Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NLRB Election Day At Northwestern: What To Expect

Law360, New York (April 25, 2014, 2:59 PM ET) -- On April 25, 2014, the National Labor Relations Board conducted an historic election on the campus of Northwestern University. Approximately 75 scholarship student-athletes who play for Northwestern's football team were eligible to vote on whether they desire representation by the College Athletes Players Association ("CAPA"), a labor union supported by the United Steelworkers.

The NLRB is likely to impound and seal the ballots, pending resolution of Northwestern's appeal of Regional Director Peter Sung Ohr's decision ordering this election. The full NLRB decided on April 24 to hear that appeal. The regional director's decision on March 26 held, for the first time, that undergraduate students who receive athletic scholarships are "employees" under the National Labor Relations Act, and thus eligible to seek union representation. The winner of the election and resolution of the underlying legal dispute may not be known until exhaustion of appeals through the NLRB and courts, which should take 18-24 months, or longer, if the U.S. Supreme Courtwere to weigh in.

The Northwestern case has understandably generated considerable publicity. Friday's election will surely generate additional buzz, and not just on ESPN's "SportsCenter." Unionization of scholarship student-athletes at American colleges and universities would force dramatic changes in the administration of intercollegiate athletics.

The NLRB case comes at a critical time for the National Collegiate Athletic Association and its member institutions. Several antitrust actions have been brought against the NCAA and major athletic conferences, alleging the current system's limits on compensating student-athletes amount to an unlawful restraint of trade.

The class action antitrust case filed by Ed O'Bannon, the former University of California, Los Angeles basketball player, against the NCAA over the association's ban on compensating student-athletes is set for trial in June. The plaintiffs participating in the O'Bannon suit allege that former student-athletes should receive compensation for the NCAA's commercial use of their images in videogames and other

licensing arrangements.

These cases pose significant challenges to the traditional “amateurism” rationale undergirding the current system of intercollegiate sports. The NLRB case will likely contribute to the growing perception that student athletes at some schools are being exploited.

Possible Outcomes

The NLRA has a complex procedure for resolving disputed union representation elections. There are several ways this case may be resolved. Now that the NLRB has decided to hear Northwestern's appeal, the most likely results are summarized below.

- The NLRB could reverse the regional director's decision. That would end the proceeding in what would be a clear win for Northwestern. The ballots would be destroyed and not counted. The union would have to wait 12 months to seek another election.

- The NLRB could affirm the regional director. The ballots would then be counted and the result made public. If CAPA does not get a majority of the votes cast, that would end the proceeding.

- If the union were to get a majority of the votes cast, the NLRB would certify the results. If Northwestern wishes to challenge the regional director's decision, it would invoke the NLRA's two-step process for testing the union's certification. This would first require Northwestern to refuse to bargain with CAPA. That would prompt issuance of an unfair labor practice complaint.

The NLRB routinely finds such complaints meritorious and would do so here as well. Northwestern would then be able to challenge the NLRB's decision on the question as to whether the scholarship student-athletes are properly viewed as employees, and whether CAPA’s petition described an appropriate bargaining unit, by filing a petition to review in an appellate court.

Depending on what happens in today’s election, other procedural options may develop. For example, both Northwestern and CAPA have the right to file objections to the other party’s conduct in the period leading up to the election. Northwestern has conducted an extensive communications campaign, taking the position that it opposes unionization. Unions often file election objections in such cases. Such objections allege that the employer has interfered with the employees’ right to choose union representation, and filing objectors often seek a second “rerun” election.

What’s Next for Northwestern?

Northwestern finds itself in a tricky situation. As with any employer stuck in the middle of a protracted union organizing campaign, the university’s conduct will be subject to strict scrutiny by the NLRB. As a result of the regional director’s decision, scholarship student-athletes will be entitled to the full-range of rights provided to nonrepresented employees by Section 7 of the NLRA, which includes the right to

strike. And, the university is subject to allegations that it has violated various provisions of Section 8, which is applicable to nonrepresented employees, including prohibitions on employer discrimination against employees for engaging in union activity.

Northwestern is now obligated to comply with recent NLRB decisions finding unlawful various employer policies imposing restrictions on nonunion employees, including provisions in employee handbooks requiring confidentiality and limits on the usage of social media. For example, any restrictions placed on Facebook postings by scholarship student athletes would be problematic.

If the regional director's decision is ultimately upheld — and the university is required to bargain with CAPA — Northwestern will face substantial challenges in negotiating a collective bargaining agreement. The substantial restrictions imposed by the NCAA with respect to payments to student athletes would present particularly difficult issues.

The Merits

The question of whether scholarship student-athletes should be deemed "employees" under the NLRA is fascinating. While novel, the regional director's decision applies the traditional common law test of "employee" status. The decision is supported by numerous citations to a record developed at an evidentiary hearing, including evidence that Northwestern exerts substantial control over the activities of the student-athletes.

The regional director's treatment of the NLRB's 2004 decision in Brown University is interesting. In that case, the majority of the board held that graduate students who also served as teaching assistants were not employees eligible to seek union representation. The decision concluded that Brown is inapplicable because the "work" performed by the graduate students there was related to the students' academic course of study, unlike the tasks performed by Northwestern's football players.

The regional director's decision also presents significant questions as to whether CAPA sought an election in an appropriate bargaining unit. The NLRB has a well-developed body of case law applying a multifactor "community of interest" test in deciding whether a particular group of employees constitutes an appropriate unit. The regional director excluded so-called "walk-on" players from the unit. He concluded that the university exercised significantly less control over them, by virtue of their lack of scholarship status. However, if one interprets the facts, this is an extraordinary result. It is hard to recall another situation in which a bargaining unit has been certified to include some — but not all — of the employees performing a particular function.

Northwestern's appeal also presents the issue of whether the proposed unit is inappropriate under NLRB rules excluding temporary employees. This is another novel aspect to the regional director's decision. After all, a college athletic team may be the only "workplace" in the country in which, by definition, the entire bargaining unit turns over within a four-to-five year period.

Organized Labor's Long-Term Objective

The labor movement has broader goals beyond trying to organize football players at Northwestern. In its brief filed with the NLRB, CAPA urged that the Brown ruling should be overruled. Union leaders are keenly interested in changing the law so they can seek to represent the more than 100,000 graduate students at universities around the country who serve as teaching or research assistants. There is strong interest in unionization among significant segments of this population.

Ramifications

A decision sustaining the regional director would implicate the full-range of federal and state labor and employment laws. Although the definition of "employee" differs slightly under statutes, such as the Fair Labor Standards Act, Family and Medical Leave Act, Americans with Disabilities Act and Employee Retirement Income Security Act, it is no stretch to conclude that such statutes would eventually become applicable to scholarship student-athletes.

Notwithstanding Section 117(a) of the Internal Revenue Code, which addresses qualified scholarships, there are substantial questions as to whether compensation received by unionized student athletes is subject to federal and state income and employment taxes.

The challenge of applying these obligations to undergraduate student-athletes is daunting. Here are a few examples:

- How would a university determine whether its student athletes were being paid the minimum wage?
- How would a university handle compensation for overtime worked while preparing for a game?
- Is a football player with a concussion "disabled" within the meaning of the ADA?
- Is a sprained ankle suffered during basketball practice a reportable incident for Occupational Safety & Health Administration purposes?
- Does it give rise to a workers' compensation claim?
- Are student-athletes eligible for unemployment compensation after the end of the season?
- What if they are "cut" from the team and lose their scholarships?

It is not fanciful to imagine that other private universities could face the prospect of becoming the "next Northwestern" — CAPA has stated it has over 1,000 members. Today's election will generate additional publicity, both on the nation's sports pages and in the legal press. There is a real prospect of "copy-cat" petitions filed at other universities by students who participate in all sports for which scholarships are provided.

Title IX

The NLRA does not exempt educational institutions that receive federal funds from compliance with Title IX of the Education Amendments Act of 1972.

A decision permitting collective bargaining by members of a male intercollegiate sports team presents novel questions under the "equivalence" mandate of Title IX. Universities would have to wrestle with measuring the value of wages and benefits negotiated by male football players who are "employees" when compared with other groups — for both males and females — that receive athletic scholarships for similar athletic activities.

Another question raised by the NLRB's decision is whether the money paid by the institution to the athletes would nevertheless constitute "athletic financial assistance" under Title IX. If so, Title IX would require the institution to award scholarships to male and female athletes in amounts roughly proportionate to their participation in the institution's competitive athletic program. Application of this mandate would likely increase the amounts required to be awarded to female athletes, and adversely

affect the scholarships awarded to male athletes in other sports.

Even if the money paid to football players were viewed as “compensation” to “employees,” one can argue that the nondiscrimination provisions of both Title IX and Title VII would require ”equal compensation for equal work” by the student “employees” and student “athletes,” as measured under Title IX by reference to the “skill, effort and responsibility” required to perform the work. Among other novel issues, this prospect raises the question of whether the "work" of female basketball players requires the same “skill, effort and responsibility” as that of male football players.

What About Public Universities?

Although state universities are exempt from the NLRA, the Northwestern case will likely not be limited to private universities. More than 25 states either require or permit collective bargaining for public sector employees. In many of these states, public universities should consider the possibility that union election petitions will be filed under state law.

Legislation has been introduced in the Pennsylvania legislature seeking to amend that state’s public employee bargaining statute to permit collective bargaining by certain student athletes. Ohio's House of Representatives, by contrast, recently passed a bill that would expressly preclude bargaining by student athletes.

Because these eligibility issues would play out on a state-by-state basis, universities, the conferences and the NCAA would face a chaotic situation in the interim, in which student-athletes can unionize at certain schools but not others. This could dramatically affect recruiting and alumni financial support.

These and other questions will be resolved in the months ahead, and it will be a fascinating time for both sports fans and employment lawyers.

—By Thomas P. Gies and Laurel P. Malson, Crowell & Moring LLP

Thomas Gies is the founding partner of Crowell & Moring's labor & employment practice group and is based in the firm’s Washington, D.C., office.

Laurel Malson is a partner in Crowell & Moring’s Washington, D.C., office, where she is co-chairwoman of the firm’s education practice group.