

## NLRB General Counsel’s Memorandum Foreshadows Additional Changes to NCAA Athletics



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On September 29, 2021, National Labor Relations Board (NLRB) General Counsel, Jennifer A. Abruzzo, issued [Memorandum GC 21-08](#) (the “Memorandum”) stating her groundbreaking prosecutorial position that “scholarship football players at Division I [Football Bowl Subdivision (FBS)] private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the [National Labor Relations Act (NLRA)].” This Memorandum, on the heels of the Supreme Court’s decision in *NCAA v. Alston*, could have drastic ramifications for colleges and universities. While the consequences of this position are not detailed in the Memorandum, the NLRB Regional Offices will be applying this analysis to future cases.

While not binding authority, Memorandum GC 21-08 reinvigorates the threat of college athletes unionizing—something the Northwestern University football team unsuccessfully attempted to do in the mid-2010s—or now

engaging in a protected right to strike, picket, or engage in other concerted activity. The Memorandum makes clear that these athletes will be afforded the same rights as **employees** under the NLRA. This is at odds with the NCAA's existing amateurism model, which requires its institutions to treat athletes as non-employees, and by the very terms of its Division I rulebook, penalize institutions who do give their athletes employee-like rights or benefits.

Equally significant is Memorandum GC 21-08's context. It comes in the wake of, and leans heavily on, the Supreme Court's decision in *NCAA v. Alston* as well as the mounting state and federal pressures which caused the NCAA to loosen its restrictions on college athletes' ability to earn compensation through their name, image, and likenesses (NIL). In his *Alston* concurrence, Justice Kavanaugh threw sharp criticism at the NCAA for couching "its arguments for not paying student athletes in innocuous labels"—e.g. the term "student-athlete." For Justice Kavanaugh and now General Counsel Abruzzo, the "student-athlete" moniker and similar labels "cannot disguise the reality: the NCAA's business model would be flatly illegal in almost any other industry in America."

Viewed in this context, a logical fallout from this Memorandum could be an increased threat of "pay-for-play" in NCAA athletics. Importantly, pay-for-play is not the same as NIL compensation. Based on the [interim policy](#), adopted on June 30, 2021, NCAA athletes are currently entitled to earn compensation through their NILs. This includes making public appearances, signing autographs, operating a lucrative social media account, or appearing in advertisements in exchange for a fee. The money is transferred directly from a third-party sponsor to an athlete and is not touched by the school. The athlete is only required to disclose the opportunity to the school's compliance officer, who vets the transaction to ensure all the institution's, NCAA's, and state's rules have been followed.

Pay-for-play, on the other hand, involves the direct payment of money from a school to an athlete for the sole reason that the athlete will participate in athletics for the school. It is akin to a professional sports contract. And while the NCAA has firmly opposed pay-for-play since it was founded in 1906, the billion-dollar revenue streams its members now enjoy have caused numerous external commentators, now including Justice Kavanaugh and General Counsel Abruzzo, to call the very fairness of this model into question.

Accordingly, although not an immediate threat, pay-for-play in NCAA athletics becomes an increasingly real possibility that the NCAA, its conferences, and its institutions could face in this decade. It remains to be seen through which mechanism this change will take place, but Memorandum GC 21-08 proves that the avenues for challenge to the NCAA's amateurism model are only increasing in number.

Lippes Mathias' [Sports, Entertainment & Hospitality Practice Team](#) will continue to monitor legal developments related to NCAA governance, including the legal challenges to the NCAA's amateurism model. If you have any questions, please contact any of our attorneys.

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