WORKERS' COMPENSATION RECOVERY FOR INJURED UNIVERSITY STUDENT ATHLETES: THE IMPACT OF RECENT LEGAL DEVELOPMENTS

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I. INTRODUCTION

Scholars have long debated the entitlement of university[1] student-athletes to workers' compensation recovery for injuries arising out of the athletes' participation in university athletic activities.[2] Despite the scholarly arguments in favor of granting workers' compensation recovery to student-athletes, a majority of the caselaw in recent decades suggests that courts are not receptive to student-athletes' attempts to recover workers' compensation from their universities.[3] However, recent developments indicate that courts may become more receptive to these claims than they have been in the past. Specifically, three recent developments, taken together, foreshadow a sea-change in workers' compensation recovery for student-athletes: (1) the Supreme Court's opinion in *Alston v. NCAA*;[4] (2) the Eastern District of Pennsylvania's decision in *Johnson v. NCAA*;[5] and (3) the September 29, 2021, National Labor Relations Board ("NLRB") General Counsel's memo titled "Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act" ("NLRB Memo").[6]

This essay will begin by briefly explaining the existing framework for workers' compensation recovery.[7] Then, it will discuss the historical application of the workers' compensation framework to cases brought by student-athletes.[8] It will next detail each of these recent developments in turn and the impact of these developments on the workers' compensation analysis

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[1] This note uses the term "university" to refer generally to all institutions of higher education as defined by the Higher Education Act. *See* 20 U.S.C. § 1001 (2012).

[2] *See generally* Frank P. Tiscione, *College Athletics and Workers' Compensation: Why the Courts Get it Wrong in Denying Student-Athletes Workers' Compensation Benefits When They Get Injured*, 14 SPORTS L.J. 137 (2007); Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269 (1994); Shaun Loughlin, *Workers' Compensation and Student-Athletes: Protecting Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics*, 48 CONN. L. REV. 1737 (2016).

[3] *See infra* Section II.2.b.

[4] NCAA v. Alston, 141 S. Ct. 2141 (2021).

[5] Johnson v. NCAA, 561 F. Supp. 3d 490 (E.D. Pa. 2021).

[6] Memorandum from Jennifer A. Abruzzo, Off. Gen. Couns., NLRB, to the Reg'l Dirs., Officers-in-Charge & Resident Officers, NLRB (Sept. 29, 2021) [hereinafter NLRB Memo].

[7] *See infra* Section II.A.

[8] *See infra* Section II.B.

as applied to student-athletes.[9] Lastly, this essay will examine the potential systematic implications of administering workers' compensation benefits to injured university student-athletes.[10]

II. BACKGROUND

A. EXISTING FRAMEWORK FOR WORKERS' COMPENSATION RECOVERY

At its core, workers' compensation is the system through which an employee receives medical and financial benefits to compensate the employee for loss of earning potential resulting from work-related injuries.[11] Although workers' compensation is a creature of state law, most jurisdictions require that an injury must (1) arise out of the employment, and (2) occur within the course of employment in order for the injured worker to receive workers' compensation benefits.[12] An injury arises out of employment when there is a causal connection between the injury and the employment.[13] An

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[9] *See infra* Section III.A.

[10] *See infra* Section III.B.

[11] *See* 1 LARSON'S WORKERS' COMPENSATION LAW § 1.03(1) (Matthew Bender Elite Prods. 2022) ("The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . In compensation, unlike tort, the only injuries compensated for are those which either actually or presumptively produce disability and thereby presumably affect earning power.").

[12] *See* Leckie v. H.D. Foote Lumber Co., 40 So. 2d 249, 251 (La. Ct. App. 1948) ("[I]n determining whether an accident arises out of the employment, it is necessary to consider only two questions. First, was the employee then engaged about his employer's business *and not merely* pursuing his own business or pleasure and second, did the necessity of the employer's business reasonably require that the employee be at the place of the accident at the time the accident occurred." (emphasis in original)). *See generally* 1 LARSON'S WORKERS' COMPENSATION LAW § 3 (Matthew Bender Elite Prods. 2022) (explaining the historical development and current application of the arising out of employment element); 2 LARSON'S WORKERS' COMPENSATION LAW § 12 (Matthew Bender Elite Prods. 2022) (explaining the historical development and current application of the course of employment element).

[13] 1 LARSON'S WORKERS' COMPENSATION LAW § 3.syn (Matthew Bender Elite Prods. 2022) ("[T]he 'arising out of' test is primarily concerned with causal connection. Most courts in the past have interpreted "arising out of employment" to require a showing that the injury was caused by an increased risk to which claimant, as distinct from the general public, was subjected by his or her employment. A substantial number have now modified this to accept a showing merely that the risk,

injury occurs within the course of employment when the injury "takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or [is] engaged in doing something incidental thereto."[14] As these elements imply, courts must answer a threshold question in the affirmative to uphold a grant of workers' compensation to a claimant: is the claimant an employee of the respondent?[15] In other words, a court must determine that an employment contract exists between the claimant and the respondent.

While courts in different states may use a variety of tests to determine whether an employment contract exists, the most common tests are: (1) the right to control test,[16] (2) the nature of the work test,[17] and (3) the

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even if common to the public, was actually a risk of this employment. An important and growing group of jurisdictions has adopted the positional-risk test, under which an injury is compensable if it would not have happened but for the fact that the conditions or obligations of the employment put claimant in the position where he or she was injured.").

[14] 2 LARSON'S WORKERS' COMPENSATION LAW § 12.syn (Matthew Bender Elite Prods. 2022). *See also* Perez v. RadioShack, 2008 Colo. Workers' Comp. LEXIS 85, 3–4 (2008) (finding that an employee injured during a golf trip that the employee took at the behest of a supervisor was within the course of employment because "[t]he supervisor proposed the golf outing and rescheduled . . . [t]he golf outing occurred during work hours on a day that the claimant was to have off . . . [and the employee's] evaluation and a possible promotion were both discussed while golfing").

[15] *See id.*

[16] *See, e.g.*, Hanson v. Transp. Gen., 716 A.2d 857, 861 (Conn. 1998) ("The 'right to control' test determines the [employment] relationship by asking whether the putative employer has 'the right to control the means and methods' used by the worker in the performance of his or her job." (citing Hunte v. Blumenthal, 680 A.2d 1231, 1235 (Conn. 1996); Silverberg v. Great Southwest Fire Ins. Co., 573 A.2d 724, 727 (Conn. 1990))).

[17] *See, e.g.*, Hammermill Paper Co. v. Rust Eng'g Co., 243 A.2d 389, 392 (Pa. 1968) ("While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration: 'Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the

economic realities test.[18] Each of these tests focuses on whether the facts of a particular case demonstrate that a legally binding contractual relationship was formed such that the claimant can be fairly categorized as an employee of the respondent for purposes of a workers' compensation claim.[19]

All in all, in order to succeed in a workers' compensation claim, an injured worker must prove that they were employed by the employer from which they seek recovery and that the worker's injury arose out of and occurred within the course of such employment.

B. HISTORICAL APPLICATION OF THE WORKERS' COMPENSATION FRAMEWORK TO STUDENT-ATHLETES

Courts apply the aforementioned framework to examine whether student-athletes are entitled to workers' compensation recovery for injuries arising out of their participation in university athletic activities. To understand the significance of the *Alston* and *Johnson* decisions and the NLRB memo, it is important to place these recent developments in the context of the courts' historical application of the workers' compensation framework as applied to university student-athletes. As mentioned above, to succeed in a workers' compensation claim, the athlete must prove that they were an employee of the university and that their injury (1) arose out of the employment and (2) occurred within the course of employment.[20] Case law applying this framework to student-athletes can be described in two distinct categories: pre-1980s cases, mostly allowing recovery in discrete claims of workers' compensation by student-athletes against universities,[21] and the

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job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.'" (quoting Stepp v. Renn, 135 A.2d 794, 796 (1957))).

[18] Kidder v. Miller-Davis Co., 564 N.W.2d 872, 880 (Mich. 1997) ("The relationship must still be evaluated under the economic reality test . . . this standard examines a number of criteria including control, payment of wages, hiring, firing, the maintenance of discipline, and common objective. These factors are viewed together in their entirety under a totality of the circumstances test. We repeat: No one factor is controlling.").

[19] *See, e.g.*, Johnson v. City of Albia, 212 N.W. 419, 421 (Iowa 1927) ("The question at once, the, in the case, is whether or not the appellee at the time of the injury, to wit, on November 16, had a contract of employment, express or implied, with the appellant.").

[20] *See supra* Section II.A.

[21] *See infra* Section II.B.1.

1980s-to-present cases, categorically denying workers' compensation recovery for student-athletes.[22]

As will be discussed, the recent cases denying workers' compensation recovery have almost entirely relied on the reasoning that the student-athlete claimants failed to prove that they were employees of the university.[23] In other words, the recent case law demonstrates that courts deny student-athletes the right to recover workers' compensation from universities by holding that student-athletes are not employees of their universities and, consequently, dispense with the claim before analyzing whether the athlete's injury arose out of university athletic participation and occurred during the course of the university's athletic program.[24] It is against this backdrop of the 1980s-to-present caselaw that the *Alston* and *Johnson* decisions and the NLRB Memo stand out as suggestive of a significant sea-change in courts' treatment of student athletes' claims for workers' compensation recovery.[25]

1. The Pre-1980s Cases

In the early days of college athletics, courts upheld grants of workers' compensation to injured university student-athletes at a more frequent rate than in recent years. For example, in *Van Horn v. Industrial Accident Commission*, a California court of appeals annulled an administrative denial of workers' compensation in the form of death benefits from the state's industrial accident commission to the widow and children of a college athlete killed in a plane accident on his way back from an intercollegiate football game.[26] The *Van Horn* court reasoned that the Commission's finding that the deceased athlete was not "rendering services" for the university within the meaning of the relevant Workmen's Compensation Act was erroneous.[27] The court further found that the

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[22] *See infra* Section II.B.2.

[23] *See id.*

[24] *See id.*

[25] *See infra* Section III.

[26] *See* Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 460 (Cal. Dist. Ct. App. 1963).

[27] *See id.* at 465 ("As we have stated, the commission concluded that by playing football for the college the decedent was not 'rendering services' within the meaning of the Workmen's Compensation Act. While the case is one of first impression in this jurisdiction, there is authority for the proposition that one who participates for

deceased athlete's scholarship for his participation on the football team was evidence of an employment contract.[28]

Similarly, in *University of Denver v. Nemeth*, the Supreme Court of Colorado upheld the industrial commission's grant of compensation to a student-athlete who injured his back during a university football practice.[29] The *Nemeth* court pointed to evidence that the student athlete's part-time employment with the university in exchange for reduced room and board expenses was offered to him, particularly because he was a student-athlete.[30] The court reasoned that because the university conditioned the student athlete's part-time employment on the student athlete's participation in university athletic programs, the student was an employee of the university, injured during the course of the student's employment, and the injury was causally connected to the university athletic program.[31]

The Supreme Court of Colorado overturned *Nemeth* in *State Compensation Insurance Fund v. Industrial Accident Commission*.[32] The *State Compensation Insurance Fund* court examined whether an employment relationship existed between the student-athlete and the university by examining whether the student-athlete's participation in athletic activities provided value to the university.[33] The court reasoned that no employment agreement existed between a university and a student-athlete because the university did not receive a direct benefit from the student-

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compensation as a member of an athletic team may be an employee within the statutory scheme of the Workmen's Compensation Act. (Metro. Cas. Ins. Co. v. Huhn, 142 S.E. 121 (Ga. 1928) [professional baseball player]; Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953) [state college football player].) The fact that academic credit is given for participation in the activity is immaterial.") (internal citations altered).

[28] *Id.* at 464.

[29] Univ. of Denver v. Nemeth, 257 P.2d 423, 427 (Colo. 1953).

[30] *See id.* at 426–27, 430.

[31] *Id.* at 430 ("The obligation to compensate Nemeth arises solely because of the nature of the contract, its incidents and the responsibilities which Nemeth assumed in order not only to earn his remuneration but to retain his job. He apparently had the physical ability and aptitude for football, and the University hired him to perform work on the campus and, as an incident of this work, to have him engage in football.").

[32] State Comp. Ins. Fund v. Indus. Accident Comm'n, 314 P.2d 288 (Colo. 1957).

[33] *See id.* at 289–90.

athlete's participation in the university's athletic program.[34] The *State Compensation Insurance Fund* court's reasoning foreshadows the reasoning of courts analyzing student athletes' entitlement to workers' compensation recovery in recent decades.

2. The 1980s-to-Present Cases

During the 1980s, courts began consistently holding against granting workers' compensation to university student-athletes. In *Rensing v. Indiana State University Board of Trustees*, a student-athlete on the Indiana State football team suffered a back injury leaving them permanently disabled.[35] The Supreme Court of Indiana held that the student athlete's permanent disability was not a covered injury under the state workers' compensation statute because no employer-employee relationship existed between the student and the university.[36] The court reasoned that since the student's scholarship was not considered income by the National Collegiate Athletic Association ("NCAA") rules or the Internal Revenue Service ("IRS"), the student-athlete was not an employee of the university.[37] The court specifically referred to the NCAA's policy, which described the scholarship money as a "grant in aid of athletic participation," *not* a payment for athletic

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[34] *See id.* ("Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the Act. A review of the evidence disclosed that none of the benefits he received could, in any way, be claimed as consideration to play football, and there is nothing in the evidence that is indicative of the fact that the contract of hire by the college was dependent upon his playing football, that such employment would have been changed had deceased not engaged in the football activities.").

[35] Rensing v. Ind. State Univ. Bd. of Trs., 44 N.E.2d 1170, 1172 (Ind. 1983).

[36] *Id.* at 1173.

[37] *See id.* ("[T]here is evidence that the financial aid which Rensing received was not considered by the parties involved to be pay or income. Rensing was given free tuition, room, board, laboratory fees and a book allowance. These benefits were not considered to be 'pay' by the University or by the NCAA since they did not affect Rensing's or the University's eligibility status under NCAA rules. Rensing did not consider the benefits as income as he did not report them for income tax purposes. The Internal Revenue Service has ruled that scholarship recipients are not taxed on their scholarship proceeds and there is no distinction made between athletic and academic scholarships.").

participation in support of its finding that the student-athlete was not an employee.[38]

Additionally, in *Coleman v. Western Michigan University*, a university student-athlete suffered a disabling injury that prevented him from playing football.[39] Western Michigan University reduced the student athlete's scholarship as a result of him no longer being able to participate in football.[40] The *Coleman* court found that the university student-athlete's scholarship was a wage but ultimately held that the economic realities of the relationship between the student-athlete and Western Michigan University did not demonstrate an employment relationship and, consequently, the university student-athlete was not entitled to workers' compensation recovery.[41]

Similarly, in *Cheatham v. Workers' Compensation Appeals Board*, the court denied workers' compensation coverage to an injured college wrestler, reasoning that the university was providing service in the form of educational benefits to the student-athlete and no economic benefit for the university existed in its wrestling program.[42] In other words, the *Cheatham* court found that the injured student-athlete was not an employee of the university because his participation in the university's athletic program did not provide a service of value to the university, but instead, the defining characteristic of the relationship was that the university was providing education to the student-athlete.[43]

Further, in *Waldrep v. Texas Employers Insurance Association*,[44] a student-athlete that suffered a football injury, leaving him with quadriplegia, was denied workers' compensation coverage. The *Waldrep* court reasoned that no employment relationship existed between the student-athlete and the university because the student-athlete and the university never intended for

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[38] *See id.*

[39] Coleman v. W. Mich. Univ., 336 N.W.2d 224, 226 (Mich. Ct. App. 1983).

[40] *See id.* at 227.

[41] *Id.* at 227 ("In summary, the first and second factors of the 'economic reality' test demonstrate that defendant had at least some right to control the activities of the plaintiff and to discipline the plaintiff for nonperformance, but these rights were substantially limited. The third factor, *i.e.*, the 'payment of wages,' favors the finding of an employment relationship. The fourth factor, concerning whether the employee's duties were integral to the employer's business, however, weighs heavily against the finding of an employment relationship.").

[42] Cheatham v. Workers Comp. Apps. Bd., 49 Cal. Comp. Cases 54, 55, 58 (Cal. Ct. App. 1984).

[43] *See id.*

[44] Waldrep v. Tex. Emps. Ins. Ass'n, 21 S.W.3d 629 (Tex. App. 2000).

student-athletes to be considered professional athletes.[45] In furtherance of its reasoning, the court cited the NCAA's rules distinguishing college athletes as amateurs.[46]

III. ANALYSIS

A. RECENT DEVELOPMENTS IMPACTING WORKERS' COMPENSATION FOR STUDENT-ATHLETES

1. *Alston*

The Supreme Court's recent decision in *Alston v. NCAA* did not take up workers' compensation directly. Instead, *Alston* was an antitrust case against the NCAA.[47] In *Alston*, the plaintiffs (Division I basketball and football players) successfully argued that the NCAA's grant-in-aid cap—which limited the dollar amount of educational benefits a university may provide student-athletes—was an unreasonable restraint on trade in violation of the Sherman Antitrust Act.[48] Consequently, the Supreme Court upheld an injunction against the NCAA enforcing its grant-in-aid cap on educational benefits.[49] Although the *Alston* decision did not take up the issue of workers' compensation for university student-athletes, the Supreme Court's opinion provided a particularly relevant lengthy discussion of the history of compensation for student-athletes.[50] The *Alston* court's discussion of university student-athlete compensation is significant to workers' compensation because it detailed the development of the NCAA as the story of an organization with two juxtaposed purposes: (1) limiting compensation for student-athletes and (2) expanding its share in the market for commercializing university sports.[51] The *Alston* court's description of the

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[45] *See id.* at 700.

[46] *See id.* at 700–02.

[47] NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

[48] *Id.* at 2151, 2165.

[49] *Id.* at 2165 ("Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; . . .").

[50] *See id.* at 2148–52.

[51] *Id.* at 2149 ("To some, [NCAA rules] sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, [NCAA rules] marked the beginning of the NCAA behaving

NCAA's development suggested that the NCAA's ever-expanding share in the market for commercializing university sports may have become large enough, at least in regard to Division I athletic programming, and that the university student-athletes are providing a service of value to their universities.[52]

Furthermore, the Supreme Court's classification of scholarships and educational benefits as compensation for student-athlete labor provides student-athletes with support for the contention that their educational benefits should also be considered compensation under the workers' compensation framework.[53] Arguably, the *Alston* court's discussion of the NCAA's development established that college athletics is an industry and that the scholarships, travel expenses, tutors, and other benefits that student athletes receive is compensation for their contribution to the profit-making goal of college athletics.[54] Accordingly, the *Alston* court provides a foundation on which student-athletes may successfully argue that they are employees of their universities because of their participation in their university's athletic programs.[55] Particularly regarding workers' compensation claims, courts have barred student-athletes from recovering workers' compensation from universities because scholarships and educational benefits did not count as a direct benefit paid to the student-athlete as an employee of the university.[56]

Historically, courts have reasoned that universities are not employers of student-athletes because universities provide the service of

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as an effective cartel, by enabling its member schools to set and enforce rules that limit the price they have to pay for their inputs." (internal quotation marks omitted)).

[52] *Id.* at 2150 ("At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually.").

[53] *See id.* at 2166 ("[T]his case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools.") (emphasis in original).

[54] *Id.* at 2150.

[55] *Compare id.* at 2166, *with* Rensing v. Ind. State Univ. Bd. of Trs., 44 N.E.2d 1170, 1173 (Ind. 1983) ("[T]here is evidence that the financial aid which Rensing received was not considered by the parties involved to be pay or income. Rensing was given free tuition, room, board, laboratory fees and a book allowance. These benefits were not considered to be 'pay' by the University or by the NCAA[.]").

[56] *See* State Comp. Ins. Fund v. Indus. Accident Comm'n, 314 P.2d 288, 289–90 (Colo. 1957); Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d, 1172, 1173 (Ind. 1983).

education to students. Consequently, universities' business objectives are tied to the institutions' educational services to students, not profit-making athletic programming.[57] The *Alston* decision dispenses with this argument by classifying educational benefits as compensation and describing competition among schools to recruit student-athletes as ensuring "[s]tudent-athletes would receive offers that would more closely match the value of their athletic services."[58] Consequently, the *Alston* decision provides injured university student-athletes, especially those in Division I programs, with support for a claim that they are entitled to workers' compensation as employees of their universities, given that their participation in athletic programming provides universities with valuable revenue.

2. *Johnson*

Like the Supreme Court's *Alston* decision, the Eastern District of Pennsylvania's decision in *Johnson v. NCAA*[59] did not directly consider the question of a university student-athlete's entitlement to workers' compensation benefits. Instead, the *Johnson* court held that the plaintiffs, also Division I student athletes, survived a 12(b)(6) motion to dismiss the plaintiffs' claims that they were employees of the NCAA and their universities.[60] The *Johnson* court held that the plaintiff university student athletes plausibly pled that they were employees of their universities under the Fair Labor Standards Act ("FLSA") and various state minimum wage acts and, consequently, were entitled to payment of wages for the time they spent participating in their universities' athletic programs.[61] Therefore, the court denied the defendant NCAA and member institutions' motion to dismiss for failure to state a claim.[62]

In reaching its conclusion, the *Johnson* court addressed the defendants' three arguments in turn: (1) that the student athletes were amateurs, not professional athletes and, therefore, not employees, (2) that the Department of Labor ("DOL") does not consider student-athletes as

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[57] *See* Coleman v. W. Mich. Univ., 336 N.W.2d 224, 225 (Mich. Ct. App. 1983); Cheatham v. Workers Comp. Apps. Bd., 49 Cal. Comp. 54, 58 (Cal. Ct. App. 1984); Waldrep v. Tex. Emps. Ins. Ass'n, 21 S.W.3d 692, 698 (Tex. App. 2000).

[58] NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

[59] Johnson v. NCAA, 561 F. Supp. 3d 490 (E.D. Pa. 2021).

[60] *Id.* at 493, 507.

[61] *Id.* at 497–508.

[62] *Id.* at 507.

employees under the FLSA, and (3) that the plaintiffs did not plausibly allege that the economic realities of the relationship between the plaintiffs and defendants demonstrated an employment relationship.[63]

First, the *Johnson* court cited *Alston* to support its finding that the argument that the plaintiff university student-athletes were not employees of their universities because they were amateurs necessarily failed as "circular reasoning."[64] Second, the court found that although the DOL's Field Operations Handbook provided that programs "conducted primarily for the benefit of the participants as a part of the educational opportunities provided by the school or institutions are not work of the kind contemplated by [the FLSA]," the *Johnson* plaintiffs' participation in NCAA Division I athletic programing was not for the primary benefit of the plaintiff student-athletes, but instead for the benefit of the defendant universities.[65] Third, the court applied the seven factor *Glatt* test to analyze the economic realities of the relationship between the plaintiffs and the defendants, "based on the whole relationship between the parties."[66]

The seven *Glatt* factors required the court to analyze the extent to which (1) both parties had no expectation of compensation; (2) the training provided was educational; (3) the plaintiff's participation in the athletic program structurally resembled an academic program; (4) the athletic program accommodated the plaintiff's academic requirements; (5) the athletic program duration was limited to the duration for which the program would benefit the plaintiff's learning; (6) the plaintiffs' participation in athletics complimented, rather than displaced, the plaintiffs' education; and (7) the parties understood that the program was to be conducted without pay.[67] The *Johnson* court found that the first and seventh factors weighed in

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[63] *Id.* at 503, 505.

[64] Johnson v. NCAA, 556 F. Supp. 3d 491, 501 ("[T]he [defendants] engage in the circular reasoning that they should not be required to pay Plaintiffs a minimum wage under the FLSA because Plaintiffs are amateurs, and that Plaintiffs are amateurs because the [defendants] and other NCAA member schools have a long history of not paying student athletes like the Plaintiffs.") .

[65] *Id* at 504 n.8; *see also id.* at 506 ("[T]he Complaint plausibly alleges that the NCAA D1 interscholastic athletics are not part of the educational opportunities provided to the student athletes by the colleges and universities that they attend but, rather, interfere with the student athletes' abilities to participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities.").

[66] *Id.* at 504–05.

[67] *Id.* at 505–06.

favor of the defendants, the second and fifth factors were neutral, and the third, fourth, and sixth factors weighed in favor of the plaintiffs.[68]

Much like how student-athletes can argue that the *Alston* decision supports a finding that they are employees of their universities,[69] they can also find support by pointing to the *Johnson* court's finding that student-athletes are plausibly employees—considering the economic realities of the relationship between Division I student-athletes, the NCAA, and the students' universities.[70] The *Johnson* court not only cites *Alston* in dispensing with the defendants' amateurism argument,[71] but also extensively analyzes the economic realities of the relationship between Division I student-athletes and their universities.[72] The *Johnson* court's reasoning directly addresses the workers' compensation threshold question of whether student-athletes are employees by using a test that has been applied to analyze claimants' entitlement to workers' compensation recovery in other contexts.[73] Therefore, an injured university student-athlete may cite *Johnson* in pursuing workers' compensation benefits as support for the contention that the economic realities of the relationship between university student-athletes and their universities demonstrates that they are in fact employees of their universities.

3. NLRB Memo

While the *Alston* and *Johnson* decisions alone provide evidence of a change in how courts view university student-athlete's legal status in relation to their universities, the NLRB Memo provides evidence that signals a shift in the treatment of student-athletes by the legal community more broadly. On September 29, 2021, the General Counsel of the NLRB published the NLRB Memo, titled "Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act."[74] The NLRB memo reinstated a 2015 NLRB decision titled *Northwestern University and College Athletes Players Association (CAPA)* that had been repealed by the

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[68] *Id.* at 508.

[69] *See supra* Section III.A.1.

[70] *See generally* Johnson v. NCAA, 561 F. Supp 3d 490 (E.D. Pa. 2021).

[71] *See id.* at 499.

[72] *See id.* at 502.

[73] *Compare id., with* Kidder v. Miller-Davis Co., 564 N.W.2d 872, 880 (Mich. 1997).

[74] NLRB Memo, *supra* note 6.

Trump-era NLRB.[75] The 2015 NLRB decision provided, in relevant part, that Northwestern University Division I football players who were fighting for their right to unionize were employees under the National Labor Relations Act ("NLRA"), and, therefore, entitled to engage in collective bargaining.[76] The NLRB Memo also articulated the NLRB General Counsel's position on university student-athletes more generally: "the football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, are employees under [the NLRA]."[77]

Although the NLRB Memo, like the *Alston* and *Johnson* decisions, did not specifically take up the question of student athletes' entitlement to workers' compensation benefits, it provides support for the argument that university student-athletes should be legally categorized as employees of their universities, which would increase the likelihood that such student-athletes would succeed in accessing workers' compensation benefits when injured during university athletic programs.[78] Illustratively, the NLRB General Counsel specifically cited the Supreme Court's *Alston* decision as "a precursor to more changes to come in college athletics . . . as courts continue to chip away at NCAA restrictions on benefits to student-athletes, more compensation that is untethered to academics brings student-athletes more fully within employee status under the law."[79] In other words, the NLRB Memo frames the *Alston* decision as suggestive of a judicial trend toward allowing more compensation of university student-athletes, which in turn allows more university student-athletes to take on the characteristics consistent with the legal definition of an employee.[80]

Further, the NLRB Memo specifically makes a point of calling student-athletes "Players" because the General Counsel claimed that the term student-athlete "was created to deprive those individuals of workplace protections . . . . [the] NCAA's president and lawyers coined the term 'student athlete' in 1950s to avoid paying workers' compensation claims to injured athletes[.]"[81] Arguably, if the NLRB General Counsel's claims are presented to and accepted by courts deciding whether university student-

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[75] *See id.*

[76] *See id.* at 2. *See also* Northwestern Univ. 362 N.L.R.B. no. 167, 1364 (2015) ("In sum, based on the entire record in this case, I find that the Employer's football players who receive scholarships fall squarely within the Act's broad definition of 'employee' when one considers the common law definition of 'employee.'").

[77] *See* NLRB Memo, *supra* note 6.

[78] *Id.*

[79] *See id.* at 5 (internal quotation marks omitted).

[80] *See id.*

[81] *Id.* at 1 n.1.

athletes are entitled to workers' compensation recovery, these courts will likely be increasingly wary of defendant universities' arguments that university student-athletes are in a separate legal category from professional athletes that are entitled to workers' compensation recovery.[82]

All in all, the *Alston* and *Johnson* decisions and the NLRB Memo suggest that the legal classification of university student-athletes as non-employees is eroding.[83] At minimum, these recent developments in the legal classification of university student-athletes provide injured university student-athletes with legal precedent in support of the argument that they are employees of their universities.[84] Once student-athletes are no longer considered non-employees of universities by courts, courts will consider a given student-athlete's claim for workers' compensation recovery by analyzing the two elements of a workers' compensation claim: (1) whether the injury arose out of the employment, and (2) whether the injury occurred during the course of employment.[85] Given that university athletic programs are physically strenuous and dangerous activities, student-athlete claimants will likely succeed in making a case for workers' compensation recovery because athletes are likely to suffer injuries caused by their participation in athletic programs (arising out of employment) and at the time and place of such athletic programming (course of employment).[86] Therefore, the *Alston* and *Johnson* decisions and the NLRB Memo are significant in that they provide support for student athletes overcoming their biggest hurdle to

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[82] *Compare id., and* Johnson v. NCAA, 556 F. Supp. 3d 491, 501 (E.D. Pa. 2021) ("[T]he [defendants] engage in the circular reasoning that they should not be required to pay Plaintiffs a minimum wage under the FLSA because Plaintiffs are amateurs, and that Plaintiffs are amateurs because the [defendants] and other NCAA member schools have a long history of not paying student athletes like the Plaintiffs."), *with* Coleman v. W. Mich. Univ., 336 N.W.2d 224, 226, 227–28 (Mich. Ct. App. 1983) ("[W]hether the employee's duties were integral to the employer's business, however, weighs heavily against the finding of an employment relationship.").

[83] *See supra* Section III.A.

[84] *See id.*

[85] *See supra* Section II.A.

[86] Zachary Y. Kerr, et al., *College Sports-Related Injuries—United States, 2009–10 Through 2013–14 Academic Years,* CTRS. DISEASE CONTROL & PREVENTION (Dec. 11, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6448a2.htm.

workers' compensation recovery: the existence of an employment relationship between the university and the student athlete.

B. POTENTIAL SYSTEMATIC IMPLICATIONS OF WORKERS' COMPENSATION FOR STUDENT-ATHLETES

As the history of workers' compensation caselaw demonstrates, the largest hurdle to workers' compensation recovery for student-athletes has been the courts' decision not to classify them as employees.[87] As discussed above, the recent developments of the *Alston* and *Johnson* decisions and the NLRB Memo suggest that a sea-change is occurring in the legal classification of student-athletes, making it more likely that student-athletes will be considered employees of their universities in the future.[88] Given the inherent dangers of university athletics, it is very likely that opening the door to student-athletes becoming classified as employees will also open the flood gates to student-athletes' workers' compensation recovery because it is highly likely that student-athletes' injuries will both arise out of and occur during the course of their participation in university athletic programs.[89]

Therefore, the three recent developments of *Alston*, *Johnson*, and the NLRB Memo are significant catalysts to workers' compensation recovery for university student-athletes. These developments provide precedent for courts to allow student-athletes to recover workers' compensation benefits using the traditional workers' compensation framework, but coming to a different result than courts have since the 1980s on the threshold question of whether an employment relationship exists.

Given that the *Alston* and *Johnson* decisions and the NLRB Memo suggest that courts will more readily classify student-athletes as employees, and the fact that student-athlete plaintiffs will meet the other elements of a workers' compensation claim with ease, these recent developments merit a closer look at the administrative realities of a workers' compensation system for student-athletes. Specifically, these recent developments merit a closer examination of four considerations: (1) the source of funds for student-athlete workers' compensation recovery and the potential financial burden of such claims; (2) the implication of the exclusivity of remedy doctrine; (3) the impact on other legal systems affecting student athletes; and (4) the impact on other student workers.

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[87] *See supra* Section II.B.
[88] *See supra* Section III.A.
[89] *See* Kerr et al., *supra* note 86.

1. The Potential Financial Burden and the Source of Funding

If, as this essay predicts, workers' compensation recovery becomes more common for student-athletes, it is helpful to analyze the financial risk faced by universities and conferences by examining the possible recovery for the most extreme case as an orienting analysis. At first glance, one may think that workers' compensation recovery for a permanently disabled university student-athlete may be astronomical. Given the athlete's young age and the potential (albeit exceedingly rare) that they may become a high-earning professional athlete.[90] However, it is unlikely that workers' compensation is the system by which student athletes will find such windfall recovery.

Workers' compensation benefits in most states are set by an average weekly wage schedule.[91] Therefore, even professional athletes who obtain workers' compensation for their injuries tend to only receive workers' compensation recovery in amounts set by state average weekly wage schedules, which almost always fall far below what the professional athlete would have made had they been able to continue competing at the professional level.[92] The fact that courts in many jurisdictions apply scheduling to calculate the amount of workers' compensation recovery for injured professional athletes suggests that courts are not likely to provide

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[90] *NCAA Recruiting Facts*, NCAA (August 2014), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf ("Fewer than 2 percent of NCAA student-athletes go on to be professional athletes.").

[91] 8 LARSON'S WORKERS' COMPENSATION LAW § 93.01(1)(a) (Matthew Bender Elite Prods. 2022) ("The beginning point in calculating the amount of benefits is the 'average weekly wage.' This, when the fixed statutory percentage—usually two-thirds—has been applied to it, becomes the unit of benefit by which practically all compensation except disfigurement allowances, medical payments, and occasional special enhancements is measured, subject to maximum and minimum limits.").

[92] Dan Churney, *Life After the Chicago Bears: Ex-Players Have Collected $13M in Workers' Comp Since 2000*, FORBES (Mar. 20, 2018, 10:47 AM), https://www.forbes.com/sites/legalnewsline/2018/03/20/life-after-the-chicago-bears-ex-players-have-collected-13m-in-workers-comp/?sh=5b220bfd97e1 (summarizing workers compensation settlements for various professional athletes valued at $550,000, $220,000, and $400,000); Marc Lifsher, *Athletes Cash in on California's Workers' Comp*, LA TIMES (Feb. 23, 2013, 12:00 AM), https://www.latimes.com/sports/la-xpm-2013-feb-23-la-fi-proathletes-workers-comp-20130223-story.html (detailing a $199,000 workers compensation settlement for a professional athlete).

workers' compensation recovery equal to the university student-athlete's potential professional earning capacity but for the injury. A court is unlikely to speculate as to the amount earned in a university student-athlete's potential professional career if courts do not make a special exception to the wage scheduling for the calculation of recovery for a professional athlete, who has already been making a professional athlete's salary and, therefore, whose earning potential is much less speculative than that of a university student-athlete.

Although the amount of recovery may not be crippling to a university or a conference in response to each discrete claim of workers' compensation by a university student-athlete, university athletics is a dangerous undertaking and, consequently, the probability of multiple student athletes seeking workers' compensation is high.[93] Therefore, it remains important to consider the source of funding for student-athlete workers' compensation recovery. Most universities are not-for-profit institutions.[94] The main funding for universities comes from tuition, fundraising, and governmental grants.[95] One other source of funding of note in this context is the broadcasting and spectator revenue from particularly popular university athletic events.[96] Further, universities insure against financial risks posed by

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[93] Kerr et al., *supra* note 86 ("The 1,053,370 injuries estimated during the 5 academic years studied represented an average of 210,674 total injuries per year[.]").

[94] Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. NEWS & WORLD REP. (April 27, 2021 9:30 AM) https://www.usnews.com/education/best-colleges/articles/how-many-universities-are-in-the-us-and-why-that-number-is-changing#:~:text=Private%20Colleges,profit%20schools%20in%20fall%202019.

[95] *See Current Revenue Sources for Public Research Universities*, AM. ACAD. ARTS & SCI., https://www.amacad.org/publication/public-research-universities-understanding-financial-model/section/2#:~:text=As%20state%20appropriations%20for%20higher,and%20endowment%20and%20investment%20income (last visited Nov. 25, 2021); *IPEDS ANALYTICS: Delta Cost Project Database, National Center for Education Statistics*, NAT'L CTR. EDUC. STAT., https://nces.ed.gov/ipeds/deltacostproject/ (last visited Nov. 25, 2021).

[96] *See* NCAA v. Alston, 141 S. Ct. 2141, 2150–51 (2021) ("At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) made more than $409 million in

lawsuits, including workers' compensation for individuals traditionally considered employees of the university.[97] Arguably, the most efficient way for student-athlete workers' compensation recovery to be funded is through insurance coverage that mirrors the coverage already in place for typical employees.[98] Although it remains to be seen how much financial risk universities face from student-athlete workers' compensation claims, the typical employee workers' compensation insurance deductible provides a good baseline metric until enough of these cases are processed to provide a representative dataset for future cost predictions for student-athlete-specific workers' compensation recovery.[99]

2. The Implications of the Exclusive Remedy Doctrine

A fundamental characteristic of workers' compensation is the exclusivity of remedy doctrine. Exclusivity of remedy provides that employees entitled to workers' compensation recovery are not able to pursue another cause of action against their employers to compensate them for an

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revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year. All these amounts have increased consistently over the years." (internal quotations and citations omitted)).

[97] *See, e.g.*, *Workers Compensation*, PA. ST. UNIV., https://hr.psu.edu/workers-compensation (last visited Nov. 25, 2021); Risk *Management and Insurance*, COLO. ST. UNIV. http://rmi.prep.colostate.edu/workers-compensation/ (last visited Nov. 25, 2021); *Workers' Compensation*, UNIV. OF MO. SYS., https://www.umsystem.edu/ums/fa/management/risk/insurancecoverages-workerscompensation (last visited Nov. 25, 2021).

[98] *See* Jennifer Berrier et al., *2020 Pennsylvania Workers' Compensation and Workplace Safety Annual Report*, PA. DEP'T LAB. & INDUS. (July 2021), https://www.dli.pa.gov/Individuals/Workers-Compensation/publications/Documents/2020%20WC%20Annual%20Report.pdf ("For new self-insurers starting self-insurance after Oct. 30, 1993, the assessment is 0.5 percent of their modified premium for the 12 months immediately preceding the start of self-insurance. Existing and former self-insurers with runoff claims may be assessed on an as-needed basis at the rate of up to 1 percent of compensation paid annually. For fiscal year 2019-20, the amount assessed was $33,478 and represented 0.5 percent of the annual modified premium of employers starting self-insurance.").

[99] *See id.*

injury covered by workers' compensation.[100] In other words, workers' compensation recovery is the exclusive remedy provided to injured workers for compensation of a workplace injury.[101] One justification for exclusivity of remedy is that in workers' compensation cases, claimants have a lower evidentiary burden. Workers' compensation claimants are not required to show fault on behalf of the employer, whereas in tort cases, plaintiffs are required to prove a breach of duty, which requires proof of negligence on the part of the employer.[102] Given the centrality of exclusivity of remedy to the workers' compensation system, in assessing the implications of allowing workers' compensation recovery for student-athletes, it is important to assess the risks and benefits of foregoing other potential tort claims that student-athletes may currently bring against their university.[103]

In order to hold the university liable for negligence arising out of the student-athlete's injury during an athletic activity, the student-athlete would need to prove that the university had a duty to prevent such an injury; that the university breached such duty; that the university's breach caused the injury; and that the injury was legally cognizable.[104] Arguably, one benefit

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[100] *See, e.g.*, Hyett v. Nw. Hosp. for Women & Children, 180 N.W. 552, 553 (Minn. 1920) ("That the remedy so given and provided is exclusive of all others seems to be the prevailing opinion of the courts where the question has received attention. . . . With the opportunity presented, the discovery of negligence in some respect contributing to a particular injury, would not be difficult, and thus the employer exposed to a second suit in which recovery could be had for pain and suffering, disfigurement of person, in addition to a recovery of compensation for actual disability under the compensation act." (internal citations omitted)).

[101] *See id.*

[102] *See* 9 LARSON'S WORKERS' COMPENSATION LAW § 100.01(1) (Matthew Bender Elite Prods. 2022) ("Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or the employee's dependents against the employer, including a borrowing employer, and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts.").

[103] *See, e.g.*, Ryan Boysen, *Ex-Players Sue UCLA, Coaches, NCAA For Injuries, Abuse*, LAW360 (May 31, 2019, 10:38 PM) https://www.law360.com/articles/1164791/ex-players-sue-ucla-coaches-ncaa-for-injuries-abuse.

[104] RESTATEMENT (SECOND) OF TORTS § 281 ("The actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to such interest

of a workers' compensation system is that the student-athlete would only need to prove that the they were an employee of the university and that the injury arose out of and was in the course of the their employment, which is a comparably lower evidence.[105]

However, one potential downside of allowing workers' compensation recovery for student-athletes is that the recovery will be limited by schedules determined by state workers' compensation statutes.[106] Whereas with tort claims, the student-athlete's damages would not be limited in such a manner.[107] Therefore, exclusivity of remedy could prevent injured student-athletes from receiving a monetary award equal to the amount that they would be entitled to if the university was being held liable for negligence. Given that workers' compensation law limits the amount of benefits that a student-athlete may recover, and exclusivity of remedy bars an injured university student-athlete from bringing a concurrent tort claim, the university's incentive to rectify the dangerous condition that led to the injury of the plaintiff may be lessened by allowing workers' compensation recovery instead of tort claims.

3. The Impact on Other Relevant Legal Systems

As mentioned above, workers' compensation claims by injured university student-athletes have not been successful in courts since the 1980s.[108] Since the 1980s, much has changed in the world of higher education law. Some legal developments in the recent decades may pose

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or any other similar interest of the other which is protected against unintentional invasion, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.").

[105] *See supra* Section II.A.

[106] *See* 7 LARSON'S WORKERS' COMPENSATION LAW § 86.01 (Matthew Bender Elite Prods. 2022) ("Schedule benefits for permanent partial disability are authorized by the statutes of all American jurisdictions except Florida, Kentucky, and Nevada.").

[107] *See* RESTATEMENT (THIRD) OF TORTS § 901 (AM. L. INST. 2000) ("The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are: (a) to give compensation, indemnity or restitution for harms; (b) to settle disputes as to rights; (c) to punish wrongdoers.").

[108] *See supra* Section II.B.2.

particular challenges to the administration of a workers' compensation system for university student-athletes.[109] Specifically, Title IX, which prevents discrimination on the basis of sex in educational programs receiving federal funding,[110] and Title IV, which regulates the administration of federal financial assistance that students receive for university attendance.

Title IX was interpreted by the Department of Education to require a federally funded university "which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes."[111] In other words, Title IX requires the equal distribution of university resources for university athletic teams that are designated by gender (historically men's and women's teams).[112] Given that the *Alston* and *Johnson* decisions, as well as the NLRB memo, include an analysis of the employment relationship between universities and student-athletes with a particular focus on Division I football, it is unclear whether the same analysis finding that particular university student-athletes were employees would likewise apply to other teams.[113] This legal context presents a challenge to university efforts to comply with Title IX because if only athletes from particular teams are designated as "Men's Teams" (such as football) and considered employees eligible for workers' compensation benefits, then a university could be liable under Title IX for discriminatorily allocating resources to teams with players of a certain gender. In other words,

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[109] 20 U.S.C. § 1070 (2009).

[110] § 1681(a) (1986).

[111] 45 C.F.R. § 86.41(c) (1979); 10 C.F.R. § 5.450(c) (2009).

[112] *See id.*

[113] *See* NCAA v. Alston, 141 S. Ct. 2141, 2150–51 (2021) ("The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. . . . Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year."); Johnson v. NCAA, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021) ("In their 2016 fiscal year, NCAA D1 schools in the football power five subdivision had median total revenues related to NCAA sports of $97,276,000; schools in the football bowl subdivision reported median total revenues related to NCAA sports of $33,470,000; schools in the football championship subdivision had median total revenues related to NCAA sports of $17,409,000[.]"); NLRB Memo, *supra* note 6 ("[T]he athletes play football (perform a service) for the university and the NCAA, thereby generating tens of millions of dollars in profit and providing an immeasurable positive impact on the university's reputation, which in turn boosts student applications and alumni financial donations; the football players received significant compensation, including up to $76,000 per year, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare[.]").

universities could violate Title IX because traditionally male football student athletes would be entitled to workers' compensation recovery, whereas teams typically designated as "Women's Teams" would not.[114] In order to address this potential Title IX compliance risk, universities may need to designate a fund for medical and disability benefits that mirrors the amount of workers' compensation benefits that may be recovered by university student-athletes on teams typically designated as "Men's Teams." This fund would then provide those benefits to injured student athletes on teams typically designated as "Women's Teams," despite the fact that those athletes may not succeed in pursuing workers' compensation recovery through traditional channels.[115]

Title IV includes nine provisions that all relate to students' receipt of federal funds to support their education.[116] Title IV is important to consider in the context of workers' compensation recovery for injured university student-athletes because, as the *Alston* and *Johnson* decisions demonstrate, courts are beginning to find that student-athletes receive compensation from universities in the form of athletic scholarships and other educational benefits.[117] Given that the majority of student-athletes do not receive the full cost of attendance from their universities in exchange for their participation in athletic programs and the majority of undergraduates receive federal student aid,[118] the impact of workers' compensation recovery on student athletes' financial aid eligibility under Title IV is important to consider.

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[114] *See* 45 C.F.R. § 86.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors: . . . [p]rovision of medical and training facilities and services [and] [p]rovision of housing and dining facilities and services[.]").

[115] *See supra* Section II.

[116] 20 U.S.C. § 1070 (2009).

[117] *See Alston*, 141 S. Ct. at 2164; *Johnso*n, 556 F. Supp. 3d at 507.

[118] *NCAA Recruiting Facts*, NCAA (August 2014), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf (finding that 53% of Division I student athletes receive some level of athletic scholarship).

On one hand, workers' compensation recovery is typically federally tax-exempt,[119] which suggests that workers' compensation recovery would not be considered in a Title IV analysis of the student-athlete's federal student aid eligibility.[120] On the other hand, if the purpose of workers' compensation benefits is to compensate an injured worker for their loss of earning capacity, and the earnings of a student-athlete are scholarship dollars, then an athlete may receive a windfall by receiving workers' compensation benefits without also having such benefits accounted for as deductions from the athlete's eligibility for federal student aid under Title IV.[121] Therefore, if workers' compensation recovery becomes commonplace for injured university student-athletes, Title IV may need to be amended or further guidance may need to be issued to address whether workers' compensation benefits will be included in future calculations of student-athletes' eligibility for federal student aid.

4. The Impact on Other Student Workers

If, as this essay argues, the *Alston* and *Johnson* decisions and the NLRB memo do signal a sea-change in the legal classification of student athletes as employees and such a sea-change will also lead to increased workers' compensation recovery for student-athletes,[122] it is important to consider what this change would mean for other student workers who have typically not been legally considered employees of their universities.[123]

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[119] *See* I.R.S. Notice 15047D, 19 (2021) ("Amounts you receive as workers' compensation for an occupational sickness or injury are fully exempt from tax if they're paid under a workers' compensation act or a statute in the nature of a workers' compensation act.").

[120] 20 U.S.C. § 1070(a)(2) (2009). ("[T]he term 'adjusted gross income' means- (i) in the case of a dependent student, the adjusted gross income (as defined in section 62 of title 26) of the student's parents in the second tax year preceding the academic year; and (ii) in the case of an independent student, the adjusted gross income (as defined in section 62 of title 26) of the student (and the student's spouse, if applicable) in the second tax year preceding the academic year[.]").

[121] *See* 1 LARSON'S WORKERS' COMPENSATION LAW § 1.03(4) (Matthew Bender Elite Prods. 2022) ("In compensation, unlike tort, the only injuries compensated for are those which either actually or presumptively produce disability and thereby presumably affect earning power.").

[122] *See supra* Section III.A.

[123] *See, e.g.*, Lyons v. Chittenden Cent. Supervisory Union, 185 A.3d 551, 564 (Vt. 2018) ("As in this case, the student's program included both classroom work and an apprenticeship to allow the participants to apply their classroom knowledge

Arguably, student-athletes are not the only students that engage in work that creates value for the university. There are also student interns and student teachers working in a variety of other settings including classrooms, university hospitals, labs, and administrative offices. Non-athlete student-workers also present similar questions to courts—of whether they are employees of the university. Illustratively, the *Glatt* factors used by the *Johnson* court to examine the economic realities of the relationship between student-athletes and their universities were developed in order to test if a student intern should be considered an employee.[124] Specifically, the distinction between a student—frequently not categorized by workers' compensation statutes as an employee—and an apprentice—frequently categorized as an employee under workers' compensation statutes—can affect whether an injured student-teacher, intern, or other student-worker can recover workers' compensation from the student's institution for an injury that the student sustained while working.[125]

Arguably, if student athletes continue to be legally categorized as employees of their universities and are allowed to recover for athletic injuries, those findings would provide other students working for their universities with support for the argument that they too are employees. Particularly, the *Alston* and *Johnson* decisions found that the student athletes' academic scholarships were compensation for the value that the

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in a hospital setting. . . . In concluding that the student was an 'apprentice' under the state workers' compensation statute, the court emphasized that, although he was not paid monetarily, the student 'received the benefits of acquiring the practical skills required in accomplishing the tasks a respiratory therapist must perform.'"); Walls v. N. Miss. Med. Ctr., 568 So. 2d 712, 717–18 (Miss. 1990) ("The job status of apprentice medical-related personnel is highly problematic and usually must be determined not only on a case-by-case basis but also with special regard to relevant statutory provisions. Though possibly and seemingly incongruous, a lab technician trainee could be considered a student for some purposes and an employee for others. . . . we are concerned with coverage under the Workmen's Compensation Act of trainees who learn primarily from work in a hospital affiliated with a technical school the practical and technical skills required for employment in their training specialty. We find these trainees not to be primarily students, but rather to be apprenticeship employees within the meaning of the Workmen's Compensation Act.").

[124] *See* Johnson v. NCAA, 561 F. Supp. 3d 490, 505–06 (E.D. Pa. 2021).

[125] *See supra* note 123.

student athletes brought to the university.[126] A student-worker could make a similar argument that participation in a university internship program or work-study was in fact the student adding value to the university and not the student receiving educational services from the university.[127] Whether or not student-workers succeed with such an argument, courts that allow workers' compensation recovery for injured student-athletes will need to engage in difficult and fact-specific, line-drawing analyses to define the type of work or athletic activity that counts as employment under the relevant workers' compensation laws of each state. In doing so, courts will need to engage in the task of analyzing what type of student-work creates value for the university, which is a highly subjective task with important public policy implications.

IV. CONCLUSION

The recent developments of the *Alston* and *Johnson* decisions, as well as the NLRB memo, suggest that student athletes will succeed more frequently in workers' compensation claims because these developments provide a framework for which courts may more readily hold that student-athletes are employees. Courts applying such reasoning are likely to hold in favor of workers' compensation recovery for student-athletes because the other elements of workers' compensation claims will be easily met, given the inherently dangerous nature of college athletics. Therefore, it is important to consider the administrative realities of a workers' compensation system for student-athletes, since such recovery is more likely in light of *Alston*,

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[126] *See* NCAA v. Alston, 141 S. Ct. at 2150–51 (2021); *Johnson*, 561 F. Supp. 3d at 495–96.

[127] *See, e.g.*, *Alston*, 141 S. Ct. at 2166 ("By permitting colleges and universities to offer enhanced education-related benefits, [the injunction against the cap on educational benefits] may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools."); Memorandum at 18, Johnson v. NCAA, No. 19-5230 (E.D. Pa. Aug. 25, 2021) ("[W]e find that the Complaint plausibly alleges that NCAA D1 interscholastic athletics are not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend. We further find that the Complaint plausibly alleges that the NCAA D1 interscholastic athletics are not part of the educational opportunities provided to the student athletes by the colleges and universities that they attend but, rather, interfere with the student athletes' abilities to participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities.").

Johnson, and the NLRB memo. Specifically, courts should consider the implications of allowing injured university student-athletes to recover workers' compensation benefits on: (1) the source of funds for student-athlete-workers' compensation recovery and the potential financial burden of such claims; (2) the implications of the exclusivity of remedy doctrine; (3) the impact on other legal systems affecting student athletes; and (4) the impact on other student workers.