



Winter 2024 Virtual CLE Workshop · February 7 – 9, 2024

# Employment Law

## **When Students Work: The Complex Employment and Labor Law Treatment of Student Workers**

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# Are graduate students unionized at your institution?

1. Yes, and they've been organized for five or more years.
2. Yes, and they've been organized for between 3-5 years ago.
3. Yes, and they've been organized for between 0-3 years ago.
4. No, graduate students at my institution are not unionized (yet).

# Are undergraduate students unionized at your institution?

1. Yes, and they've been organized for five or more years.
2. Yes, and they've been organized for between 3-5 years ago.
3. Yes, and they've been organized for between 0-3 years ago.
4. No, undergraduate students at my institutions are not organized (yet).

# Labor Organizing in Higher Ed

- Patchwork of laws that vary by the nature of the institution, including:
  - public or private
  - location of institution
  - state laws
  - whether such rights are extended to student workers
- The National Labor Relations Act (NLRA) only applies to private employers, limiting its protections only to employees at private universities.
- Landmark 1980 Supreme Court decision, *NLRB v. Yeshiva University*



# **Current Trends in Student Organizing Efforts**

'Enormous Surge' in Unions Reflects  
Disconnect Between Colleges and  
Graduate Employees

Unionization increased by  
**200,000 in 2022**

**Graduate  
Worker Unions  
Win Major Gains  
and Strengthen  
the Labor  
Movement**

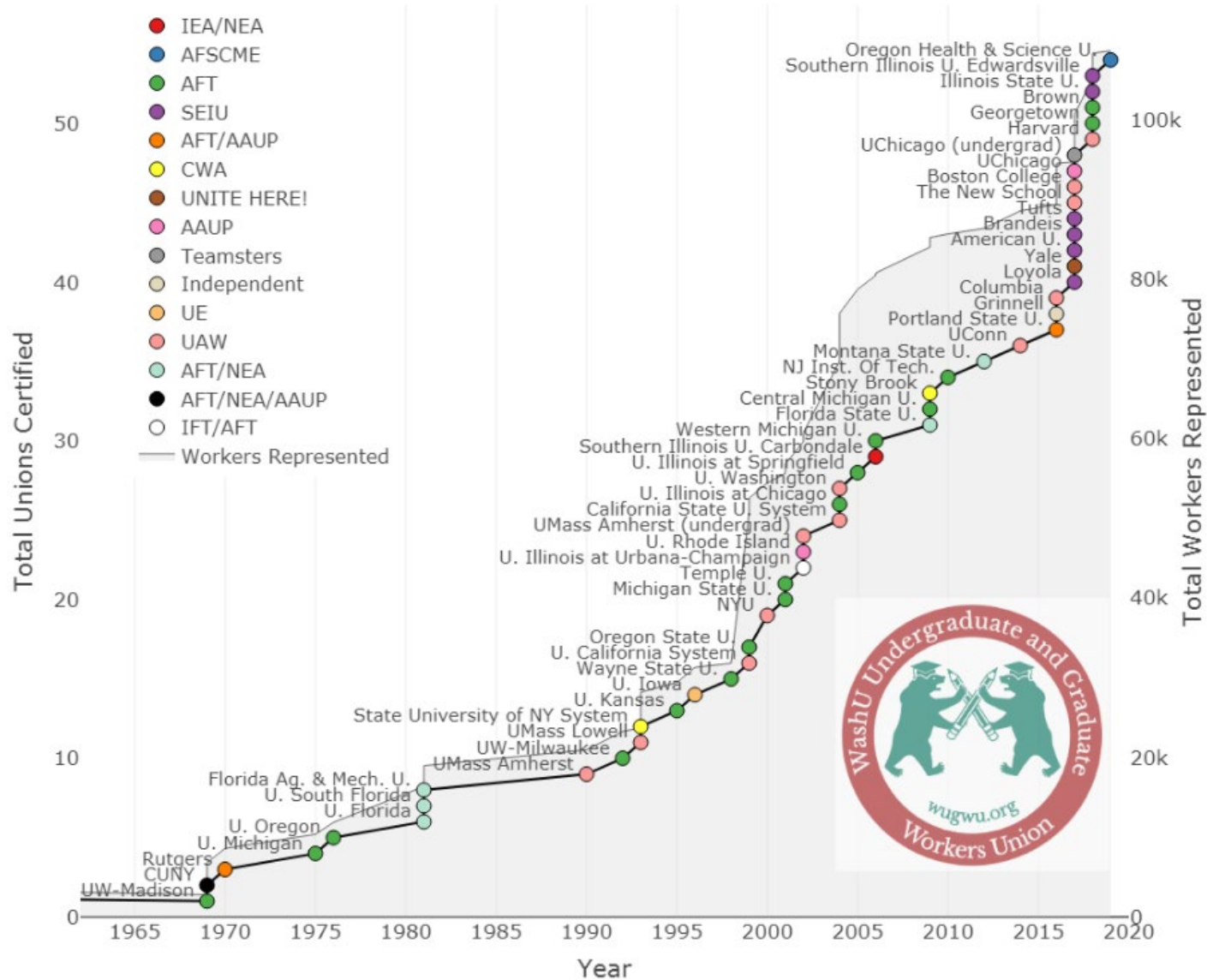
**Union Wave Comes to the College Campus**

Undergraduate workers seek better pay and more protections

As Grad Student Unionizing  
Effort Grows, Universities Raise  
Stipends, Benefits

Unionization Efforts Spread  
Through Higher Education As  
Colleges Double Down

## Student Employee Union Growth



<https://wugwu.org/resources/graduate-and-undergraduate-student-unions>





# **Graduate Student Unionization**



# Graduate Student Organizing



# 2016-2019 Student Unionization

Grinnell College	220	2016
Portland State University	700	2016
Columbia University	4,250	2016
Loyola University Chicago	212	2017
Brandeis University	220	2017
University of Chicago	225	2017
Tufts University	281	2017
American University	761	2017

The New School	900	2017
Boston College	778	2017
Southern Illinois University Edwardsville	332	2018
Illinois State University	500	2018
Georgetown University	1,100	2018
Brown University	1,250	2018
Harvard University	4,500	2018
Oregon Health & Science University	280	2019

<https://wugwu.org/resources/graduate-and-undergraduate-student-unions>

# Factors driving grad labor movement

- Most common factors: higher salaries, improved health benefits, and better working conditions.
- University reliance on non-tenure-track faculty and graduate assistants to conduct teaching and research.
- Between 2005 and 2015, graduate student employment growth was triple the rate of growth of tenure track faculty.
- Flexibility and reduced cost for University.
- The resurgent graduate labor movement in line with increased union drives nationally.



# **NLRB and Student Unionization Over the Years**



# 2000-2015: Presidential Ping Pong

- Legality of graduate student unions at private institutions now largely depends on which president was in power.
- 2000: Clinton's NLRB ruled that *New York University* graduate assistants had the right to unionize in 2000.
- 2004: G.W. Bush's NLRB reversed that precedent in the *Brown* case holding that graduate students were not workers but were primarily students.



# 2016: NLRB Counts Grad Students as Employees

- 2016: Obama's NLRB voted that *Columbia University* undergraduate and graduate teaching assistants are students and employees, covered by the NLRA.
- After the 2016 election, student unions withdrew their NLRB claims so that pending cases wouldn't overturn the *Columbia* decision.
- Without any cases to review, the NLRB did not have the means to overturn its precedent.

# 2016-Current day

- The Trump NLRB disagreed with *Columbia* and more broadly opposed workers' rights and protections.
- Biden NLRB affirmed its commitment to graduate workers' collective bargaining rights
  - Lack of legal challenges = Increase in graduate student unions





# Duke Challenges 2016 *Columbia* Ruling

- July 2023: NLRB rejected Duke's challenge against Graduate Students Union.
- August 2023: Duke's PhD students voted to unionize.
- First union recognized at a private university in the South.



# 2020-2023: Labor Activism Rises Post-Pandemic

- Explosion of post-pandemic labor activism, new generation.
- Graduate work was particularly vulnerable during the pandemic.
  - In-person teaching cut surfaced inequalities.
  - Students realized the value of union protection—especially for those required to work in person after campus reopened.
- Wage stagnation and increasing endowment funds.
- Unions are becoming the standard for higher education.
- In terms of the number of petitions for union representation = uncharted territory.

# Post Pandemic Unionization

University of California system	17,000	2021
University of New Mexico	1,600	2021
Hamilton College	65	2021
New Mexico State University	940	2022
Clark University	147	2022
Wesleyan College	100	2022
Dartmouth College	170	2022
Massachusetts Institute of Technology	3,700	2022
Fordham University	360	2022
Washington State University system	1,500	2022

Worcester Polytechnic Institute	535	2022
Mount Holyoke College	78	2022
Barnard College	58	2022
Boston University	3,200	2022
Yale University	3,200	2023
Northwestern University	2,900	2023
Johns Hopkins University	3,300	2023
University of Southern California	3,200	2023
University of Chicago	3,200	2023

**And counting...**

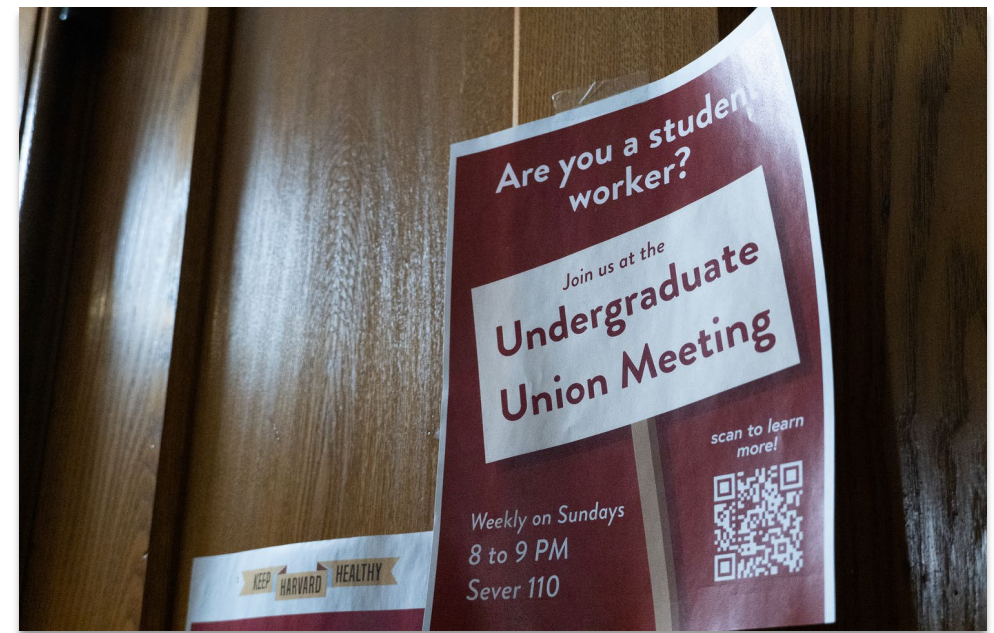
<https://wugwu.org/resources/graduate-and-undergraduate-student-unions>



# **Undergraduate Unionization**



# Undergraduate Unionization



# Rise of Undergraduate Unions

- 2003 to 2016: UMASS - Resident Assistant and Peer Mentors
- 2016: Grinnell College (Iowa) students established the Union of Grinnell Student Dining Workers
- 2016 – now: dozens of undergraduate unions have been recognized, including:
  - Barnard College, Tufts University, Fordham, Wesleyan, Mt. Holyoke and Dartmouth College.
- April 2022: Grinnell College - expanded to include all undergraduate workers, first fully unionized undergraduate workforce in the country.
- Emerson, New School, Harvard



# **‘We’re Not Slowing Down,’ Student Workers Say**

Undergraduate workers are winning collective bargaining rights, making student unions increasingly common. They’re driven by the pandemic, pro-union sentiment and each other.

- Increase in graduate student unions created more support for undergraduate union efforts.
- Undergrads in a much stronger position if other unions are on campus.
- Unhappy workers, taking a stand.
- Solidarity



# Not Just a Private University Issue


- Public institutions continue to see significant labor activity by their students across the country.
- University of Oregon, Cal State system.
- Even though collective bargaining rights of students are not recognized at public institutions.
  - Strike at Temple University, organization drives at the University of Minnesota.
- United Campus Workers, has organized at public university campuses across Arizona, Colorado, Georgia, Kentucky, and Tennessee.
- Strikes at public sector institutions even when they are not are not legal, some courts have refused to intervene.

# Strikes by Student Unions

Columbia University	2020	30 days
University of Michigan system	2020	8 days, 13 days
University of California system	2020-21	4 months
Kenyon College	2021	1 day
Kenyon College	2021	14 days
Cornell University	2021	1 day
Columbia University	2021	3 weeks
New York University	2021	21 days
Stanford University	2021	1 month

Harvard University	2021	3 days
Columbia University	2021-22	10 weeks
Kenyon College	2022	1 day
Kenyon College	2022	4 weeks
Indiana University Bloomington	2022	4 weeks
University of Illinois Chicago	2022	6 days
Clark University	2022	5 days
University of California system	2022	5 weeks
Temple University	2023	6 weeks

<https://wugwu.org/resources/graduate-and-undergraduate-student-unions>



# **Recent Student-Athlete Union Efforts**

# Student Athletes Organizing Efforts

- 2021: *NCAA v. Alston*; NCAA could not limit certain benefits for students, but Court did not say athletes were employees
- 2021: NLRB opens the door
  - Abruzzo = certain athletes are employees
- 2023: Dartmouth Men's Basketball
  - September petition to join the Local 560 of the Service Employees International Union
  - seek to be the first group of collegiate student athletes to unionize



# What's Next?

- Against the backdrop of these trends and emboldened by the support of the NLRB, union efforts are poised to remain strong in 2024 and beyond.
- 2024 Election





# Proactive Preparations

- Begin preparing even when there is no indication of union activity by strengthening student/employee relations infrastructure
- Utilize focus groups, surveys, forums and other avenues to gather feedback and take action
- Partner with student leaders, student groups, student organizations and employees who work with students frequently to identify concerns
- Perform union vulnerability audit (e.g., are there effective channels to report and respond to student employee concerns)



# Proactive Preparations (cont'd)



- Establish a small but effective workgroup that can respond to union activity more rapidly
- Analyze potential bargaining units and related issues (e.g., do you prefer micro-units or larger comprehensive units, have you identified supervisors, are there any joint employer issues, etc.)
- Provide “front line” supervisors (including faculty and principal investigators with knowledge about current labor labors and what is and what is not permissible
- Check in with key internal and external stakeholders (e.g., graduate deans, Academic Senate, governmental agencies, external funding agencies and donors)
- Develop communication strategy (and written materials) including whether and how you will respond to union activity



# Proactive Preparations (cont'd)

- Know (and update if necessary) your property and access rules/policies and how it's been used in the past (e.g., do you have updated policies on use of University property for advocacy, distribution of literature, when are such policies enforced, etc.)
- Know (and update if necessary) your student code of conduct policy and how it's been used in the past (e.g., when is misconduct handled through student code of conduct as opposed through other avenues)



# Key Considerations in Engaging with Represented Student Employees



Direct Dealing



FERPA vs. RFIs



Weingarten Rights



Student Conduct vs.  
Employee Discipline



Academic Progress



Protest Activities

# Intercollegiate Athletics ...

[ BIG PICTURE ]

# Tipping Point: SCT in Alston

- Supreme Court 9-0 Decision rejected notion NCAA is immune to antitrust claims, did not address pay4play, and said that NCAA restrictions on education-related financial assistance violated antitrust law.
- Made clear that courts are not the proper forum for the NCAA to seek antitrust exemptions.
- Justice Kavanaugh's concurrence questioned legality of other NCAA rules (i.e., restrictions on compensation for playing and endorsements).





# Antitrust



## ***Fontenot and Carter***

- Challenging NCAA bylaws that prohibit direct compensation of athletes. Seeks damages in amounts D1 football and basketball student-athletes would have received if NCAA rules against compensation had not been in place. *Carter* also seeks injunctive relief moving forward on behalf of all student-athletes.

## ***In Re College Athlete NIL Litigation (House Litigation)***

- Seeking a share of the college sports TV revenue dating back to 2016 and NIL compensation athletes allege they would have received but for NCAA prohibitions. Challenge inducements and other continuing NCAA NIL restrictions.

## ***Choh v. Brown University***

- Challenging Ivy League rule prohibiting the provision of athletics scholarships as illegal price fixing.

## ***Hubbard v. NCAA***

- Seeking retroactive **Alston** (\$5980) payments.

# Baker Proposal/Project D1 Framework

## **Proposed NIL Changes for all D1 Schools:**

- Bring NIL in-house and enter into deals directly with their own SAs for the use of their NIL.
- Coordinate NIL deals on behalf of their SAs directly without forcing schools to rely on third parties.

## **Creation of Opt-In NCAA Division I membership subdivision to allow for schools to pay SAs directly for their athletics participation. The division's membership criteria include:**

- Mandatory minimum Title IX compliant annual payments of at least \$30K each to at least 50% of each school's SAs. The number of students to be paid and the amount of payment is uncapped, i.e., each school may fund more than 50% of its SAs and/or pay more than \$30K annually per SA.
- Member schools would be permitted by the NCAA to set their own rules, including but not limited to rules related to recruiting, roster sizes, and transfers (although likely still subject to legal challenges).

**2024 NCAA Convention: DI Board charged DI Council to develop recommendations for framework to address the key elements of proposal.**

# Top 100 NIL College Athletes

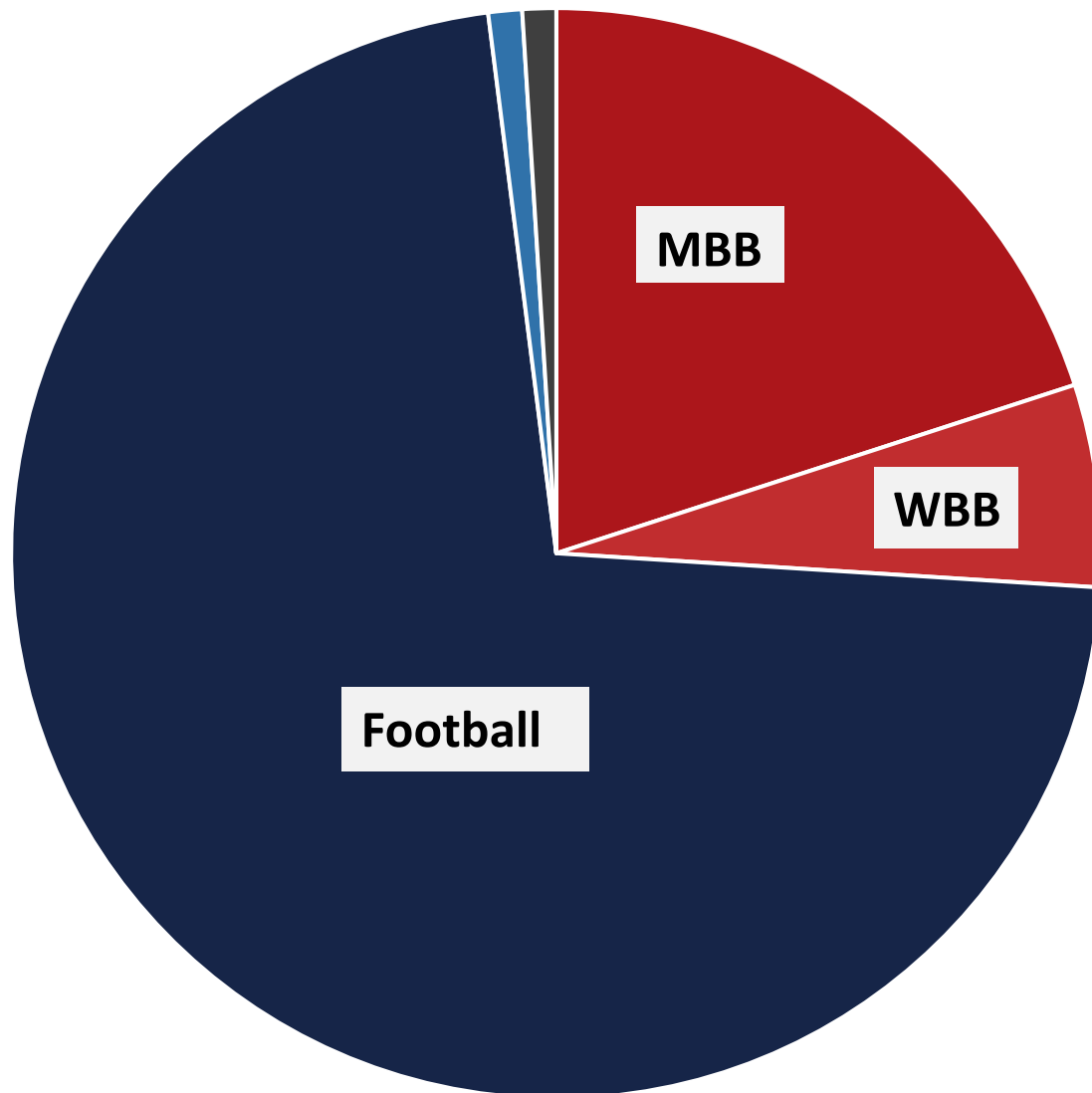
## Individual Valuation

- \$541K to \$5.8M

## By Sport:

- Football: 72
- Men's Basketball: 20
- Women's Basketball: 6
- Women's Gymnastics: 1
- Men's Track and Field: 1

<https://www.on3.com/nl/rankings/player/nl-100/> (as of January 19, 2023)





# Intercollegiate Athletes as Employees

## **FLSA:**

- *Johnson v. NCAA.*
- Interlocutory Appeal Pending in the 3<sup>rd</sup> Circuit

## **NLRB:**

- *University of Southern California.*
- *Trustees of Dartmouth College.*

## **Proposed Legislation:**

- College Athlete Right To Organize Act (CARO).
- Reintroduced 12/6/2023.
- Classifies SAs as employees under the NLRA, with all collective bargaining rights.

# Johnson v. National Collegiate Athletic Association

(E.D. Pa. Aug. 25, 2021)



*The FLSA defines the term “employee” as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1).*

- S/As at 5 NCAA D1 schools, brought a class action lawsuit against the NCAA, their institutions and addition D1 colleges and universities.
- DCT Applied Non-Exhaustive 7 Factor Glatz Test.
- Question on appeal before the Third Circuit:
  - “Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics.”
- NCAA CARA vs. RARA Hours and Practice Logs





# NLRB GC 21-08 (9/21)



- Reinstated earlier advice that scholarship athletes are entitled to NLRA protections.
- Adopts phrase “Players at Academic Institutions.”
- Suggests misclassifying players as “student-athletes” may be an independent unfair labor practice in violation of NLRA.
- Indicates openness to pursue NCAA and athletic conferences as joint employers.

A close-up, low-angle shot of a basketball hoop and net. The orange rim is in the foreground, with the white net hanging down. A basketball is visible in the upper left corner, and a hand is partially visible at the bottom left, reaching towards the net.

# NLRB Case: USC, PAC 12, NCAA

- November 2021: College Basketball Players' Association (CBPA) files claim against NCAA for misclassifying players as student-athletes.
- The NLRB's Los Angeles region found "merit" in an unfair labor practice charge seeking employee recognition for USC football and basketball players and issued complaint.
- Hearing before an administrative law judge in LA.
- Likely will be appeals.

**NOTE:** The NLRB declined to assert jurisdiction in the 2014 Northwestern case due to substantial disruptions that likely would be caused by union and non-union teams and among public and private schools that compete against each other in conference play.



# NLRB Final Rule: Joint Employer

- In October 2023, the NLRB issued a final rule addressing “joint employer” under the NLRA.
- An entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the following employees’ essential terms and conditions of employment:
  - 1) wages, benefits, and other compensation;
  - 2) hours of work and scheduling;
  - 3) the assignment of duties to be performed;
  - 4) the supervision of the performance of duties;
  - 5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
  - 6) the tenure of employment, including hiring and discharge; and
  - 7) working conditions related to the safety and health of employees.
- Under this broader standard, it may be easier for college athletes and their advocates to establish joint employer status among the NCAA, its conferences and member schools.

# Discussion Points



- FLSA vs. NLRA and Antitrust Laws
- *Wood v. National Basketball Association*, 809 F.2d. 954 (2d. Cir. 1987).
  - Salary cap, draft, and restricted free agency are mandatory subjects of collective bargaining and protected by non-statutory labor exemption provision.
  - CBA provisions are not subject to federal antitrust challenge.
- Envisioning a world where college athletes are employees.



# Smart v. NCAA

No. 2:22-cv-02125 (E.D. Cal.)

- Class action filed 11/22 claims:
  - The NCAA and its member schools ran afoul of federal antitrust laws when they enacting legislation limiting Division I schools to three paid baseball coaches and one “volunteer” coach.
  - Alleges that “volunteer” baseball coaches performed many of the same job duties as paid coaches, and often work more than 40 hours per week.
- *Colon v. NCAA*, No. 1:23-cv-00425 (E.D. Cal.) builds on Smart and extends the complaint to include all other NCAA designated volunteer coach positions.
- Echoes of earlier restricted earnings case, ultimately settled for approximately 54 million. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998)

# State Revenue Sharing Bills



1 of 3

California Assemblymember Chris Holden discusses a bill called the College Athlete Protection Act in front of the Rose Bowl on Thursday, Jan. 19, 2023, in Pasadena, Calif. The bill would require schools that play major college sports to pay some athletes as much as \$25,000 annually, along with covering the cost of six-year guaranteed athletic scholarships and post-college medical expenses. (AP Photo/Beth Harris)





# Questions?



## Title IX Regulations

- To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

## 1979 Policy Interpretation

- When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans . . . made available to the members of one sex, for example, could constitute a violation of Title IX.

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