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College Athlete Employee Claims A Dead End Post-Penn Suit

By **Zachary Zagger**

Law360, New York (February 19, 2016, 10:15 PM ET) -- Efforts by student-athletes to be considered employees have reached a dead end, attorneys say, following the latest setback when an Indiana court shot down former University of Pennsylvania student-athletes' federal wage-and-hour claims.

Three former track and field athletes at Penn had sought to represent a class of student-athletes across the country against the National Collegiate Athletic Association and over 100 schools, including Penn, arguing they should have been paid minimum wage under the Fair Labor Standards Act because they were university workers analogous to work-study participants.

But U.S. District Judge William T. Lawrence did not buy this argument, ruling that their participation on a university sports team does not make them employees and that U.S. Department of Labor assessments show work-study positions don't support FLSA protection. The ruling comes just six months after the National Labor Relations Board declined to rule on whether Northwestern University football players could unionize, essentially denying their efforts to be considered employees.

Attorneys said the combination of the Indiana judge's opinion with the NLRB decision shows that it will be difficult for those seeking to change the amateurism model of college athletics to push the idea that student-athletes are somehow employees of the school for which they play, leaving the antitrust claims that have also been lobbed as possibly a better alternative.

"I think the FLSA looks like a dead end, and I am not sure that even a more nuanced or narrower approach" would overcome that legal barrier, said sports labor attorney Jonathan L. Israel of Foley & Lardner LLP.

In his Tuesday opinion, Judge Lawrence tossed the claims against the NCAA and all of the schools other than Penn for lack of standing, saying the plaintiffs did not allege they could possibly be employees of anywhere else other than Penn.

The judge then further tossed the FLSA claims against Penn with prejudice, ruling that the student-athletes are clearly not employees and pointing to the DOL's express position that those participating in "interscholastic athletics" are not considered employees.

"It was inevitable that this was probably going to be the result," Israel said. "I was intrigued by this case following the Northwestern filing just because I thought people would see that as an opening to treat student-athletes as employees. … But obviously, the DOL has already taken the space and have a pretty

direct pronouncement on the subject."

The plaintiffs had insisted that theirs was a case of first impression that applies new criteria the DOL issued in 2010 pertaining to the employment status of interns. The fact sheet set guidelines for determining whether interns must be paid minimum wage and overtime under the FLSA for the service they provide to "for-profit" private-sector employees.

But Judge Lawrence found that guidance didn't apply to the former Penn athletes as he came down strongly in favor of the "revered tradition of amateurism in college sports," quoting the U.S. Supreme Court's decision in NCAA v. Board of Regents of the University of Oklahoma. He also pointed out that generations of students have sought to play college sports without the thought of being compensated.

"This demonstrates unequivocally that the students at Penn who choose to participate in sports ... as part of their educational experience do so because they view it as beneficial to them," Judge Lawrence wrote. "Indeed, millions of Americans participate in amateur sports in countless contexts; they do so for myriad reasons, none of them, by definition, involving monetary compensation, but all of them, it is fair to assume, involving benefit of some sort to the participants."

Put this ruling into context of the unanimous NLRB decision in August, which dismissed the Northwestern football players' unionization petition, and it seems college players pushing employee claims will be difficult, attorneys said. The decision overturned a landmark ruling by an NLRB regional director that said the football players receiving scholarships were in fact employees under the National Labor Relations Act, though the full board stopped short of making a final determination on the employee question.

Sports attorney Tyrone Thomas, a member of Mintz Levin Cohn Ferris Glovsky & Popeo PC, said the rulings show there is still deference to the function of athletics in the college educational experience and the historic function of amateurism in making college sports a more level playing field.

"Focusing on the student-athlete side, this decision in combination with the NLRB ruling on Northwestern's football players and the historical precedent at the state level excluding student-athletes from workers' compensation-based claims make it very difficult to proceed with an argument that student-athletes are 'employees,'" Thomas said.

But the Penn FLSA action may not be the best test case for the issue. The plaintiffs were student-athletes at Penn, a school known more for its academic prowess than its sports programs, and track and field athletes are in a sport that traditionally doesn't bring in much revenue even at major programs.

Even if the facts were different, however, the law is just not on college players' side, attorneys said.

Labor attorney Stacey L. Smiricky of Faegre Baker Daniels LLP said it might be possible for a student-athlete at a major private college program who receives a scholarship to have more of a case for compensation, but that would still be tough. Judge Lawrence had noted that the plaintiffs did not receive scholarships.

"Ultimately, though, I do not think it will matter as courts likely will focus on the fact that student-athletes benefit from participating in the athletic programs," Smiricky said.

She added that given the FLSA has an exceptionally broad definition of "employee," "it is safe to say this

decision finding student-athletes are not employees will have an impact of any such future suits."

Further, attorneys pointed to the DOL position highlighted by the judge that participation in "interscholastic athletics" does not create an employment relationship with the school.

"This court said, 'There is no way you are going to be able to do this if we are going to look at what the DOL has said about student-athletes and 'interscholastic athletics,'" Israel said.

For those hoping to effect change to allow college players to be paid, antitrust claims may be the way to go as they have had somewhat more success. In October, the Ninth Circuit in O'Bannon v. NCAA struck down a decision that would have allowed college players to be compensated for their publicity rights following graduation but said players could be compensated with aid packages that go up to the full cost of attendance.

Currently, there is another suit in the pipeline in California that seeks to allow colleges to provide whatever benefits they want to attract the best college athlete recruits. A judge has certified three classes in that case.

"So it is on to California." Israel said. "I think this is once again another intriguing blip that has gone nowhere, and now it is back to see whether change can be affected through the antitrust laws. The real question will be if there is any change, how significant will that be?"

The case is Lauren Anderson et al. v. NCAA et al., case number 1:14-cv-01710, in the U.S. District Court for the Southern District of Indiana.

--Additional reporting by Aaron Vehling and Linda Chiem. Editing by Christine Chun and Philip Shea.