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NEWSLETTER

Professional legal information, services, and education

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The saga continues: Are student athletes employees?

By Kylie E. Stryffeler, Kasey Nielsen of Bricker Graydon LLP

This question, once settled, has seen increased scrutiny in recent years both from the National Labor Relations Board[1] and courts that have considered the issue.[2] One of those courts – the Third Circuit Court of Appeals, which covers Pennsylvania, New Jersey and Delaware – will soon have the opportunity to add its opinion to the mix as it considers whether student-athletes are employees for purposes of the Fair Labor Standards Act (FLSA) in Johnson, et al v. The National Collegiate Athletic Association, et al.

But, before we get to the facts in Johnson, we would be remiss if we did not note that intercollegiate athletics looks markedly different now than it did when the issue of student-athletes-as-employees first took shape, and this new landscape may impact how this weighty issue is ultimately decided. The trajectory of name, image and likeness rules (and laws) alone serves to highlight this evolution. From Board of Regents of the University of Oklahoma to O'Bannon to Alston, the rise of NIL may have paved the way for future seismic activity.3

So, what is Johnson about? The facts are rather straight forward: former and current Division I student-athletes are suing the schools they attended, and the NCAA, and are seeking compensation for their services. More specifically, they are seeking wages for their participation in Division I athletics under the FLSA and various state laws. Putting a finer point on it, the student-athletes are arguing that they were employees, in part because of the control the NCAA and the universities held (and hold) over their activities and the revenue generated by their sports.[4]

The schools and the NCAA moved to dismiss the complaint, but the District Court denied the motion and held that the student

-athletes "plausibly allege[d]" that they were employees.[5] Unhappy, the schools and the NCAA appealed the District Court's decision, arguing, among other things, that the District Court improperly disregarded the 7th Circuit Court's ruling in Berger, and improperly applied and weighed elements of the multifactor test used to evaluate the status of student interns.[6]

Recall that in Berger, the Seventh Circuit held that student

athletes were not employees under the FLSA because (1) participation in collegiate athletics is entirely voluntary and (2) the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation.[7]

What is the question before the Third Circuit? To start, the question is not necessarily whether student-athletes are employees. Instead, the question is whether the District Court properly denied the motions to dismiss. And while this could be a distinction without a difference, it is certainly possible that the Third Circuit issues its opinion without addressing the larger question of whether student-athletes are employees. That said, during oral argument, the court challenged counsel on a number of points that go to the very heart of the inquiry, including:

- Title IX. The NCAA argued that categorizing student athletes as employees would create a situation in which schools are caught between inconsistent standards under Title IX and Title VII with respect to Title IX's mandate regarding equal opportunity to participate in athletics for men and women. The NCAA said that prong has the tendency to fall "disproportionately on female shoulders" because it may undo advancement. The Judges seemed unconvinced of this argument, noting that disparities are already prevalent.
- Substantial control. The Judges highlighted that the institutions appear to exercise substantial control over student athlete's schedules. The NCAA could implement rule changes to lessen the control over student athletes and avoid the claim that student athletes are employees. For example, the Plaintiffs said that the NCAA could allow athletes to enroll in elective courses that conflict with practice schedules without fear of punishment.
- Scholarships. Following oral argument, the Third Circuit also asked the NCAA counsel to provide a supplemental letter brief regarding whether an athlete loses their scholarship if they quit or are removed from the team.[8]

In the end, the details of the Third Circuit's ruling will likely dictate whether an appeal to the Supreme Court is in the cards, though at the motion to dismiss stage the record of the case is necessarily somewhat thin. Regardless, the Supreme Court's decision in Alston undoubtedly looms large in any further appellate considerations.

What does this case mean for your campus? Right now, nothing specific. But, zooming out, there is considerable uncertainty in the student-athlete space, and institutions would do well to start thinking through how certain decisions will impact their campus and their stakeholders. What would happen on your campus if student-athletes were deemed employees? How would that impact your operations? Circling back to the Circuit Court's question at oral argument, what would it mean for your Title IX compliance obligations?
Our team will continue to follow this issue. Stay tuned for updates regarding the Johnson v. NCAA decision, the NLRB's actions and other developments regarding student-athlete compensation.

Link to the Original article HERE.

Kylie Stryffeler is a higher education attorney at Bricker Graydon. She works with colleges and universities to ensure both legal and regulatory compliance. Kylie has particular expertise on Title IX compliance issues. As such, when possible, Kylie takes a preventative approach and partners with administrators to avoid legal matters that could have been mitigated with strong compliance policies.Link to Kylie's bio.

Kasey Nielsen is a higher education attorney at Bricker Graydon. A primary focus of her practice is in university policies related to collegiate athletics, including name, image, and likeness matters and reviewing athletic programs for Title IX compliance. Kasey is a trained and highly sought-after Title IX investigator and decision-maker. As such, she helps colleges and universities draft and review institutional policies to comply with federal regulations.Link to Kasey's bio.

1 In December 2022, the NLRB found that an unfair labor practice charge against the NCAA, Pac-12, University of Southern California and UCLA had "merit" and that it would allow the complaint to move forward. Contemporaneously with that decision, the NLRB General Counsel, Jennifer Abruzzo, issued a statement that the universities, the NCAA and Pac-12 "as joint employers, have maintained unlawful rules and unlawfully misclassified scholarship basketball and football players as mere 'student-athletes' rather than employees entitled to protections under our law [the National Labor Relations Act]."

2 Two circuits – the Seventh and the Ninth – have opined that student-athletes are not employees under the FLSA. See Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016), (holding that that student athletes were not employees and are not covered by the Fair Labor Standards Act.); Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019) (holding a student-athlete in a football program was not an employee of the NCAA or Pac-12 under the FLSA).

3 See O'Bannon v. NCAA, 802 F. 3d 1049 (2015)(holding that NCAA rules barring NIL were subject to antitrust laws); Alston V. NCAA, 141 S. Ct. 2141 (2021).

4 Notably, the FLSA broadly defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1)

5 Johnson v. NCAA, 556 F.Supp.3d 491, 512 (E.D. Pa. Aug. 25, 2021).

6 See Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 538 (2d Cir. 2016) (whether student interns are "employees" under the FLSA depends on whether the student intern or the company that "hired" them is the "primary beneficiary" of the arrangement.).

7 Berger, 843 F. 3d at 293

8 On February 27, 2023, Counsel for Appellants submitted a letter clarifying that if an athlete is removed from the team, then the institution may be able to "reduce or cancel athletic aid if a student does not fulfill the terms of their aid agreement." Supplemental Brief of Appellants, Johnson, et al v. Nat'l Collegiate Athletic Ass'n, et al. (No. 22-1223, ECF 74). The Appellants went on to explain that "it is up to each school to determine whether to grant, renew, reduce or cancel any form of aid" including athletic id. Id.

Resources

Law Library subscribers have access to a variety of Sports Resources, including those listed below. If you have questions about these resources, contact the reference staff at reference@cms.hamilton-co.org or 513.946.5300.

WESTLAW

Like students in work-study programs, NCAA athletes deserve pay, suit says
WESTLAW Labor and Employment Daily Briefing November 22, 2019 WL 6222170

§ 64. Injunctions in civil actions for restraint of trade violations; quo warranto
Ohio Jurisprudence, Third Edition OHJUR TRADEREG

LEXISNEXIS

NOTE: The Path to Employee Status for College Athletes Post- Alston
Vanderbilt Journal of Entertainment and Technology Law Vand. J. Ent. & Tech. L.
Tyler J. Murry*

SPOTLIGHT ON STUDENT SCHOLARSHIP: PART I: The Money Game: Student-Athletes' Battle for Employee Status New York Law School Law Review Jan 01, 2022
6 N.Y.L. Sch. L. Rev. 61

Amy at Off-Site Court

By: Amy Kurlansky

Issue—Does sovereign immunity apply to an officer who is a K-9 handler when the K-9 officer bites (and injures) an invited guest to their home for a social gathering, or is the K-9 handler responsible for the dog bite? Or, is the Issue—Is a police officer personally responsible when his K-9 partner bites a guest invited to their home for a social gathering? Try to remember back to your first semester Legal Research and Writing—does anybody really get assigned to brief a "dog bite case?" Well…. a number of area high school students recently had the opportunity to hear oral arguments on exactly that.

You may have seen it in the news, but this past month, the Supreme Court of Ohio brought their Off-Site Court Program to the University of Cincinnati College of Law. A bit of history of the program:

> Established in 1987 by Chief Justice Thomas J. Moyer, the Off-Site Court Program has taken the judiciary in person to local communities across Ohio for more than 30 years, enabling 42,266 Ohioans, 33,3362 of them students, to personally observe the proceedings of the Supreme Court and interact with justices, attorneys, and court staff.
> https://www.supremecourt.ohio.gov/education/civic-ed/off-site-court-program/

Chief Justice Kennedy explained that the Off-Site Program takes the Court around to all 88 counties in Ohio. The last time that the Court had appeared in Cincinnati was in 1988.

The Court heard oral arguments in 3 cases, with 6 high schools participating. Through the Cincinnati Bar Association, local attorneys were invited to brief and advise the students on the oral arguments they would hear.

I jumped at the chance to volunteer to work with the high school students, and I am so glad that I did. It was a once in a life time experience for them, and for me, first, because I was going to be able to observe the Court, but also because of working with the students.

In mid-April, I had the opportunity to meet with Ms. Thomas' 4th Year Latin Students at Walnut Hills High School. As part of their class curriculum, the students address issues of justice, fairness, and law. And, they were impressively prepared to talk about these issues. My role was to advise them about the court system in general, as well as the issues, parties, and players in "our assigned case."

We were assigned to the first case of the morning, *Harris v. Hildebrand, 2002-Ohio-1555,* which is about a dog bite. You are correct, it took me back to first year Legal Research and Writing, too. But—the interesting twist on this case was that the dog involved is a K-9 officer, and the issue is whether his human partner could be held personally liable for the dog's actions under ORC § 955.28, or if

sovereign immunity applies to the K-9 officer's partner, under ORC § 2744.03.

After going over some civics basics about the court system, like what to expect at oral arguments versus a trial level hearing, the students launched right into the meat of the issues. They vigorously debated the fairness of the competing interests, hitting on many of the questions and issues raised in the parties' briefs, as well as the amici briefs filed on behalf of both sides.

I walked out of the school on cloud nine, impressed by the students and how much their teacher had prepared them for this once in a lifetime opportunity.

That elation only grew on April 19th when we went "to Court." Because "our" case was first on the docket, the students, their teacher, and I had the privilege to meet with the Justices prior to open court. The students had the chance to engage with the Justices and ask them anything they wanted that wasn't about the case at issue, of course.

The students did not disappoint—they peppered the Justices with questions about the role of the judiciary in the legal system: how they choose the cases that they will hear, how the Justices determine what is fair in a case, and how they balance their personal political and moral views with the cases before them.

Like I said, impressive.

We met with the Justices for about 30 minutes prior to the opening of Court, and once Court opened, the students got to see how the attorneys presented their cases and the questions the Justices had for them, based on the record. Many of the questions the Justices asked were the same questions the students had had about the issues in the case.

After the oral arguments, we had the chance to debrief with the two lead attorneys. The students asked them questions about the process, as well as the facts and parties involved. (Of major interest was the fate of the dog, who is still in service.) Debriefing lasted at least as long as the arguments, possibly even longer.

And, at the end of the morning, which also highlighted the new facilities at UC Law, I walked away feeling engaged in the study of law, and excited about the next generation of potential future lawyers.

Please join us on Tuesday, May 23, 2023, 12-1 PM, as Attorney Mark Basil explains how to handle problem probate cases.

This is a online class and we will send you a Zoom meeting link and password closer to the CLE date.

This program is approved for 1.0 hour of general credit in Ohio & 1.0 hour of general credit in Kentucky.

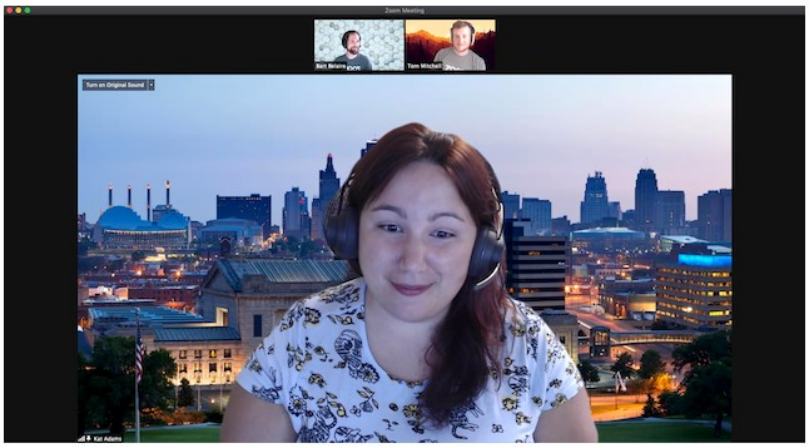
TECH TIP

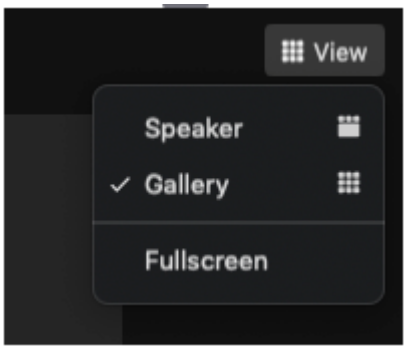
Changing your Zoom Meeting Layout

By: Ana Mendoza

Speaker view will switch the large video window between who is speaking with 3 or more participants in the meeting. If it is just you and one other participant, your video will be smaller at the top and their video will appear below.

Click on your video and hold to change the location of your video.

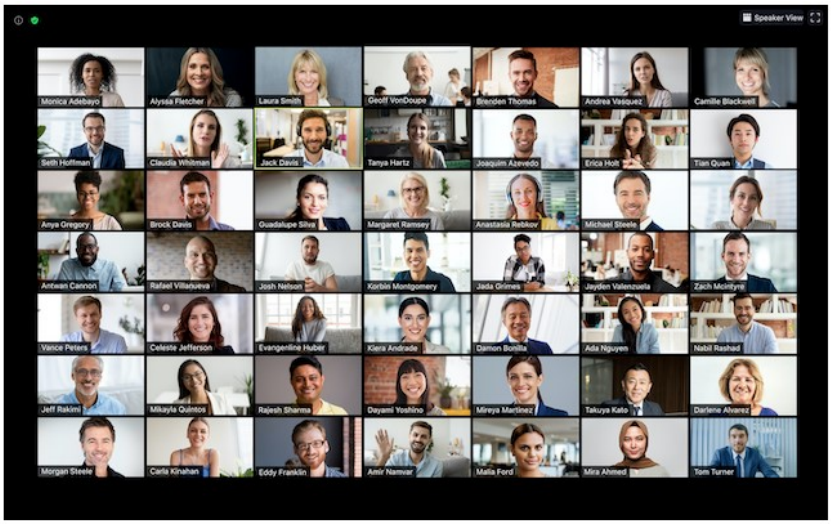


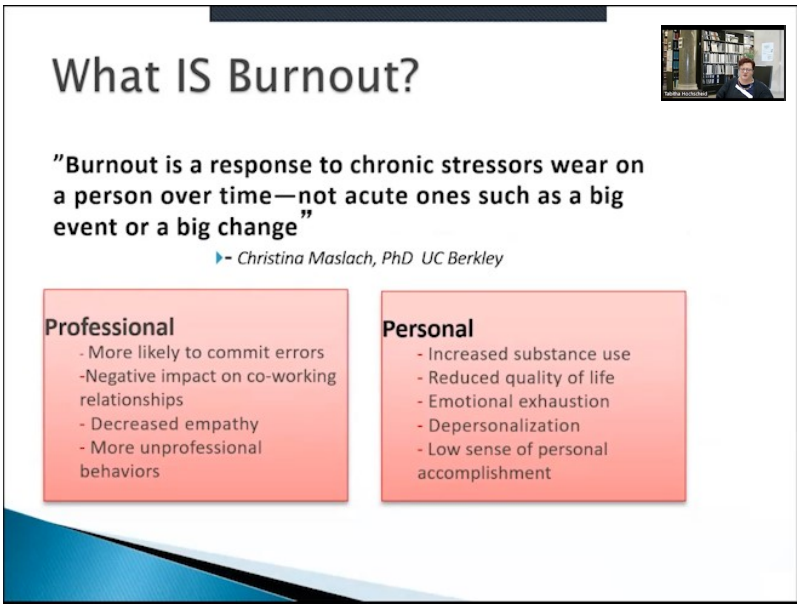


Gallery view lets you see thumbnail displays of participants, in a grid pattern, which expands and contracts as participants join and leave the meeting.

You can switch any of the layouts (except floating the thumbnail window) to full screen mode by double-clicking your Zoom window.

You can exit full screen by double-clicking again or using the **Esc** key on your keyboard.



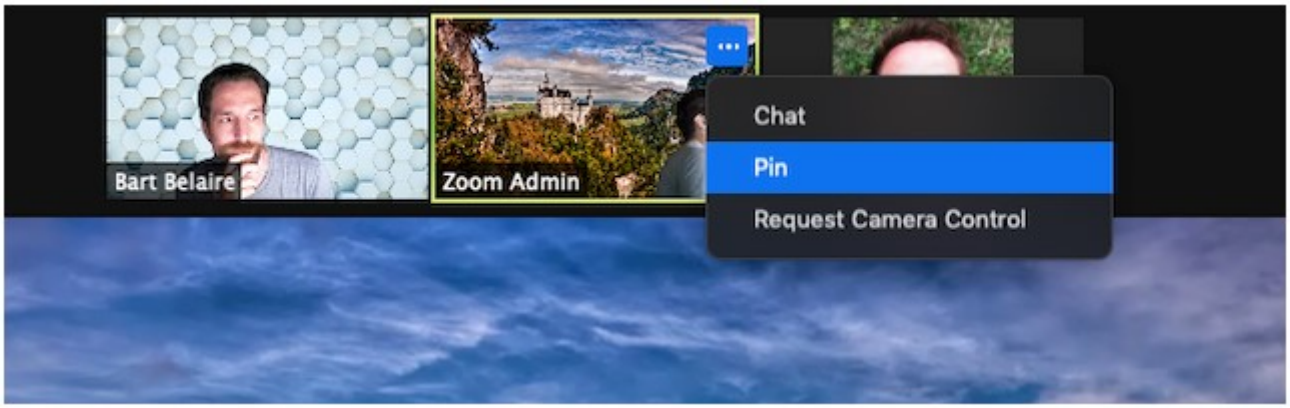


When someone is screen sharing, you can use Side-by-side mode or view the screen share with Speaker view. Any of these layouts can be used in full screen or windowed mode, with the exception of the floating thumbnail view.

Click on your video and hold to change the location of the speakers video.

Pinning a Window:

- At the top of your meeting window, hover over the video of the participant you want to pin and click ...
- From the menu, click **Pin**.
- (Optional) If the host wants to pin additional videos (up to 9 total), follow steps 1 & 2 again as needed. If you have at least 3 participants in the meeting and dual monitor enabled, you will have the option to pin to your first screen or your second screen.



Cancel a pin:

In the upper left corner of any currently-pinned video, click **Remove Pin.**
This will return your view to Active Speaker layout.

Subscriber Benefits

All subscribers have access to the following valuable resources and services:

Circulation privileges to borrow from over 40,000 print volumes for up to six weeks at a time

Access to extensive legal information databases from the Law Library, including

Lexis+, Westlaw, Wolters Kluwer VitalLaw™, Overdrive e-books, HeinOnline, and Loislaw treatises

Wireless network throughout the Law

Library

Zoom, Skype & other videoconferencing

Eight meeting rooms with speaker phones

Professional reference service by our law librarians, available via e-mail, telephone, and in person

Free document delivery by fax or e-mail of print and electronic materials

CLE seminars throughout the year on legal research and substantive topics

Subscribers' lounge, magazines, daily newspapers, and coffee

Bi-weekly news alerts by practice area

Discounted rates for photocopying

In addition, solos and attorneys whose firm has a subscription have 24 hour remote access to Fastcase.com case law, Aspen/LOISLaw treatises, HeinOnline (for under 50 attorney firms), EBSCOhost, and Wolters Kluwer VitalLaw™

UPCOMING EVENTS:

"You're our only hope!" to join the HCLL-CBA Book Club meeting – 05/04/2023 at 12:00 PM – 1:00 PM

CLE: Handling Problem Probates – 05/23/2023 at 12:00 PM

Memorial Day— 5/29/2023 CLOSED

Well-Being Week in Law

Well-Being Week in Law is May 1-5 this year. According to the Institute for Well-Being in Law (WWIL):
"The aim of WWIL is to raise awareness about mental health and encourage action and innovation across the profession to improve well-being…
When our professional and organizational cultures support our well-being, we are better able to make good choices that allow us to thrive and be our best for our clients, colleagues, organizations, families, and communities."
We will be sharing daily info and resources to help inform and contribute to well-being in law throughout the week. Stay tuned to our social media channels for more information!

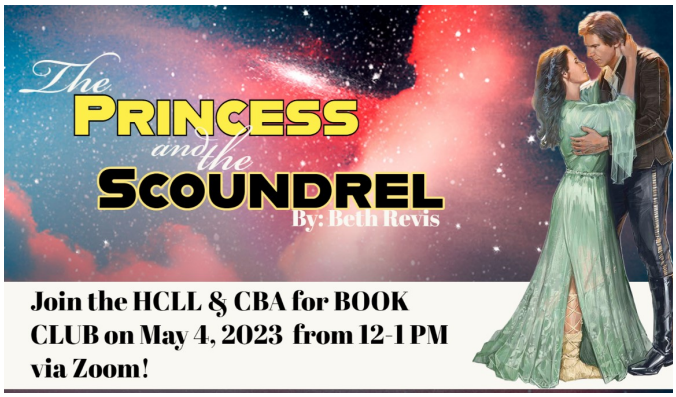
CBA Bundle Renewals

A reminder for our subscribers who have bundled their Law Library subscription with their Cincinnati Bar Association membership – please make sure to select the Law Library add-on when you submit your 2023-2024 Membership Renewal to the CBA. Already renewed with the CBA and didn't add it on? It's not too late! Please contact Betsy by email at bweber@cms.hamilton-co.org and she'll work with you to make sure it gets processed.

Conference Rooms

Our conference rooms provide versatile options for our subscribers to do work in a quiet setting in the courthouse. Equipped with large monitors and technology for remote court hearings or meetings via Zoom and other methods, the rooms allow subscribers to conduct their business from the comfort of the Law Library. Subscribers can reserve the rooms and use the tech for these purposes, and can also conduct in-person client meetings, make phone calls, do legal research or just take a moment between hearings.

In addition to the smaller conference rooms, subscribers can also reserve the boardroom for larger meetings, hearings and other videoconferences. That room is configurable in multiple ways. If you let us know how you'd like it set up and what your tech needs are when you reserve it, we'll have it arranged and ready for your arrival!



Our website features descriptions of the available resources and capacities of each room, so feel free to peruse to determine which space best suits your needs. Note that even rooms that don't have a hard-wired computer connection can be made more tech-friendly by borrowing one of the Law Library's new laptops, available for in-library use.

Reserve the rooms via our website 24/7 or call 946-5300 during business hours for us to assist or with questions. Walk-ins are welcome, but priority will be given to reservations.

Follow us on social media!

If you appreciate the content of our monthly newsletter, you should like us on Facebook and follow us on Twitter (@HCLawLib) and Instagram for even more updates on library happenings and info on relevant legal news. We also publish a blog and push those updates to our social media accounts, so if you follow us you'll never miss a post.