine that this was the perfect guest to have to kind of break down what all of this means.

Right. And so just to be clear, on the front end, this is a statement that was in a memo by the head lawyer, if you will, for the NLRB. This doesn't change anything directly today, but boy, does it open up the path for things to change in the future.

So Jyllian, can you just break down what exactly what is going on? What does this mean, and why is this such a big deal?

Jyllian: Sure. So I mean, you've mentioned already Jennifer Abruzzo, who is the general counsel for the NLRB, recently confirmed General Counsel, she's a Biden appointee. And I think it's important to note, too, that the National Labor Relations Board, the NLRB, is now democratic controlled, three-to-two. So, you know, in a sense, there are going to be a lot of changes happening as it relates to issues that are affected by the NLRB.

So what Mrs. Abruzzo said in this most recent memo, essentially was that she essentially is designating the possibility that student athletes that attend private universities, private colleges and universities, may be considered employees, for purposes of a lot of different things, right?

So the memo does not create this issue. The memo basically says this is her position. This is what she anticipates the board is going to do with this. But she states very clearly that the board is going to find a case to quote unquote, "prosecute this," right. So a set of facts is going to arise where this issue is challenged, and the board is going to hear it. And I think based on what she's written, we can reasonably assume that the board is going to say, "yeah, athletes at these institutions are going to be considered employees."

And what that means practically, is that they are then protected from discrimination, for speaking about their need or want for pay for benefits related to their working conditions. Boil it down, it means they have a right to complain. And under them, they have the right to organize. And so here's where we might see this real drastic shift and how athletes at private colleges move forward.

Luke: Now fascinating. There's so much there to break down that we could we could talk for hours on this. And you all know I like to keep these relatively brief in consumable amounts of time. So you already know we're going to be bringing Jyllian back for future episodes to dive into additional details. But let's break down some of what you just shared, right?

When you talk about this idea that it somewhat gives the student athlete the right to complain, let's talk about organizing here in a second, the right to complain. So break that down. Does that mean then that a student athlete could say, you know, football player, let's say it is so hot, we shouldn't be practicing in this heat. You know, guys are going down with heat injuries, things like that. We know that there have been student athletes who passed away at the college level from training in the heat. So is this something where if they were to say that, does that mean, then that the coach can't suspend them? Or can't really, you know, take their scholarship? In a sense?

Jyllian: Yeah, I mean, so what we're talking about in the labor world would be a working condition. You know, imagine that same 105 degree heat, but let's say that existed on the floor of a manufacturing plant, right? So if you want to think about your traditional labor setting, and sort of superimpose that on to a sports field, I mean, that's what we're talking about. And so you're exactly right, that would mean that the coach would not be able to discriminate against that student/athletes/potential employee. Because what he'd be doing is engaging in protected speech.

Luke: Yeah, Interesting. Interesting. So okay, there's so much more, you know, this is one of those where I feel like if we had a live call in podcast episode, this is where the phones would be going off the hook with scenarios and questions. So I'm going to try to hit some different

scenarios and some different questions, as we go throughout this conversation. Just want you know, refresh everyone's memory, we're talking about the National Labor Relations Board, we're talking about the statement that student athletes at private institutions should be viewed as employees and therefore be afforded the protection as an employee that they currently don't have. And then obviously, also to potentially unionize.

So let's talk about that aspect. And help us understand what does that actually mean, if student athletes at private institutions were to be able to unionize. And I think we have some, for those who have been following this this issue for a while, we have some context. Back in 2015, when Northwestern University was trying to do just this right to unionize as you know, student athletes that are at a private institution, and in doing that, ultimately, at its final level, the NLRB said, you know, they just didn't take jurisdiction, right, which isn't saying, "No, you're wrong on the merits." Right? Or that, "Yes, you're correct on the merits, but rather, we just, we're not taking on jurisdiction here," which I think this memo might alter that perspective at this point, right? A lot has changed as, as you know, Mrs. Abruzzo said, yesterday, a lot has changed in the last, you know, 5, 6, 7 years. So what exactly what it mean, then, for student athletes at private institutions to be able to unionize?

Jyllian: It can mean a lot of different things, Luke, I mean, you know, should a group of student athletes decide to organize that gives them a collective voice to then engage in what could be collective bargaining with their college or university about their terms and conditions, essentially. So is there compensation involved? Let's talk about the working conditions. Let's talk about other benefits involved - the overarching idea being that these young people contribute so greatly to this influx of revenue to their colleges and universities that Mrs. Abruzzo - her position is that that is sort of, the linchpin fact, that suggests that these young people are employees. And, you know, then have a right to engage in a discussion about perhaps sharing in the revenues that are ultimately earned.

Luke: Yeah. Wow. So you hear us talking about Mrs. Abruzzo, right. And so she is the general counsel for the National Labor Relations Board, which, to give you context, she is the kind of senior lawyer, if you will, for that organization. So when she writes a memo, not just answers questions in a press conference, but actually author's a memo that is released, that is a big deal, and that represents kind of significant shockwaves through the sports world.

So in her memo, she kind of talks about this, as I know, our listeners have listened to me talk about name, image and likeness in so many different episodes. We've talked at length about the Supreme Court decision in the NCAA vs Alston case, and how the court came out unanimously against the NCAA and said that it was a violation for them to limit or put a cap on education related benefits. She cites to that she talks about the rules around name image and likeness, changing and that now student athletes are able to engage in this name, image and likeness space and earn compensation from contracting with a third party to represent their brand or what have you. And she's talked also about in this memo, about the skyrocketing involvement of student athletes in issues of social justice and all of these things combined in her opinion is what has changed over the last five, six years since Northwestern student athletes attempted to do just this. Now, Jyllian, I got to ask you, then, you know, and again, this is one of those situations where I think we could come up with scenarios all the time. But this is an important one, because this has been a hot button issue across the board, especially over the last year and a half, looking at the summer that we had of racial unrest in 2020. If student athletes were to unionize again, and just to be clear, we're only talking at this point about the possibility of student athletes at private institutions being able to unionize if they were to unionize, and then say, go out and protest, whatever the issue is that they would go out and protest. Does that

then, you know, even if coaches say we don't want you going out and protesting, we don't want our student athletes taking a stand on this particular issue, or what have you, does this then mean that they would be protected a protected class and being able to do that?

Jyllian: So I think maybe we've got a couple of different issues going on within that particular hypothetical, because, so a group of athletes bargaining about terms and conditions of their employment as athletes, you know, so much can be negotiated in that conversation with their college or university. And if we've ever seen a collective bargaining agreement of any kind, it can be anywhere from 15 to 150 pages, depending on what is priority for these young people, what is priority for the college, etc, etc. So many of those details in terms of like the nitty gritty, what are we allowed to do, what aren't we allowed to do, many of those details get hashed out in collective bargaining.

Now, when it comes to issues on social justice, and the speech related to that, whether it's protesting, whether it's the wearing of a certain garb, if you want to take it all the way back to like the Tinker case, back, back in the day, you know, wearing black armbands, or whatever, there's an element of free speech involved there, too, that requires sort of like an entirely separate analysis. And I think as adults, because all these students are assuming over the age of 18, legally adults, right, so their free speech related to social justice issues, there's probably far more leverage in the higher education space for those athletes to say and do things that align with their beliefs to message a certain way. That may or may not be related to the terms and conditions that they negotiate with their college or university. So not to say that they're completely separate, because I think there could be some overlap. But again, just sort of talking about this, hypothetically, in the future, how is this going to play out? Those two things might have something to do with one another? And might be a conversation that goes a little deeper?

Luke: Okay, okay. Well, you know, this is how it's gonna be right, everybody's gonna give hypotheticals, and you know, want to understand how this might apply. But let's talk about the facts a little bit more, let's talk about where we find ourselves right now. And it's interesting because literally, as we are recording this, Mark Emmert is testifying in front of a subcommittee at the House of Representatives on the matter of name, image and likeness.

The NCAA came out with a statement, as you can well imagine, yesterday after this memo was released, and ultimately part of that statement said, from the NCAA, with college sports embedded within the higher education experience, we firmly believe that college athletes are students who compete against other students, not employees who compete against other employees. As you can imagine, that is pretty expected for the NCAA to share that mindset and to share that perspective.

We don't have time to talk about all the money and everything that comes into sports as you can obviously, well imagine, we've talked about that before. But it does raise an interesting issue. And I think part of that is to think about the federal level.

So you've heard me talk about name, image and likeness. We've talked about the idea that at some point, there's going to be federal legislation as it relates to name image and likeness in particular. Now, again, what I don't want to do is conflate two different issues around the possibility of organizing and potentially unionizing along with name image and likeness, right. But here's why I want to bring the two of them together for a moment. So when the NCAA is lobbying Congress, which they are most definitely actively doing for their own protection as any organization would, they are asking that as Congress contemplate federal legislation to create a national standard for name, image and likeness, that included in that legislation, be language

against student athletes being classified as employees or having the right to unionize. Obviously, things change when you have a group of student athletes that are able to collectively bargain for the rights that they believe that they should have within their sport and within their life or lived experience on college campuses.

So recently we've had a couple different Congress people, I believe was Senator Chris Murphy from Connecticut and Rep. Laurie Trahan from Massachusetts, they relatively recently have introduced legislation that's specifically designed to allow college student athletes to collectively bargain on the rights that they want and actually representative Trahan and is a member of that house subcommittee that is hearing testimony today as we record. So it's interesting, right? That obviously, as I think most people in America these days know, nothing is easy when it tries to get through Congress.

Now you've got you know, some people on one hand, obviously, that are saying, student athletes are students, they should not have the rights to collectively bargain unionize, etc. and others saying absolutely, the money is too big. The schools are relying on the student athletes too much that that there ultimately needs to be rights afforded to those student athletes. I share that, Jyllian because maybe you could give us a little primer just on generally, how would all of this work? So and maybe we take it from the federal versus state level just for a minute, just so that people kind of understand the levels that are involved with this. So if you know, we have the National Labor Relations Board that is empowered to act under the National Labor Relations Act, which is a, which is federal law. But then states kind of play a role in this, too. So how does that all work together?

Jyllian: Yeah, sure. I imagine there are plenty of athletes out there who say, Hey, wait a minute, I attend to public college, where do things fall? For me, in this conversation, and, long story short, public colleges and universities are sort of agents of the state.

Luke: Yeah.

Jyllian: So, you know, it's going to be two separate processes, unless Congress says otherwise, which I mean, perhaps we'll see that, perhaps we won't. But it is important to say that this conversation that we're having around this potential to organize potential to unionize, we're talking about private colleges and universities that are non-religiously affiliated, because that's yet another exception from you know what we're talking about for that when it comes to the jurisdiction of the National Labor Relations Board. So it is kind of a small carve out, if you look at the whole world of higher education, the private, non-religiously affiliated colleges and universities are sort of like a smaller piece of the pie in the whole higher education world. And so I would say then a smaller piece of the pie when it comes to all student athletes.

So when it comes to, you know, that versus, okay, now, what about the state level? What's going to happen? At the state level? It's really hard to say, I imagine it's going to be a sort of a state by state situation, absent any sort of federal act, to make something blanket that applies to everybody.

Luke: Yeah, I mean, really, really fascinating. conversation, it will absolutely be interesting to see how this all plays out.

You know, just as a quick aside, twice in the past month and a half, a federal judge has dismissed or rejected the NCAA attempt to dismiss some lawsuits that seek to have college student athletes be declared school employees under the Fair Labor Standards Act. So yet

another kind of situation that is also brewing at the same time. And just to help you understand, for those who aren't entrenched in kind of the legal process, what that means is, the NCAA was trying to say, "Hey, you know, Your Honor, throw this out, like, this isn't something that you should even hear." And we should be able to just move on. And the judge says, "Hey, sorry, NCAA, we do want to continue to proceed and hear this." And I think, broadly speaking, and generally speaking, it is helpful when these cases are heard, to be able to hear the arguments that are made on both sides and allow for our judicial system to work and operate in the manner in which it is expected to. So it will be fascinating to see how all of this plays out.

Jyllian, you know, I can talk to you for hours. We try to we try to keep this podcast relatively short. To all of our listeners, we're going to be bringing Jyllian back in. We're going to be talking about, again, where do we go from here? What have we heard in various testimony? What are we seeing in some of these court cases, and I'm sure that we're going to be seeing a university that could fall kind of within this category that you mentioned, student athletes, they're trying to make a move to ultimately test the waters then on this, you know, idea of college student athletes at private institutions, being able to unionize and collectively bargain so if we haven't had enough change in college sports over the last year, buckle up! Look, because we've got a lot more coming. And you know that we're going to be having this conversation. Jyllian Bradshaw, thank you so much for being with us today.

Jyllian: Total pleasure, Luke. Thanks again for having me. Looking forward to continuing the conversation.

Luke: This is going to get real interesting, really interesting. All right, thank you so much for tuning in to the Protecting Your Possibilities podcast. I'm really excited for the topics that we're able to share with you. I just love when I hear from our listeners, how much they enjoy the podcast, the topics, the guests. I'm excited that we were able to have Jyllian in with us today. Definitely look forward to more of these conversations going forward.

As always, if you haven't subscribed yet, go ahead and subscribe to the podcast. Feel free to give us as many stars as you can possibly give us on whatever platform you listen to the podcast. Feel free to reach out to me share comments, share your thoughts on topics that you'd like to hear, because we want to be responsive to all of you who make this podcast a success. So again, thank you so much for tuning in. We'll talk to you real soon. Have a great day.

Disclaimer: Porter Wright Morris & Arthur LLP offers this content for informational purposes only, as a service for our clients and friends. The content of this publication is not intended as legal advice for any purpose, and you should not consider it as such. It does not necessarily reflect the views of the firm as to any particular matter, or those of its clients, please consult an attorney for specific advice regarding your particular situation.