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Student Note: Hoops, Hurdles, and Legal Layups: How Public Universities like Indiana May Be Able to Follow Dartmouth's Lead Towards Unionization

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HOOPS, HURDLES, AND LEGAL LAYUPS: HOW
PUBLIC UNIVERSITIES LIKE INDIANA MAY BE
ABLE TO FOLLOW DARTMOUTH'S LEAD
TOWARDS UNIONIZATION

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HOOPS, HURDLES, AND LEGAL LAYUPS: HOW PUBLIC UNIVERSITIES LIKE INDIANA MAY BE ABLE TO FOLLOW DARTMOUTH'S LEAD TOWARDS UNIONIZATION

3 U.N.H Sports L. Rev. 323 (2024).

ABSTRACT. Dartmouth Men's Basketball team has become the first successful team at a collegiate level to unionize. In March of 2024, the National Labor Relations Board certified the team as a union after a thirteen-two vote in favor of unionization. This move directly contradicts the current structure of the National Collegiate Athletic Association as they do not allow collegiate athletes to receive pay from their university for their performance. Other private universities will be able to follow directly in Dartmouth's footsteps as the National Labor Relations Board has jurisdiction over all private institutions. Public universities, like Indiana University, however, are subject to the law in which the institution resides. On balance, it is likely a court would find the Indiana athletes to be employees of the University based on control asserted over the players. While Indiana law does not support unionization at public universities, other groups around Indiana University's campus have seen success in their unionization attempt.

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INTRODUCTION

Since its founding in 1906, the National Collegiate Athletic Association (“NCAA”) has avoided compensating athletes by promoting the concept of amateurism and denying that these athletes are employees of their respective universities. Under the NCAA’s governance, only “amateur student-athletes” may participate in collegiate athletics.¹ The NCAA’s principle of student-athlete well-being states that:

“Intercollegiate athletics programs shall be conducted... in a manner designed to protect, support and enhance the physical and mental health and safety of student-athletes. Each member institution shall facilitate an environment that reinforces physical and mental health within athletics...”²

The primacy of academic experience principle includes:

“Intercollegiate student-athletes are matriculated, degree-seeking students in good standing with their institutions who choose voluntarily to participate in NCAA sports. It is the responsibility of each member institution to establish and maintain an environment in which a student-athlete’s activities are conducted with the appropriate primary emphasis on the student-athlete’s academic experience. Intercollegiate athletics programs shall be maintained as a vital component of each institution’s broader educational program.”³

Thus, student-athletes have historically not received recognition as employees at their respective universities. On March 5, 2024, however, collegiate athletics changed. The members of the Dartmouth Men’s Basketball Team became the first group of collegiate athletes to unionize. An athlete can now lose their amateur status for a variety of reasons, including accepting payment for their play.⁴

Dartmouth’s unionization push pressures the NCAA to rethink its governance structure. Recognition of student-athletes as employees by the NCAA impedes the current no-pay- for-play structure; a structure historically protected by the principle of amateurism. The model currently utilized by the NCAA contradicts the ultimate purpose of unionization - to negotiate equitable labor relations for its constituents.

¹ *Division I 2023-2024 Manual, Nat’l Collegiate Athletic Ass’n*, bylaw 12.01.1, <https://web3.ncaa.org/lstdbi/search/bylawView?id=165#result> [<https://perma.cc/R7A8-J6D2>] (last visited May 14, 2024).

² *Id.* at art. I, § D.

³ *Id.* at art. I, § A.

⁴ *Id.* at bylaw 12.1.2(b).

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I. BACKGROUND

A. NCAA History and Current Governance Structure

The NCAA, originally named Intercollegiate Athletic Association (“IAA”),⁵ was found by a collective of thirteen university presidents in 1906 after President Theodore Roosevelt threatened federal governance of college sports to address the safety issues in collegiate football.⁶ The organization’s primary goal was to save the game of football by implementing stronger safety regulations to protect young athletes⁷ and exercise control of college athletics as a majority were student-organized.⁸

Today, the NCAA is a non-profit organization consisting of more than 1,200 member colleges and universities who sponsor the athletes competing in various sports.⁹ Its mission is to “provide a world-class athletics and academic experience for student-athletes that fosters lifelong well-being.”¹⁰ Acting as a general legislative and administrative authority for a majority of intercollegiate athletics, it formulates and enforces the rules of play for various sports and eligibility criteria for athletes.¹¹ The eligibility criteria for athletes includes the NCAA’s principle of amateurism.

To remain eligible as student-athletes, players are subject to various compliance rules including Countable Athletically Related Activity (“CARA”); Voluntary Athletically Related Activity (“VARA”); and other Required Athletically Related Activities (“RARA”).¹² “A student-athlete’s participation in countable athletic

⁵ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS. L. REV. 9, 12 (2000).

⁶ W. Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215 (2006).

⁷ *Id.* at 216 (citing *Play by Rules, Request Made by Roosevelt; Walter Camp Issues Statement as to Conference at White House*, WASH. POST, Oct. 12, 1905, at 1.)

⁸ See Smith, *supra* note 5 at 21.

⁹ Adrianna Robakowski, *No More Time Left on the Clock: Name, Image, and Likeness as the End of the Line for Student-Athlete Compensation Under Antitrust Law*, 96 S. CAL. L. REV. 989, 993 (2024).

¹⁰ Nat’l Collegiate Athletic Ass’n, *Mission and Priorities*, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [<https://perma.cc/ZRV4-J2LH>] (last visited Apr. 1, 2024).

¹¹ See Robakowski *supra* note 9 at 993-94.

¹² Trustees of Dartmouth College, Case No. 01-RC-325633, 8 (NLRB Feb. 5, 2024).

related activities shall be limited to a maximum of four hours per day and 20 hours per week.”¹³

Activities subject to these hour restrictions include any required activity with an athletic purpose involving student-athletes supervised by a member of the coaching staff.¹⁴ Furthermore, the NCAA provides off-season schedule guidelines for collegiate athletes.¹⁵ In addition to CARA, which is counted towards the twenty-hour minimum, it is also common for teams to engage in Voluntary Athletically Related Activity (“VARA”).¹⁶

Unlike CARA, these activities consist of outside effort by the players without the coach’s supervision, including captains’ practices or workouts. As these hours are not accurately counted, it is hard to determine accurately how much time a collegiate athlete dedicates to their sport each week.

Lastly, some activities are categorized outside of CARA and VARA and instead fall into RARA. Activities in this category include sport-specific travel, required team building activities, individual meetings with the coach at the end of the season, required team life skill sessions, and team promotional activities.¹⁷ These activities along with VARA hours do not count towards the twenty hour a week minimum.

Currently, most Division I collegiate athletes follow a schedule set up by their athletic programs without consideration of what the student is passionate about studying or otherwise participating in while in college. For example, Dartmouth basketball players must show up to campus to begin workouts before summer break concludes for other students.¹⁸ The start of the season was decided by the schools and the NCAA, resulting in the practice schedule being implemented without input from the athletes.

Players are required to participate in events such as alumni or booster events. On occasion, the players must wear specific team apparel, specifically on game days or travel days. Furthermore, collegiate athletes are asked to promote team activities such as games, highlights, or valuable information on their personal social media platforms. Players are also subject to the direction of the coach for practices and games

¹³ See NCAA *supra* note 1 at bylaw 17.1.7.1.

¹⁴ See NCAA *supra* note 1 at bylaw 17.02.1.

¹⁵ See NCAA *supra* note 1 at bylaw 17.1.7.2.

¹⁶ See Trustees of Dartmouth College *supra* note 12 at 9.

¹⁷ Arizona State University, *RARA, CARA, VARA and Permissibility Under New Time Balance Legislation* (Jul. 13, 2017) https://sundevilcompliance.asu.edu/sites/default/files/rara_pac-12chart_and_edcolumn_1.pdf [<https://perma.cc/8Y6V-NUC6>].

¹⁸ See Trustees of Dartmouth College *supra* note 12 at 15.

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and must follow strict travel protocols for away games.¹⁹ Lastly, collegiate athletes have additional responsibilities they must fulfill because of their position as athletes. These activities are required by the coach or university to help promote the team and increase overall performance.

While there are a variety of meanings for the term “student-athlete,” the most widely accepted definition has been promulgated through the structure of the NCAA. It acknowledges the players as student-athletes, meaning they are students who value education first and then choose to participate in athletics.²⁰

Dartmouth College, a private university, pushes for recognition as employees with the National Labor Relations Board (“NLRB”), and eventual unionization, as its employment matters are governed by federal law.²¹ In comparison, public universities are state-run,²² with state labor laws regulating questions of employment at those schools.²³ This dynamic poses unique challenges, because the NLRB regional director, Laura Sacks, held that the Dartmouth Men’s Basketball players are employees under the National Labor Relations Act (“NLRA”) on February 5th, 2024.²⁴

Unionizing private universities may be simple; however, the question is more complicated in the case of public universities. This article will compare, while considering the principle of amateurism and the obstacles the latter university may face as a public institution.²⁵

**B. What is Unionization and What Impact Could It Have on
the NCAA?**

The first union in America was formed in 1794 by a group of shoemakers in Philadelphia.²⁶ Unions formed predominately to represent craftsmen, tradesmen, and

¹⁹ See Trustees of Dartmouth College *supra* note 12 at 16-9.

²⁰ See Robakowski *supra* note 9 at 989; NCAA, 2020-21 NCAA Division I Manual 3 (2020).

²¹ Arthur P. Menard and Nicholas DiGiovanni Jr., *NLRB Jurisdiction Over Colleges and Universities: A Plea for Rulemaking*, 16 Wm. & Mary L. Rev. 599, 600 (1975), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2533&context=wmlr> [<https://perma.cc/KEU5-GEZR>].

²² H. Kathryn Merrill, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 BYU Educ. & L.J. 63, 63 (1994) <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1061&context=elj> [<https://perma.cc/8VJU-QUJN>].

²³ See Menard and DiGiovanni *supra* note 21 at 600.

²⁴ See Trustees of Dartmouth College *supra* note 12 at 3.

²⁵ This author is an alumnus of Indiana University, which is the reason for the comparison to Indiana University in particular.

²⁶ Ronni Sandroff, *The History of Unions in the United States*, INVESTOPEDIA (updated Mar. 12, 2024) <https://www.investopedia.com/financial-edge/0113/the-history-of-unions-in-the-united-states.aspx> [<https://perma.cc/75P3-4ABD>].

workers in private industry.²⁷ In 1935, the right to negotiate in the private sector became a reality through the enactment of the NLRA.²⁸ Public employees seeking the same right initially met general resistance.²⁹ Today, public employees may unionize as a matter of federal law and in a majority of state and local governments.³⁰

The NLRA empowers unions to form and collectively bargain with employers.³¹ Collective bargaining consists of a good faith negotiation surrounding wages, working hours, working conditions, and other interests.³²

An additional benefit to unionization is that some rules agreed upon are exempt from antitrust scrutiny under the non-statutory labor exemption.³³ Antitrust law aims to promote competition by eliminating unreasonable restraints on trade or competition. However, the non-statutory labor exemption immunizes certain restraints on trade stemming from good faith negotiations that otherwise are a violation of antitrust law.³⁴

The first professional sports league in the United States to form a players' association with intent to unionize was the National Football league in 1956.³⁵ The union was officially recognized in 1958.³⁶ The last major professional sports league to unionize was Major League Soccer in 2003.³⁷ Common terms negotiated between the respective sports owners and the players include eligibility requirements, salary caps, maximum work week hours, off-season schedules, and profit splits from various streams of revenue such as broadcasting rights and publicity rights.³⁸ Some of these

²⁷ *Union*, BLACK LAWS DICTIONARY (10th ed. 2014).

²⁸ Patricia N. Blair, *State Legislative Control over the Conditions of Public Employment*, 26 VANDERBILT LAW REVIEW 1, 1 (1973).

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ See 29 U.S.C. § 151 (1994).

³² *Collective Bargaining*, BLACK LAWS DICTIONARY (10th ed. 2014).

³³ Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LABOR AND EMPLOYMENT LAW JOURNAL 529, 529 (2001).

³⁴ Bradley S. Albert and Brian K. Albert, *Article: Fourth and Goal: It's Time for Congress to Tackle the Nonstatutory Labor Exemption*, 2 SPORTS LAW J. 185, 187-88 (1995).

³⁵ C. P. Goplerud III, *Collective Bargaining in the National Football League: A Historical and Comparative*

Analysis, 4 JEFFREY S. MOORAD SPORTS L.J. 13, 14 (1997).

³⁶ *Id.*

³⁷ Major League Soccer Player Association, <https://mlsplayers.org/about-us/history> [<https://perma.cc/9ULF-T4VN>] (last visited Apr. 25, 2024).

³⁸ *Collective Bargaining Agreements in Sports Leagues & Their Legal Scope*, JUSTIA, (Jul. 2023)

<https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/> [<https://perma.cc/CXX9-DG9E>].

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terms have survived antitrust scrutiny solely because they were products of collective bargaining and thus subject to the non-statutory labor exemption.³⁹

C. Successful Unions and How Collegiate Athletes Compare

In 2022, student dining workers at Dartmouth were successful at unionizing following a unanimous vote and are recognized as employees of the college.⁴⁰ Student employment at Dartmouth includes “any job through which a student is enrolled in a degree earning program [and] is compensated by a paycheck issued by the Dartmouth Payroll Office.”⁴¹ The terms ultimately decided upon between Dartmouth and the student worker’s union include pay at the rate of twenty-one dollars per hour and no working during scheduled class times.⁴² Furthermore, the two sides negotiated worker eligibility requirements including that first-year students cannot begin work until the first day of orientation the year they begin their studies and graduated students must seize work upon graduation.⁴³ Additionally, students should limit work to ten to twelve hours per week, but if they reach over forty hours, they are entitled to overtime compensation.⁴⁴ Lastly, Dartmouth as an at-will employer reserves the right to terminate a student worker for any reason.⁴⁵

Do collegiate athletes differ from the student workers or professional athletes in a significant enough way which justifies these groups to be employees while college athletes remain non-employees? A typical day in the life of a student worker includes their shift on campus, attending class, spending time with friends, extracurricular activities around campus, potentially another job off campus, and doing homework. A typical basketball player’s day-to-day schedule can include but is not limited to practices and/or games, strength training, conditioning, fitness activities, on-court

³⁹ *Clarett v. Nat’l Football League*, 369 F.3d 124, 135 (2nd Cir. 2004) (finding the non-statutory labor exemption bars Clarett’s claim as the eligibility rules were collectively bargained through the union and the NFL).

⁴⁰ Liz Sauchelli, *Dartmouth Dining Workers Form Union in Unanimous Vote*, NEW HAMPSHIRE PUBLIC RADIO, (Apr. 1, 2022, 2:17 PM), <https://www.nhpr.org/nh-news/2022-04-01/dartmouth-dining-workers-form-union-in-unanimous-vote> [<https://perma.cc/7XCY-F3V3>].

⁴¹ Dartmouth College, “Student Employee Handbook for Student Employees and Supervisors of Student Employees,” <https://www.dartmouth.edu/hr/docs/employment/seohandbook.pdf> [<https://perma.cc/XB8P-4QAU>] (Accessed Apr. 25, 2024).

⁴² Michael McCann, *Dartmouth Dining Hall Losses Reheat Basketball Union Push*, SPORTICO, (Feb. 20, 2024, 9:00 AM) <https://www.sportico.com/law/analysis/2024/dartmouth-dining-services-basketball-employees-1234767391/>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

skill instruction, film review, meetings, lectures/discussions about the sport, and game simulations/walk-throughs.⁴⁶ It is upon the player to find time to complete homework and attend classes in addition to their athletic responsibilities. Professional athletes are held to similar expectations within the terms of their employment which necessitates their compliance to keep their job. A professional athlete's tasks include practices, games, traveling for away games, film days, team media days, and more, akin to a collegiate athlete.

While these student workers and collegiate athletes have a variety of different activities and responsibilities, there is more control asserted over collegiate athletes. Student workers, on the other hand, are only controlled within the scope of their job description for that position and typically do not receive further guidelines.

Since its founding, the NCAA asserts control over collegiate athletes through its rules and regulations. Its reach has grown drastically, limiting the athlete's ability to control their athletic future, which has led in turn to greater interest in potential unionization. Complying the FLSA via unionization directly contradicts the NCAA's principle of amateurism, as currently, players cannot receive pay for their performance. A union typically negotiates wages for its constituents, so, if collegiate athletes could unionize, the potential for a pay-for-play scheme becomes apparent.

The NCAA unilaterally bars collegiate athletes from receiving pay, which results in different treatment for students who appear to provide similar services to a sole employer; specifically, the university or college. As the players are the group impacted the most by these enforcements, there is strong indicia of a violation of antitrust law as some of these unilateral impositions are unreasonable restraints on trade for the collegiate-athletes marketability.

Unionization would allow collegiate athletes to negotiate for how many hours they can allot to their sport, including the voluntary hours which are not currently tracked. This would allow athletes to balance their time between athletics and academics. The NCAA's pushback of unionization stems from a fear that payment to athletes would turn collegiate athletes professional, causing harm to the NCAA's market.

D. The Dartmouth Men's Basketball Decision

Over the years, student-athletes have tried different methods of gaining recognition as employees. In the 1950s, student-athletes fueled the effort by seeking workers' compensation for injuries sustained while playing their respective sports.⁴⁷

⁴⁶ See Trustees of Dartmouth *supra* note 12 at 9.

⁴⁷ See e.g. Waldrep v. Texas Emplrs. Ins. Ass'n, 21 S.W.3d 692, 699-700 (Tex. App. 2000) (finding injured athlete was not an employee under Texas law because if he received pay for play he would lose amateur status and be in violation of NCAA bylaws.)

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The next attempt for recognition was through the Fair Labor Standards Act (“FLSA”).⁴⁸ The more contemporary effort is based on the NLRA.

On September 10, 2023, the men’s basketball team of Dartmouth College, a member of the Ivy League Conference,⁴⁹ sought NLRB recognition as university employees – the first step in forming a union.⁵⁰ One main driver for the Dartmouth Men’s Basketball Team unionization push is basketball player, Cade Haskins, whom is also a student worker in Dartmouth’s dining hall and has union benefits from his student life job but not from his participation in athletics.⁵¹

While the Dartmouth Team has so far been the first successful union in NCAA sports, they were not the first to attempt unionization. In 2014, the football team of Northwestern University, a private university and member of the Big Ten Conference, filed for recognition as employees with the NLRB office in Chicago in an attempt to unionize.⁵² The regional director found that grant-in-aid scholarship athletes were athletes within the meaning of the NLRA and ordered a vote on unionization.⁵³ Northwestern’s request for review was granted, and the NLRB did not decide on the merits whether the players were or were not employees.⁵⁴ Instead, it declined to assert jurisdiction because if it decided the matter, it would promote instability in the labor market as the NLRB only has authority over private sector work,⁵⁵ and all other

⁴⁸ See e.g. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 288 (7th Cir. 2016), the former student athletes sought recognition as employees from their respective universities under the Fair Labor Standards Act (“FLSA”). The District Court and 7th Circuit Court of Appeals disagreed with the former student-athletes and held they were not employees. The court relied on *Nat’l Collegiate Athletic Ass’n v. Bd of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984), which has been interpreted, at least by the NCAA, to provide the NCAA with great deference in determining eligibility to maintain the tradition of amateurism.

⁴⁹ Dartmouth, *Varsity Sport Administration*, Dartmouth Sports, <https://dartmouthsports.com/sports/2018/5/30/658015.aspx> [<https://perma.cc/26GP-LEEA>] (last visited Apr. 25, 2024).

⁵⁰ Dean Lowery, *Men’s Basketball Unionization Receives Response from College’s Lawyers*, THE DARTMOUTH, (Oct. 13, 2023) <https://www.thedartmouth.com/article/2023/10/bball-union-update> [<https://perma.cc/4CTS-F6VW>].

⁵¹ Dan Grossman, *Will College Athletes Unionize? We’ll Soon Find Out*, SCRIPPSNEWS (updated Feb. 22, 2024, 9:33 AM), <https://scrippsnews.com/stories/will-college-athletes-unionize-we-ll-soon-find-out/> [<https://perma.cc/JK4Q-FB2S>].

⁵² Chris Isidore, *Northwestern Football Players Lose Bid to Start Union*, CNN (Aug. 17, 2015, 2:40 PM), <https://money.cnn.com/2015/08/17/news/companies/northwestern-university-football-union-effort-ncaa/index.html> [<https://perma.cc/4QF3-KK4C>].

⁵³ *Northwestern Univ. & College Athletes Players Ass’n*, 362 N.L.R.B. 1350, 1350 (N.L.R.B. August 17, 2015).

⁵⁴ *Id.*

⁵⁵ Bruno W. Katz, *Employment Tip of the Month: May 2023*, Nat’l Law Review (May 3, 2023) <https://www.natlawreview.com/article/employment-tip-month-may-2023> [<https://perma.cc/B3C5-CN84>].

schools within the Big Ten conference are public universities.⁵⁶ The introduction of a union at Northwestern University would have created an asymmetrical labor market within the Big Ten Conference.⁵⁷

Dartmouth College opposed the unionization of its own basketball team and presented three rationales for why these players should not be recognized as employees of the University.⁵⁸ First, it reasoned that the basketball players knew they would not receive payment in exchange for compensation, so the university does not classify them as employees.⁵⁹ This failed because other students on Dartmouth's campus have succeeded in unionizing and the players do receive benefits in exchange for their commitment such as knowledge of early acceptance at a top university in the United States.⁶⁰

Dartmouth's second rationale was that the school does not have revenue to support paying the team.⁶¹ This argument failed because employment status does not rely on the business turning a profit.⁶² Under this logic, all workers under the control of a non-profitable business would not be employees.

The last argument was that the collegiate athletes were not employees because the University does not assert sufficient control over the players.⁶³ This argument fails because Dartmouth does exercise sufficient control over the players.⁶⁴ The players may only perform services for Dartmouth college, the handbook functions as an employment handbook, and despite having to be in compliance with the NCAA, Dartmouth maintains sufficient ability to make decisions regarding collegiate athletes.⁶⁵

On February 5, 2024, the NLRB's Boston Office concluded the players were employees under the NLRA and ordered the players to vote on unionization as the next step.⁶⁶ On February 29, 2024, Dartmouth College filed a motion to suspend the

⁵⁶ *Id.*

⁵⁷ See Northwestern Univ. & College Athletes Player Ass'n *supra* note 53 at 1354.

⁵⁸ See Trustees of Dartmouth College *supra* note 12 at 34-6; see McCann *supra* note 42.

⁵⁹ See Trustees of Dartmouth College *supra* note 12 at 36.

⁶⁰ See Trustees of Dartmouth College *supra* note 12 at 44-5; see McCann *supra* note 42.

⁶¹ See Trustees of Dartmouth College *supra* note 12 at 35-6.

⁶² See Trustees of Dartmouth College *supra* note 12 at 46-7.

⁶³ See Trustees of Dartmouth College *supra* note 12 at 37.

⁶⁴ See Trustees of Dartmouth College *supra* note 12 at 42.

⁶⁵ See Trustees of Dartmouth College *supra* note 12 at 42-3.

⁶⁶ See Trustees of Dartmouth College *supra* note 12 at 3; Michael McCann, *A Legal Scouting Report for What's Next in Dartmouth Basketball*, SPORTICO (Feb. 12, 2024, 5:55 AM) <https://www.sportico.com/law/analysis/2024/dartmouth-basketball-employee-legal-analysis-1234766273/> [https://perma.cc/YL9E-G62Z].

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scheduled election for the players to unionize, or in the alternative, if the date was to remain, to keep the vote confidential until the legal process concluded.⁶⁷ However, the motion was unsuccessful as on March 5, 2024, Dartmouth Men's Basketball joined a union;⁶⁸ becoming the first union at the collegiate level after a thirteen to two vote in favor of unionization.⁶⁹

This does not necessarily constitute a win for the team, as Dartmouth College can still appeal the ruling in federal court.⁷⁰ After the regional director's ruling on February 5, 2024, Dartmouth filed a Request of Review with the national NLRB office to review her ruling.⁷¹ The attorneys representing the Universities' board of trustees called the regional director's ruling "unprecedented, unwarranted, and [an] unsupported departure" from all applicable precedent.⁷² Additionally, they claimed that the regional director "created a new definition of 'employee'" which exceeded her authority and would have negative labor and public policy implications.⁷³

The Request of Review could take months to adjudicate, and Dartmouth could appeal it in federal court and potentially the Supreme Court of the United States.⁷⁴

For now, the certificate of the union was issued, and Dartmouth College is required to begin bargaining with the players regardless of the stage of the appeal. The unionized players have commenced negotiations to bargain over wages, working hours, benefits, disciplinary procedures, and other topics central to employment.⁷⁵ However, Dartmouth College blatantly refuses to negotiate with the newly formed

⁶⁷ Michael McCann, *Dartmouth Seeks Delay of Basketball Union Election*, SPORTICO (Mar. 1, 2024, 12:01 AM) <https://www.sportico.com/law/analysis/2024/dartmouth-basketball-players-union-vote-1234768789/> [<https://perma.cc/VPX7-NFBX>].

⁶⁸ Andrea Hsu, *Dartmouth Men's Basketball Team Votes to Unionize, Shaking up College Sports*, NPR, <https://www.npr.org/2024/03/05/1235877656/ncaa-dartmouth-mens-basketball-union-election-nlr> [<https://perma.cc/5GTD-ZZTQ>] (updated Mar. 5, 2024, 2:39 PM).

⁶⁹ In the Matter of Trustees of Dartmouth College, 373 N.L.R.B. 34 (2024); Paul Myerberg, *Dartmouth Men's Basketball Team Votes to Form Labor Union, Which is First for College Athletics*, USA TODAY <https://www.usatoday.com/story/sports/ncaab/ivy/2024/03/05/dartmouth-mens-basketball-form-union-vote-nlr/72852367007/> [<https://perma.cc/B6ZN-C3TX>] (Updated Mar. 5, 2024, 7:11 PM).

⁷⁰ See Myerberg *supra* note 69.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See McCann *supra* note 67.

⁷⁵ Michael McCann, *Dartmouth Refuses to Bargain with Unionized Basketball Players*, SPORTICO <https://www.sportico.com/law/analysis/2024/dartmouth-invites-unfair-labor-practice-charge-1234771382/> [<https://perma.cc/TPD6-RCE4>] (Mar. 18, 2024 6:27 PM).

union.⁷⁶ It appears likely that Dartmouth wants a decision on its request of review before bargaining. Dartmouth may wait for a FLSA violation complaint filed from the team to have a federal judge weigh in on whether the players are employees.⁷⁷ The college may believe the Federal Court jurisdiction, since the NLRB rejected the school's attempt to stay the vote.⁷⁸

Since the Northwestern decision, no public university athletic teams have attempted to unionize. However, the former University of Michigan football coach Jim Harbaugh suggested college athletes should unionize after his team won the 2024 College Football Playoff National Championship.⁷⁹ Public universities within the conference would be subject to different laws leading to some students within a conference being employees while others are not, the exact problem raised with the Northwestern unionization attempt that was declined. The fast-changing landscape impact on public universities as they face problems not experienced by private universities like Dartmouth, for Dartmouth, all schools within its conference are governed NLRB, so it is not subject to this barrier.

This distinction in governance is key in determining how the Dartmouth team's unionization will impact the structure of the NCAA and how the principle of amateurism may begin to fall.

II. ARGUMENTS

A. *Demise of Principle of Amateurism and What It Will Lead To*

Walter Byers, the first executive director of the NCAA, coined the term student-athlete in the 1950's.⁸⁰ The term intentionally promoted the idea that athletes were students, not employees.⁸¹ The organization holds this position by focusing on the amateurism that has been created by the current structure of collegiate sports compared to professional sports and relying on the idea that payment to collegiate athletes would turn them professional and viewership will dissipate.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Tara Suter, *Michigan Coach Jim Harbaugh Suggests College Athletes Unionize After Championship Win*, THE HILL (Jan. 9, 2024, 3:33 PM), <https://thehill.com/homenews/education/4393414-michigan-harbaugh-college-athletes-unionize-championship-nil/> [<https://perma.cc/3UJC-YBA3>].

⁸⁰ Warren K. Zola, *College Athletics: The Growing Tension Between Amateurism & Commercialism*, in Michael McCann (ed.), THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 378-79 (Oxford University Press 2018).

⁸¹ *Id.* at 379.

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In *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, the Supreme Court determined whether the broadcasting deals negotiated by the NCAA on behalf of universities was an unreasonable restraint on trade in the televising of collegiate football games.⁸² In the majority opinion, the Court noted that the NCAA and its member institutions “market competition” itself which inevitably requires a “myriad of rules” affecting the competition they agree to create.⁸³ The Court went further to state that should a unilateral restriction be imposed by a member institution, the NCAA’s product would not be preserved. As such, the NCAA needs broad deference over the choices available to athletes to ensure preservation of its product.⁸⁴

For years, the NCAA relied on *Nat'l Collegiate Athletic Ass'n v. Board of Regents* to enforce its principle of amateurism. For instance, in *Berger v. Nat'l Collegiate Athletic Ass'n*, three former student-athletes sued for past wages they were owed, at least at the rate of minimum wage, for their time spent as student athletes.⁸⁵ The court noted the fact that these students “chose to participate in sports... as part of their educational experience...” a tradition that generations of student-athletes have abided to.⁸⁶ They went further to reason each year student-athletes arrive on campus knowing they will not receive pay, and the Department of Labor has taken no action to include student-athletes under the FLSA.⁸⁷ As such, the court granted the defendant’s motion to dismiss and found the former student-athletes were not entitled to compensation as they are not employees within meaning of the FLSA.⁸⁸

The NCAA bylaws require student-athletes to be amateurs or face prohibition from participation.⁸⁹ “An individual loses their amateur status when they accept a promise of pay, even if such pay is received following the completion of intercollegiate athletics participation.”⁹⁰ Dartmouth College’s Student Athlete Handbook summarizes the most significant rules and regulations for the NCAA:

“[s]tudent-athletes must maintain their amateur status... [t]hey lose their amateur status, and their eligibility to compete for Dartmouth, if they enter into an agreement with an agent; use athletic skills for pay; receive compensation from a professional

⁸² 468 U.S. 85, 88, (S. Ct 1984).

⁸³ *Id.* at 101.

⁸⁴ *Id.* at 102.

⁸⁵ 162 F.Supp.3d at 847.

⁸⁶ *Id.* at 856 (relying on *Nat'l Collegiate Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 857-58.

⁸⁹ See NCAA *supra* note 1 at bylaw 12.01.1.

⁹⁰ See NCAA *supra* note 1 at bylaw 12.1.2(b).

sports team; or receive free apparel or equipment from an individual or entity other than the Dartmouth College team for which the athlete plays.”⁹¹

However, unionization is likely to lead to the pay-for-play structure.

In 2021, the United States Supreme Court affirmed the Ninth Circuit’s decision in *Nat’l Collegiate Athletic Ass’n v. Alston* which struck down the NCAA’s rules limiting its member institutions’ ability to offer collegiate athletes educational-related expense reimbursements.⁹² Anti-competitive caps include “scholarships for graduate or vocational school, payments for academic tutoring, or paid post [] eligibility internships.”⁹³ Justice Kavanaugh wrote a concurring opinion to note that this case only addresses certain compensation rules and the remaining unchallenged compensation rules also may violate antitrust laws.⁹⁴ He then goes on to note that prospectively, the NCAA should be held to the ordinary rule of reason standard as opposed to the great deference that has been shown to them in the past.⁹⁵

The *Alston* decision indirectly impacts the discussion of amateurism. If the NCAA loses deference protection, they may face liability for several antitrust violations. For example, some schools may be willing to pay their collegiate athletes, however with the current structure of collegiate athletes they are unable to pay athletes even if they wanted. Without deference, the NCAA may not be able to restrict the ability of member universities to pay or not pay their athletes. This would have an impact on their principle of amateurism that may disappear without the protections originally afforded to the NCAA.

Since *Alston*, the strong deference originally afforded to the NCAA has depleted and led to various suits alleging its policies are anti-competitive. Dartmouth’s unionization campaign represents a small victory as employee recognition results in pay, which has been a policy the NCAA has opposed. FLSA mandates that Dartmouth negotiate in good faith with the labor group for working conditions due to the successful unionization campaign.⁹⁶ The primary goal of unionization is to bargain for working conditions. Working conditions up for negotiation include wages, hours, working conditions, and more.⁹⁷ Because the FLSA would let unionized players

⁹¹ See Trustees of Dartmouth College *supra* note 12 at 7.

⁹² 141 S.Ct 2141, 2147 (2021).

⁹³ *Id.* at 2153.

⁹⁴ NCAA v. Alston, 141 S.Ct 2141, 2167-68 (2021) (Kavanaugh, J., concurring).

⁹⁵ *Id.* at 2168.

⁹⁶ Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5)), NATIONAL RELATION LABOR BOARD, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative> [<https://perma.cc/ZM6P-2EN7>] (last visited May 15, 2024).

⁹⁷ *Id.*

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bargain for wages,⁹⁸ the goal of unionization contradicts the NCAA's rule of athletes not being able to receive pay for their performance. Should players seek compensation after successful unionization the schools will be required to oblige.

B. Indiana Men's Basketball Team: Employees or Independent Contractor?

Different states have different laws with respect to employment status; as such, analysis of a given state's employment laws must be considered when analyzing an employment status question. Here, this analysis focuses on Indiana employment law, an analysis for another school in another state may have a different outcome depending on how the law defines an employee. Public universities' collegiate athletes have tried to challenge the amateur status of the NCAA and have mainly come up short of receiving employment recognition.⁹⁹ The confusion persists because public universities are state-run institutions subject to the definition of "employee" their state has adopted, and the NCAA has refused to provide a nationwide standard.

Indiana's Department of Labor determines whether someone is an employee or not by balancing factors which weigh employee and independent contractor duties.¹⁰⁰ The Indiana test balances the following factors in determining whether an individual is an employee or independent contractor:

1. Instructions;
2. training;
3. integration;
4. services rendered personally;
5. hiring, supervising, and paying assistants;
6. continuing relationship;
7. set hours of work;
8. full time required;
9. doing work on employer's premises;
10. order of sequence set;
11. oral or written reports;
12. payment by hour, week, month;
13. payment of business and traveling expenses;

⁹⁸ Michael McCann, *Dartmouth Men's Basketball Players Certified as a Union*, SPORTICO (Mar. 14, 2024, 2:03 PM) <https://www.sportico.com/law/analysis/2024/dartmouth-mens-basketball-union-certified-1234770843/> [<https://perma.cc/7U9Z-QEQN>].

⁹⁹ Dawson v. Nat'l Collegiate Athletic Association, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017); Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845, 291 (S.D. Ind. 2016).

¹⁰⁰ See generally Ind. Code Ann. § 22-2-15-3(2)(A)-(T).

14. furnishing of tools and materials;
15. significant investment;
16. realization of profit or loss.
17. working for more than one firm at a time;
18. making services available to the general public;
19. right to discharge; and
20. right to terminate.¹⁰¹

The headers below represent the most relevant factors for analysis of collegiate athletes and their teams and mostly weigh in favor of recognition of the Indiana University basketball team players are employees. Previous cases have included multiple schools as defendants and all plaintiffs allege schools asserting the same amount of control. Most universities, regardless of whether they are public or private, assert a similar amount of control over college athletes. As such, the facts alleged in these previous cases can apply to determine whether the control asserted by Indiana University towards its Men's Basketball Team is sufficient to find an employer-employee relationship. Typically, in collegiate-athletic scenarios, the coach is the university representative acting as the employer, and the players are the workers.

- i. Instruction

Instructions may cover a wide range of topics, including how to do the work; when to do the work; where to do the work; what tools or equipment to use; what employees to hire to assist with the work; where to purchase supplies and/or services; and, how to receive compensation.¹⁰² “A worker who is required to comply with other persons’ instructions... is ordinarily an employee.”¹⁰³

Players are instructed when to be at practice, when to be at the game and when their attendance is required for a media day, booster event, film day, or other activity. Players do not have a say in who their coach is, who the assistant coaches are, or who the team manager is. Additionally, players cannot decide what to wear during game because schools enter into agreements with athletic clothing companies to sponsor the team, for example, the shoes that collegiate athletes must wear during the game. In exchange for the sponsorship, athletes are required to wear that brand's product(s) even if they are not the athlete's preferred choice. Each of these factors weigh in favor of the athletes being considered employees as they must live and obey by the decisions made for them.

¹⁰¹ *Id.*

¹⁰² Internal Revenue Service, Private Letter Ruling 9649003, 1996 PLR Lexis 1707, 11 (Aug. 15, 1996).

¹⁰³ Ind. Code Ann. § 22-2-15-3(2)(A).

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If the person who requires the services has the right to require compliance with instructions, control exists.¹⁰⁴ Collegiate athletes must follow coach instruction and NCAA rules or risk punishment. Punishments could include losing playing time, suspension, or expulsion from the team.¹⁰⁵ This would weigh in favor of a finding of an employer/employee relationship.

ii. Training

Requiring a worker to attend meetings for training purposes indicates that an individual overseeing the work performed wants the services fulfilled in predefined circumstances.¹⁰⁶ “Training a worker in... methods to be used in performing services indicates that the person... for whom the services are performed want the services performed in a particular method or manner.”¹⁰⁷

The coaches train the players through practice and instruction and by studying film. There is practice held during the week which could count as training and team meetings are not uncommon in collegiate sports. Coaches and their assistants communicate to players what is expected of them not only as individuals on the court but in the classroom as well. Such instruction as to the manner of performance expected weighs in favor of a finding of an employer/employee relationship.

iii. Integration

If the worker's services integrate with the business operations, it generally shows the worker is subject to the business's direction and control.¹⁰⁸ The basketball players' services, the games at minimum, blend with the university's overall operations. Athletics help to build community around a college campus and success for a team generally benefits the University as a whole. For example, more prospective students may apply to a college or university after one of its teams wins a National Championship. The increased administrative fees the schools collect from application fees may be attributable to athletics.

iv. Continuing Relationship

“A continuing relationship between the worker and the person for whom the services are performed indicates that an employer-employee relationship exists.”¹⁰⁹ Most student-athletes are recruited in their senior year of high school and once they

¹⁰⁴ Ind. Code Ann. § 22-2-15-3(2)(A).

¹⁰⁵ NCAA Bylaws, § 19.1 (2022-2023) (providing Figure 19.1 illustrating penalty guidelines).

¹⁰⁶ Ind. Code Ann § 22-2-15-3(2)(B).

¹⁰⁷ See Internal Revenue Service *supra* note 102 at 12.

¹⁰⁸ Ind. Code Ann § 22-2-15-3(2)(C).

¹⁰⁹ Ind. Code Ann § 22-2-15-3(2)(F).

sign with a university with an expectation to play for the next four years. While some players may transfer to a different school, the expectation that they will play until the conclusion of their schooling remains. It should also be noted that many players attend university because of athletic scholarships. Full athletic scholarships cover an athlete's tuition and fees, and room and board.¹¹⁰ Athletic scholarships therefore weigh in favor of an employer-employee relationship as players must meet a certain level of performance to maintain a scholarship and remain at the institution. Both demonstrate a continuing relationship weighing in favor of an employer-employee relationship.

v. Set Number of Hours

Requiring a person or persons to perform services under a set hours regime is a factor indicating control.¹¹¹ The NCAA and member universities provide maximum hours that a collegiate athlete may dedicate to their sport. Collegiate athletes cannot perform more than twenty hours a week of athletic activity at the direction of the coaching staff.¹¹² The NCAA's maximum hour requirement, adopted by the universities and colleges, weighs in favor of finding the athletes as employees as it constitutes a set hour regime for the players to perform within thus shows the control a university has over the collegiate athletes.

vi. Full Time Required

If a worker must "devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict[s] the worker from doing other gainful work" while an independent contractor "is free to work when and for whom he or she chooses."¹¹³

CARA allows for a maximum of four hours daily for collegiate athletes to spend on athletics, not to exceed twenty hours per week.¹¹⁴ However, as noted above, many activities are not reported under CARA. While counted activity is limited to twenty hours, whether the actual hours worked may exceed full-time hours is unclear. As such, based on how the NCAA functions today, a court may find this factor weighing against the players as employees as full time generally requires forty hours a week. However, the NLRB director found the Dartmouth Men's Basketball team to be employees regardless of the twenty-hour maximum imposed by the NCAA.¹¹⁵

¹¹⁰ Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163, 165 (1991).

¹¹¹ Ind. Code Ann. § 22-2-15-3(2)(G).

¹¹² See NCAA *supra* note 1 at bylaw 17.1.7.1.

¹¹³ Ind. Code Ann. § 22-2-15-3(2)(H).

¹¹⁴ See Trustees of Dartmouth College *supra* note 12 at 10.

¹¹⁵ See Trustees of Dartmouth College *supra* note 12 at 3.

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Furthermore, until recently, the NCAA restricted the amount collegiate athletes could earn through their publicity rights, such as name, image, or likeness deals. Collegiate athletes could start earning money off their name, image, and likeness in July of 2021.¹¹⁶ However, the NCAA had numerous bylaws surrounding how much athletes could make, and which deals athletes could accept.¹¹⁷ Now, collegiate athletes have no limits to their name, image, or likeness deals.¹¹⁸ However, the ability of the NCAA to restrict a collegiate athlete from performing other gainful work also weighs in favor of finding an employer-employee relationship.

vii. Doing Work on Employer's Premises

"If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere."¹¹⁹ Indiana Men's Basketball plays home games at Simon Skjodt Assembly Hall ("Assembly Hall"), located on Indiana's campus, owned by the University, and operated by the University's athletic department.¹²⁰ Furthermore, the team's practice facility, Cook Hall, is adjacent to Assembly Hall and "features practice courts, locker rooms, player lounges, a strength and conditioning area, coaches' offices, and meeting/video rooms."¹²¹ However, Indiana University's main gym on campus for all students is the Student Recreational Sports Center ("SRSC"); the SRSC houses five basketball and/or volleyball courts,¹²² which would be adequate for the men's basketball teams' practice if Cook Hall did not exist and is still on the employer's premises. Athletes may receive special benefits in exchange for their commitment to a university.¹²³ Clearly, collegiate athletic work is done on the

¹¹⁶ *Tennessee v. Nat'l Collegiate Athletic Ass'n*, 2024 U.S. Dist. Lexis 32050, 2 (2024).

¹¹⁷ See generally National Collegiate Athletic Association, Memorandum, Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement (Jul. 1, 2021).

¹¹⁸ Jason J. Montgomery et. al., *NCAA Adopts Changes to Transfer Rules and NIL Rules*, HUSCH BLACKWELL, <https://www.huschblackwell.com/newsandinsights/ncaa-adopts-changes-to-transfer-rules-and-nil-rules> [https://perma.cc/4Q55-CR4V] (last visited May 15, 2024).

¹¹⁹ Ind. Code Ann. § 22-2-15-3(2)(I).

¹²⁰ *Simon Skjodt Assembly Hall*, INDIANA UNIVERSITY BLOOMINGTON, <https://iuhoosiers.com/facilities/simon-skjodt-assembly-hall/2> [https://perma.cc/UF2L-4PBE] (last visited May 16, 2024).

¹²¹ *Cook Hall - Men's and Women's Basketball*, INDIANA UNIVERSITY BLOOMINGTON, <https://iuhoosiers.com/facilities/cook-hall-mens-and-womens-basketball/3> [https://perma.cc/8XUG-E3SX] (last visited May 16, 2024).

¹²² *Student Recreation Sports Center (SRSC)*, INDIANA UNIVERSITY BLOOMINGTON, <https://recsports.indiana.edu/facilities/srsc.html> [https://perma.cc/8GYP-LMTQ] (last visited May 15, 2024).

¹²³ See e.g. *Tennessee v. Nat'l Collegiate Athletic Ass'n*, 2024 U.S. Dist. Lexis 32050 (2024) (holding the restriction of NIL deals was anti-competitive and thus a violation of antitrust laws and allowing university collectives to directly pay student athletes for NIL deals.)

employer's turf. Additionally, collegiate athletes enjoy special and unique benefits in which to perform their work. Both facts show an employee/employer relationship.

viii. Oral or Written reports

“A requirement that the worker submit regular... written reports to the person or persons for whom the services are performed indicates a degree of control.”¹²⁴ NCAA member schools either participate in the Letter of Intent form program or require collegiate athletes to be accepted for enrollment and written confirmation the collegiate athlete will attend the school.¹²⁵ Here, the intent letters serve as a written report to show an intention to perform for a specific institution. These forms show control by the member schools because it is the start of the control which is being exerted by the University through the coaching staff. While intent to play agreements may not necessarily fall within the rule's definition of “oral or written reports,” it could be an argument Indiana players make in the future for employment recognition attempts.

ix. Payment of Business and Travel Expenses

“If the person or persons for whom the services are performed ordinarily pay the worker's business or traveling expenses or business and traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities.”¹²⁶

In *Alston*, the court found the NCAA's restrictions on educational-related expenses violated antitrust law.¹²⁷ As a result, players are eligible for reimbursement of any amount of tutoring they may require.¹²⁸ This decision reinforces the likelihood that an employer-employee relationship exists as players need to maintain their GPA to keep their athletic eligibility. Considering this, tutoring qualifies as a 'business' expense since the team may become academically ineligible to play without tutoring services.¹²⁹

x. Furnishing of Tools and Materials

“The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.”¹³⁰ Student-athletes do not have to provide funding for their own uniforms, shoes, practice attire, or equipment for their sport. In

¹²⁴ Ind. Code Ann § 22-2-15-3(2)(K).

¹²⁵ See NCAA *supra* note 1 at bylaw 12.11.2.1.

¹²⁶ Ind. Code Ann § 22-2-15-3(2)(M).

¹²⁷ 141 S. Ct. at 2166 (affirming District Court's finding that educational-related expense restrictions violate antitrust law).

¹²⁸ *Id.* at 2153.

¹²⁹ See *Id.* at 2165.

¹³⁰ Ind. Code Ann. § 22-2-15-3(2)(N).

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fact, Indiana University student-athlete Bill of Rights rule six demonstrates this point by stating Indiana University is “committed to comprehensive athletic support including providing top quality apparel and equipment.”¹³¹ Additionally, the University provides collegiate-athletes with facilities to perform and practice their work, and these players do not pay rent to use the space, as the University provides it to them at no cost. This factor weighs in favor of the Indiana Basketball players being employees.

xi. Making Service Available to Public

“The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship.”¹³² In determining whether services are made available to the public, the court may look at whether the workers perform similar services for other persons or firms, hold themselves out to the public as being in the business of performing such services, and advertise their availability to perform such services.¹³³

College athletes may only play for one team at a time, meaning their services are not generally available to the public unless the player announces their intention to transfer. However, even after transferring, the collegiate-athlete’s services are performed for the school with which they sign. As athletes are only allowed to play for one team, they do not perform work for other universities. Until 2021, players could not market their athletic abilities in exchange for compensation;¹³⁴ however, now that athletes can benefit from their name, image, and likeness¹³⁵ without fear of losing eligibility for collegiate athletics, this factor weighs against an employment finding. On balance, however, this factor weighs in favor of the players being employees because an athlete’s services are not available to the public on a regular and consistent basis.

xii. Right to Discharge

“The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer.”¹³⁶ Furthermore, attempting to exercise control by offering threats of dismissal to ensure worker’s compliance with rules also favors an employer/employee relationship.¹³⁷ The right to

¹³¹ Indiana University, “2022-23 Student-Athlete Handbook,” page 4, https://s3.us-east-2.amazonaws.com/sidearm.nextgen.sites/iuhoosiers.com/documents/2022/9/9/9.6.22_2022-23_SA_Handbook_-_FINAL.pdf [<https://perma.cc/8RJW-MCKL>] (Accessed Apr. 25, 2024).

¹³² Ind. Code Ann. § 22-2-15-3(2)(R).

¹³³ See Internal Revenue Service *supra* note 102 at 16.

¹³⁴ Tennessee v. NCAA, 2024 U.S. Dist. Lexis 32050, 2 (2024).

¹³⁵ *Id.*

¹³⁶ Ind. Code Ann. § 22.2.15.3(2)(S).

¹³⁷ *Id.*

discharge also includes an opportunity to cancel or loosen an obligation under a contract.¹³⁸

A coach has the ultimate control over the right to discharge because they have the power to make decisions affecting player commitment to a team. For example, Indiana Basketball's head coach, Mike Woodson, suspended five players during the 2022-2023 basketball season for one game against Northwestern University.¹³⁹ Woodson justified the suspension by telling reporters the players "broke rules and they were punished for it."¹⁴⁰ Here, Woodson exercised control because he altered the player contract which allowed them to play in the game, but that opportunity was taken away by an employee of the university and employer of the basketball team. Additionally, a suspension is a gateway to dismissal if unwanted behavior remains, as such the suspension serves as a warning for players to follow instructions given which they have failed to do in the past. Interactions like this weigh in favor of the players being employees.

More importantly, a coach has the right to discharge because a coach makes the ultimate decision on whether to dismiss a player from the team after violation of the NCAA or school's rules. For example, in 2008, two Indiana men's basketball players were dismissed from the team indefinitely.¹⁴¹ Devin Davis and Hanner Mosquera-Perea were the players dismissed from the team in the middle of the season, the reason cited was that these players failed to live up to the responsibilities of the program.¹⁴² Here, the coach exercised control over the players by dismissing them from the team and not allowing them to continue playing. Both suspensions and dismissals demonstrate a level of control sufficient to recognize an employer/employee relationship.

xiii. Right to Terminate

"If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring

¹³⁸ *Discharge*, BLACK LAWS DICTIONARY (10th ed. 2014).

¹³⁹ Zach Osterman & Dustin Dopirak, *IU Basketball, Mike Woodson Suspends five Players vs. Northwestern: 'I'm very Disappointed'*, INDIANAPOLIS STAR (updated Feb. 9, 2022 7:36 AM), <https://www.indystar.com/story/sports/college/indiana/2022/02/08/iu-basketball-5-players-suspended-northwestern-khristian-lande-xavier-johnson-parker-stewart-indiana/6713580001/> [https://perma.cc/NHA7-DWF3].

¹⁴⁰ Athletic Staff, *Indiana Suspends 5 Players, Including 2 Starters, vs. Northwestern for 'Disciplinary Reasons'*, ATLANTIC, (Feb 8, 2022), <https://theathletic.com/3511365/2022/02/09/indiana-suspends-5-players-including-2-starters-vs-northwestern-for-disciplinary-reasons/> [https://perma.cc/E4G9-N33C].

¹⁴¹ Jordan Littman, *Devin Davis and Hanner Mosquera-Perea Dismissed from Indiana*, INSIDE THE HALL, (May 14, 2015) <https://www.insidethehall.com/2015/05/14/devin-davis-and-hanner-mosquera-pera-dismissed-from-indiana/> [https://perma.cc/V48B-WUX8].

¹⁴² *Id.*

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liability, that factor indicates an employer-employee relationship.”¹⁴³ While players are free to walk away from the team, they incur liability by doing so. A player who “voluntarily withdraws” may lose their athletic scholarship.¹⁴⁴As mentioned above, a full athletic scholarship covers an athlete’s tuition and fees, and room and board.¹⁴⁵ The NCAA limits a men’s basketball team to thirteen total scholarships.¹⁴⁶ As a result, for thirteen out of seventeen players on Indiana’s roster¹⁴⁷ leaving the team will result in the loss of their scholarship and would require them to find alternative funding for their education. As such, this factor weighs against finding the players as employees.

On balance, the factors weigh in favor of a finding of players as employees. The next question is, would a unionization effort be successful?

C. Indiana Men’s Basketball Likelihood of Unionization

The Dartmouth unionization is a positive step for collegiate sports; however, what impact, if any, will public universities see from this decision? As noted above, the NLRB does not govern public universities, rather they are governed by the state law in which the University is located. Indiana follows a right-to-work statutory scheme;¹⁴⁸ however, these rules do not apply to state employees.¹⁴⁹ State employees include those who work at state institutions,¹⁵⁰ including Indiana University.¹⁵¹ According to the law, public employees in Indiana are unable to unionize thus preventing collective bargaining opportunities.¹⁵²

The Indiana unionization statutes make it appear that the inquiry of whether the team will be able to unionize ends here. As public employees are unable to unionize within the state of Indiana, employees of a state university are barred from forming a union. Despite the statutes making it clear public universities in Indiana shall not

¹⁴³ Ind. Code Ann. § 22-2-15-3(2)(T).

¹⁴⁴ See NCAA *supra* note 1 at bylaw 15.3.4.2.

¹⁴⁵ See Davis *supra* note 110 at 165.

¹⁴⁶ See NCAA *supra* note 1 at Bylaw 15.5.5.1.

¹⁴⁷ See Indiana University Hoosiers, "Men's Basketball Roster," *Indiana University Athletics*, <https://iuhoosiers.com/sports/mens-basketball/roster> [<https://perma.cc/ZA4G-QBM4>] (Accessed April 25, 2024).

¹⁴⁸ See generally Ind. Code Ann. §§ 22-6-6-1 – 22-6-6-13.

¹⁴⁹ Ind. Code Ann. § 22-6-6-1(4).

¹⁵⁰ Ind. Code Ann. § 22-6-6-7(9).

¹⁵¹ Ind. Code Ann. § 21-7-13-32(b)(3).

¹⁵² Ursula McTaggart, *Grad Student Organizing “19th-Century Style”*, MARXISTS, <https://www.marxists.org/history/etol/newspape/atc/332.html> [<https://perma.cc/AR5B-KU4B>] (last visited Apr. 25, 2024) (Indiana University employees are explicitly barred by statute to form unions, however, other groups on campus have seen success through faculty support).

unionize, surprisingly, university professors have succeeded in their unionization efforts.¹⁵³ In 2022, Indiana University graduate student workers went on strike for four weeks in an attempt to receive union recognition from the administration.¹⁵⁴ Some Indiana University faculty started a petition for an all-faculty meeting and authorized the administrators to begin meeting with the graduate workers coalition to begin the negotiation process.¹⁵⁵ The petition arose out of concern for how the strike could impact research Indiana professors were conducting with the help of these graduate students.¹⁵⁶ However, despite these efforts from the graduate student coalition, graduate students have not seen union representation yet.¹⁵⁷ Indiana Men's Basketball players would therefore need faculty approval for recognition a union as there is no statutory way to unionize in Indiana, a hurdle they may not overcome.

CONCLUSION

Although Dartmouth still faces hurdles due to the institution's unwillingness to negotiate, its movement nonetheless challenges the NCAA's structure and how the organization has been run. The principle of amateurism holds that collegiate athletes shall not receive pay with the penalty of losing their eligibility, while unionizing promotes neutral working conditions including fair wages for represented employees. It is likely that once officially settled, other private universities and private institutions will follow suit. However, state-run institutions will be dictated by their own laws unless the NCAA implements a nationwide employment standard.

The uptick in cases against the NCAA challenges their laws as unreasonable restraints on trade in violation of antitrust law leaves the NCAA vulnerable to the possibility of having to restructure their organization. If the NCAA were to succumb to the idea of unionization and put aside their old foundational goals of amateurism, the NCAA would once again receive protection for their laws, assuming they were collectively bargained in good faith. The NCAA would be able to hide behind the non-statutory labor exemption to argue their rules are immune from antitrust scrutiny like

¹⁵³ *American Ass'n of University Professors: IU Bloomington Chapter*, AAUP, <https://aaup.sitehost.iu.edu/> [https://perma.cc/F7Y2-DPND] (last visited May 17, 2024).

¹⁵⁴ Rachel Smith, *IU Bloomington Faculty Urge Board of Trustees to Intervene in Grad Worker Union Fight*, THE HERALD-TIMES, <https://www.heraldtimesonline.com/story/news/education/campus/2022/05/24/indiana-university-faculty-graduate-student-unionization-efforts/9617647002/> [https://perma.cc/8H9H-NP8U] (Updated May 24, 2022, 12:03 PM).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Griffin Gonzales, *IU Graduate Students on Strike; Seeking Over \$5,000 Raise*, WRTV INDIANAPOLIS, <https://www.wrtv.com/news/local-news/iu-graduate-students-on-strike-seeking-nearly-20-000-raise> [https://perma.cc/4UKX-Q3MZ] (last updated Apr. 17, 2024, 8:18 PM).

**HOOPS, HURDLES, AND LEGAL LAYUPS: HOW PUBLIC UNIVERSITIES LIKE
INDIANA MAY BE ABLE TO FOLLOW DARTMOUTH'S LEAD TOWARDS
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professional leagues have successfully argued for years. The next stage in collegiate athletics may entail unionization of collegiate athletes.