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Legal Sidebar

Johnson v. National Collegiate Athletic Association: Third Circuit Allows College Athletes' Claim for Wages to Move Forward

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In *Johnson v. National Collegiate Athletic Association*, the U.S. Court of Appeals for the Third Circuit (Third Circuit) considered whether college athletes can be barred as a matter of law from asserting claims for compensation because they are not employees under the Fair Labor Standards Act (FLSA), the federal law that sets minimum wage and overtime pay requirements. On July 11, 2024, the court held that the athletes could not be barred from bringing an FLSA claim, and remanded the case to the lower court to determine whether the athletes can be considered employees under the statute. This Sidebar provides a brief overview of the FLSA, discusses the Third Circuit's decision in *Johnson v. National Collegiate Athletic Association*, and offers considerations for Congress.

Fair Labor Standards Act

The FLSA, 29 U.S.C. §§ 201 *et seq*., sets forth federal minimum wage and overtime pay requirements for most private and public sector employees. The act defines an *employee* as "any individual employed by an employer," and defines *employ* to include "to suffer or permit to work." The act further states that an *employer* includes "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Reflecting on the scope and the plain words of the statute, the Supreme Court has described the FLSA as having "striking breadth" and that the act contained "no definition that solves problems as to the limits of the employer-employee relationship." The Court recognized that FLSA's broad definition of "employ" may expand the meaning of "employee" to include "some parties who might not qualify as such under a strict application of traditional agency law principles."

While broadly providing minimum wage and overtime pay protections to most employees in the United States, the FLSA also includes exemptions for certain employees. For example, the act exempts from minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, and professional capacity." Furthermore, courts have construed the terms of the act to exclude certain workers, such as independent contractors and interns. Following Supreme Court precedent

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that the employer-employee relationship "does not depend on [] isolated factors but rather upon the circumstances of the whole activity," courts have looked to the "economic realities" of the relationship to determine employee status under the FLSA. The Court has also interpreted the concepts of "work or employment" for FLSA purposes as being labor "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

Johnson v. National Collegiate Athletic Association

In 2019, a group of former and current collegiate athletes sued their colleges and universities and the National Collegiate Athletic Association (NCAA), alleging in part that they should have been classified as employees of the colleges and universities and the NCAA under the FLSA and are owed wages for the time they were required to train and compete in college sports. They also alleged violations of various state employment laws. The athletes claimed that that the rigors of college sports limited their academic opportunities, for example by forcing them to miss classes and limit their choices of majors and degrees, while the NCAA member institutions collected substantial revenues. The athletes sought relief in the form of unpaid wages, liquidated damages, and attorneys' fees. The defendants (the NCAA and various colleges and universities) moved to dismiss the complaint, arguing that college athletes cannot be their employees as a matter of law. The defendants asserted that the plaintiffs are "amateurs" and therefore have not ever been considered employees by their schools or by the NCAA.

On August 25, 2021, the District Court for the Eastern District of Pennsylvania denied the defendants' motion to dismiss, finding that the plaintiffs had "plausibly" alleged that they are employees of the defendants for purposes of protection under the FLSA. The district court relied on a multifactor test from *Glatt v. Fox Searchlight Pictures, Inc.*, a 2016 decision from the U.S. Court of Appeals for the Second Circuit (Second Circuit) that considered whether unpaid interns are employees under the FLSA. In *Glatt*, the Second Circuit assessed the economic reality of the employer-employee relationship by identifying who was the *primary beneficiary* of the relationship. To do so, the Second Circuit weighed a non-exhaustive list of seven factors, including: the extent to which the intern and the employer clearly understand that there is no expectation of compensation, the extent to which the internship accommodates the intern's academic commitments, and the extent to which the intern's work complements (rather than displaces) the work of paid employees, among others. The district court in *Johnson* observed that some of the *Glatt* factors, as applied to college athletics, weighed in favor of finding that the athletes are employees, while others did not. The court ultimately concluded that, based on the factors the athletes plausibly alleged, they are employees of the schools for purposes of the FLSA.

Following its initial decision, the district court subsequently granted defendant's motion to seek an interlocutory appeal from the denial of the motion to dismiss. The Third Circuit framed the question on appeal as: "whether college athletes, by nature of their so-called amateur status, are precluded from ever bringing an FLSA claim."

On July 11, 2024, the Third Circuit affirmed in part the district court's initial decision, holding that the college athletes were not precluded from bringing a claim under the FLSA. The Third Circuit remanded the case to the district court, however, for an "application of an economic realities analysis grounded in common-law agency principles" instead of the court applying the *Glatt* primary beneficiary test to determine whether the athletes are employees.

In support of an economic realities test grounded in common law, the Third Circuit cited favorably to the National Labor Relations Board's (NLRB) decision in *Trustees of Columbia University in the City of New York*, where the NLRB applied a similar common law test to determine whether graduate and undergraduate student teaching assistants are employees within the meaning of the National Labor Relations Act (NLRA). The court observed that, in this decision, the NLRB "notably rejected a *Glatt*-like primary beneficiary analysis." For additional information on this common law test and its application to

college athletes in the NLRA context, consult CRS Legal Sidebar LSB11168, College Athletes Unionize: *Trustees of Dartmouth College* and Other Legal Issues.

The Third Circuit next laid out a four-part test for when college athletes may be considered employees under the FLSA that cited or quoted, in part, from Supreme Court precedents discussing FLSA coverage in other contexts (such as workers in transit at a job site and patients working at rehabilitation centers). The court held that college athletes may be considered employees under the FLSA when they "(a) perform services for another party, (b) necessarily and primarily for the [other party's] benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits" (internal quotations and citations omitted). The court emphasized that the "touchstone" of the test "remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality" of an employee-employer relationship. The panel then remanded the case back to the district court to apply this test. One judge authored a separate opinion that concurred only in the judgement and would have applied a different test.

In its decision, the Third Circuit also dismissed several arguments that the defendant raised as to why the athletes cannot be employees under the FLSA, including that the athletes are part of a "long tradition of amateurism in college sports" that precludes a determination that they are employees. The court declined to follow the Seventh Circuit, which had concluded that the "long-standing tradition [of amateurism] defines the economic reality of the relationship between student athletes and their schools" and determined that certain college athletes could not allege that athletics qualify as "work" sufficient to trigger the minimum wage requirements of the FLSA. The Third Circuit rejected the use of a "frayed tradition" of amateurism in determining the employee-employer relationship, holding that such a notion carried a "dubious history" and could not be used to define the economic reality of an athlete's relationships to their schools. In support of its decision, the Third Circuit also cited to the Supreme Court's "disapproval of amateurism as a legal defense" in *National Collegiate Athletic Association v. Alston*.

Considerations for Congress

Whether college athletes are considered "employees" for purposes of other various federal laws continues to engage agencies, courts, and Congress. In recent years, federal courts and agencies have considered whether college athletes are "employees" with collective bargaining rights and whether they may profit on their name, image and likeness. In *National Collegiate Athletic Association v. Alston*, the Supreme Court held that the NCAA's rules capping certain compensation for student athletes violated Section 1 of the Sherman Antitrust Act. In a concurrence, Justice Kavanaugh joined the decision in full but questioned "whether the NCAA and its member colleges can justify not paying student athletes a fair share" of the billions of dollars in revenue that they generate. The concurrence went on to suggest that "legislation would be one option" to address the situation.

While this case resolved the issue of whether student athletes are permitted to pursue a claim under the FLSA, it is yet to be determined whether college athletes are employees for purposes of the FLSA. If Congress does not wish the courts to decide the issue presented in *Johnson*, it may seek to amend the FLSA's definition of "employee" to explicitly include or exclude college athletes. Congress may also consider legislating on the status of college athletes as employees under federal law more broadly. For example, H.R. 8534, Protecting Student Athletes' Economic Freedom Act of 2024, would prohibit a "student athlete (or former student athlete)" from being "considered an employee of an institution, a conference, or an association under any Federal or State law or regulation."

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