Once a forbidden practice, many college athletes are now getting paid by nonuniversity sources such as alumni collectives for use of their name, image and likeness. Numerous state legislatures have recently passed laws permitting student athletes to earn income for their NIL.

If House v. NCAA, consolidated as In re: College Athlete NIL Litigation in the U.S. District for the Northern District of California, settles as expected in the next few months, universities will even be able to pay student athletes directly for NIL.[1]

In addition to NIL income, in 2024, the U.S. Court of Appeals for the Third Circuit held in Johnson v. NCAA that college athletes are covered by the Fair Labor Standards Act, with the possibility of being categorized as employees subject to minimum wage and overtime pay.[2]

In February 2024, the National Labor Relations Board ruled in Dartmouth College/Dartmouth College Board of Trustees, which involved the Dartmouth basketball team, that student athletes qualify as employees under the National Labor Relations Act.[1]

Justice Kavanaugh even jumped on the issue through his 2021 concurring opinion in NCAA v. Alston, looking forward to a case in which the court could hold that student athletes should be paid as employees.

It now seems inevitable that in addition to permissible pay directly from universities to student athletes for NIL, actual hourly or "direct wages" will be paid for athletic activities soon, bringing student athletes in line with fellow students who are taking tickets and selling popcorn to fans watching them in action.

Unfortunately, current restrictions on foreign student-athletes' eligibility for U.S. employment generally prevents them from earning from NIL or direct wages. These restrictions could have a disastrous impact on their teams, college athletics programs and the local economies that surround them. The U.S. Department of Homeland Security should prevent this by implementing a simple policy change now.

F-1 Visa Restrictions

International college athletes on student visas who are not U.S. citizens or lawful permanent residents (green card holders) do not have the same ability as their U.S. counterparts to receive compensation for their required athletic hours, nor to capitalize on their NIL. This is because of restrictions on employment authorization associated with their student F-1 visa status which prohibits working in the U.S. except under limited circumstances.[4]

These restrictions can potentially be overcome by leaving the U.S. to film videos, post on social media, etc. There are no U.S. visa requirements for work done while physically outside the U.S. Students can fly to their home country, or go to a third country to do the work, though they may be required to obtain work authorization in that third country. The pretzel-twisting logistics are cumbersome, especially for a student-athlete already busy with classes, studying and athletic training.

Direct payment to athletes as university employees will have potentially serious implications for athletic programs.

When a university puts an athlete on its payroll, the athlete will have to show their eligibility for U.S. employment.[5] F-1 international student-athletes, who do not have work authorization, will not be able to demonstrate employment eligibility in order to be paid like their U.S. teammates. Because local, state and federal labor laws, including minimum wage requirements, will not permit the university to pay some employees but not others for the same services, F-1 international student-athletes will have to be cut from team rosters.

Damaging Effects

Cutting international student-athletes from college sports teams will open a Pandora's box of negative consequences. The diminished roster could leave a school unable to field a full team, resulting in its having to drop that sport altogether — and U.S. student-athletes on that team would lose the ability to compete in the college sport as well.

Moreover, the loss of top international student-athletes, and possibly a number of sports programs, could result in universities losing large alumni donations that are often driven by sports programs. On top of that, the local communities and economies that rely on tourism and revenue generated by college sports could be devastated.

Solutions

There are two other visa classifications potentially available to college athletes. These include the O-1 classification for a noncitizen "of extraordinary ability in the field" and the P-1 classification for an "internationally recognized athlete." However, the statutory and regulatory requirements of these classifications can be difficult for a college player to meet, and U.S. Citizenship and Immigration Services has been reluctant to approve such cases.[6]

The requirements for an O-1 visa include being "one of the small percentage who have risen to the very top of the field of endeavor."[7] A USCIS examiner could decide that even a famous college athlete cannot be at the "very top" where there are professional leagues above the college level.

The requirements for a P-1 visa include being an internationally recognized athlete based on individual achievements, and that the athlete is coming to the U.S. to perform services "which require an internationally recognized athlete."[8] A USCIS examiner might determine that college level competitions do not require an internationally recognized athlete. Moreover, the P classification stipulates that the athlete is coming to the U.S. solely to compete, although going to school is permitted as a side activity.[9]

A better solution to the problem is for the U.S. Department of Homeland Security to implement a policy that treats compensation from both NIL and direct wages paid to F-1 students as on-campus employment, even though some of the school's athletic competitions will be at other schools or venues.[10]

For F-1 visa holders, on-campus work authorization is considered incidental to F-1 status. A separate application to USCIS for an employment authorization document is not required.

Currently, F-1 rules limit on-campus employment to 20 hours per week. Coincidentally, NCAA Division I rules limit a student-athlete's participation in "countable athletically related activities" to 20 hours per week, with a maximum of four hours per day. During the sport's off-season, the limit is reduced to eight hours per week.

This solution would be fast and easy to implement as no legislative or regulatory change would be needed. In addition, it would enable universities to remain I-9 compliant, and ensure U.S. college sports programs remain intact for U.S. schools, their local communities and their national supporters.[11] It would also allow schools to take part in group licensing deals for a university team composed of both U.S. and international student-athletes.

Conclusion

The failure to address the inability of international student-athletes to earn compensation in the U.S. sets college sports up for disaster. A DHS policy that recognizes participation in college athletics as on-campus employment would make NIL and direct compensation available to all international student-athletes. DHS should implement this policy change now.

Catherine Haight is the founding member and managing partner at Haight Law Group PC.

[1] House v. NCAA, 545 F. Supp. 3d 804 (2021).

[2] Johnson v. NCAA, No. 22-1223 (3d Cir. July 11, 2024).

[3] NCAA v. Alston, 141 S.Ct. 2141, 594 U.S. 69, 210 L.Ed.2d 314 (2021).

[4] 8 CFR §214.2(f)(9).

[5] A Form I-9 Employment Eligibility Verification must be completed for ALL new hires in the U.S., regardless of citizenship status.

[6] 8 USC §1101(a)(15)(o) and (p); 8 CFR §214.2(o) and (p).

[7] 8 CFR §214.2(o)(3)(ii).

[8] 8 CFR §214.2(p)(1)(i) and (p)(4)(i).

[9] 8 USC 1184(c)(4)(A)(ii); https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf.

[10] 8 CFR §214.2(f)(9)(i).

[11] 8 CFR §274a.2.

---

[1] Dartmouth College/Dartmouth College Board of Trustees and Service Employees International Union Local 560, 01-RC-325633, decided by the NLRB on February 5, 2024. [https://www.law360.com/articles/1794335/dartmouth-men-s-hoops-players-get-ok-for-union-vote]