118TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
118–573

PROTECTING STUDENT ATHLETES' ECONOMIC FREEDOM ACT OF 2024

JULY 5, 2024.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Ms. FOXX, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 8534]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 8534) to prohibit a student athlete from being considered an employee of an institution, a conference, or an association based on participation in certain intercollegiate athletics, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protecting Student Athletes' Economic Freedom Act of 2024".

SEC. 2. EMPLOYMENT STANDINGS.

Notwithstanding any other provision of Federal or State law, a student athlete (or former student athlete) may not be considered an employee of an institution, a conference, or an association under any Federal or State law or regulation based on participation of the student athlete (or former student athlete) in a varsity intercollegiate athletics program or a varsity intercollegiate athletics competition, or the existence of rules or requirements for being a member of any varsity sports team.

SEC. 3. DEFINITIONS.

In this Act:

(1) ASSOCIATION.—The term "association" means an organization that—

(A) has multiple conferences and institutions as members;

(B) arranges championships for varsity intercollegiate athletics programs;

(C) sets rules for varsity intercollegiate athletics programs;
(D) sets rules for varsity intercollegiate athletics competitions; and
(E) is not a conference.

(2) CONFERENCE.—The term "conference" means an organization that—
(A) has multiple institutions as members;
(B) sets rules for varsity intercollegiate athletics competitions;
(C) arranges championships for varsity intercollegiate athletics programs; and
(D) is not an association.

(3) INSTITUTION.—The term "institution" means an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)) that sponsors a varsity intercollegiate athletics program in the United States.

(4) STUDENT ATHLETE.—The term "student athlete" means an individual who participates in a varsity intercollegiate athletics program.

(5) VARSITY INTERCOLLEGIATE ATHLETICS COMPETITION.—The term "varsity intercollegiate athletics competition" means a competition involving 2 or more varsity intercollegiate athletics programs sponsored by different institutions.

(6) VARSITY INTERCOLLEGIATE ATHLETICS PROGRAM.—The term "varsity intercollegiate athletics program" means a team or other program unit of an institution participating in a sport—
(A) played at the intercollegiate level;
(B) administered by an athletic department; and
(C) for which eligibility requirements for participation by student athletes are established by an association.

(7) VARSITY SPORTS TEAM.—The term "varsity sports team"—
(A) means a team of student athletes organized by a varsity intercollegiate athletics program to participate in a varsity intercollegiate athletics competition; and
(B) does not include a team that is traditionally characterized as an intramural or club team.

PURPOSE

H.R. 8534, the *Protecting Student Athletes' Economic Freedom Act*, prevents the National Labor Relations Board (NLRB or Board) from misclassifying student-athletes as employees. The bill also clarifies that student-athletes are not considered employees of a collegiate institution, conference, or association under federal or state law or regulation based on participation in varsity intercollegiate athletic programs or competitions.

COMMITTEE ACTION

113TH CONGRESS

Full Committee Hearing on Unionizing Student-Athletes

On May 8, 2014, the Committee on Education and the Workforce held a hearing titled "Big Labor on College Campuses: Examining the Consequences of Unionizing Athletes." Witnesses were Patrick Eilers, Managing Director, Madison Dearborn Partners, Chicago, IL; Bradford Livingston, Partner, Seyfarth Shaw LLP, Chicago, IL; Bernard Muir, Director of Athletics, Stanford University, Stanford, CA; Andy Schwarz, Partner, OSKR LLC, Emeryville, CA; and Ken Starr, President and Chancellor, Baylor University, Waco, TX. Witnesses discussed the NLRB's efforts to classify student-athletes as employees under the *National Labor Relations Act* (NLRA).

114TH CONGRESS

Full Committee Hearing on Expanding Opportunity in Schools and Workplaces

On February 2, 2015, the Committee on Education and the Workforce held a hearing titled "Expanding Opportunity in America's Schools and Workplaces." Witnesses were Mike Pence, Governor of Indiana, Indianapolis, IN; Michael Amiridis, Provost, University of South Carolina, Columbia, SC; Drew Greenblatt, President and CEO, Marlin Steel, Baltimore, MD; and Lawrence Mishel, President, Economic Policy Institute, Washington, D.C. Witnesses discussed, among other things, attempts by the NLRB to misclassify student-athletes as employees under the NLRA.

118TH CONGRESS

Joint Subcommittee Hearing on Student-Athletes

On March 12, 2024, the Subcommittee on Health, Employment, Labor, and Pensions and the Subcommittee on Higher Education and Workforce Development held a joint hearing titled "Safeguarding Student-Athletes from NLRB Misclassification." Witnesses were Jill Bodensteiner, Vice President and Director of Athletics, Saint Joseph's University, Philadelphia, PA; Tylere Sims, Shareholder, Littler Mendelson, Tampa, FL; Matthew Mitten, Professor of Law and Executive Director, National Sports Law Institute, Marquette University Law School, Milwaukee, WI; and Mark Gaston Pearce, Executive Director, Workers' Rights Institute at Georgetown Law, Washington, D.C. Witnesses discussed the negative implications of the misclassification of student athletes as university employees subject to unionization.

Legislative Action

On May 23, 2024, Representative Bob Good (R–VA) introduced H.R. 8534, the *Protecting Student Athletes' Economic Freedom Act*, with Committee Chairwoman Virginia Foxx (R–NC) and Representatives Burgess Owens (R–UT), Eric Burlison (R–MO), Andrew Ogles (R–TN), Tim Walberg (R–MI), Rick Allen (R–GA), Mike Kelly (R–PA), Doug LaMalfa (R–CA), Mary E. Miller (R–IL), and Robert B. Aderhold (R–AL) as original cosponsors. The bill was referred solely to the Committee on Education and the Workforce.

On June 13, 2024, the Committee considered H.R. 8534 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 23–16. Representative Good offered an amendment in the nature of a substitute making a technical change. The amendment was adopted by voice vote.

COMMITTEE VIEWS

Introduction

President Biden promised to be the most pro-union President in U.S. history, and his actions have met that promise. The Biden administration has taken an all-of-government approach that is steadily chipping away at workers' rights and empowering unions to entrench themselves in workplaces in every sector, regardless of worker preference.

At the epicenter of this coordinated approach by government agencies to impose unionization on workers is the NLRB. Under Chairman Lauren McFerran, the NLRB has issued decisions and rules that overturned commonsense policies and tilted the playing field in favor of labor unions at the expense of worker free choice and commonsense workplace standards. Part of this radical pro-union agenda is the NLRB's efforts to expand the agency's jurisdiction over individuals who have never before been considered employees under the *National Labor Relations Act* (NLRA), including student-athletes.

Background on NLRB Actions Concerning Student-Athletes

In the face of declining union membership, labor unions have sought to organize individuals traditionally not considered employees under the NLRA. A recent target of this effort has been student-athletes.

In March 2014, in the *Northwestern University* case, the NLRB Regional Director for Region 13 found that "grant-in-aid scholarship players for [Northwestern University's] football team who have not exhausted their play eligibility are 'employees' under the NLRA."[1] The bargaining unit excluded "walk-on" players who do not receive an athletic scholarship. The Regional Director ordered a representational election in April 2014 to determine whether a majority of the scholarship athletes supported the College Athletes Players Association (CAPA) union.

Northwestern appealed the Regional Director's decision to the full Board. In August 2015, the Board unanimously declined to assert jurisdiction and dismissed the representation petition filed by CAPA concerning Northwestern University football players who receive grant-in-aid scholarships. The Board found that "it would not effectuate the policies of the Act to assert jurisdiction in this case."[2] In large part, the Board reasoned that asserting jurisdiction "would not serve to promote stability in labor relations" because a majority of schools that compete in college football and the Big Ten Conference are public institutions not subject to the NLRA.[3] The Board declined to rule on whether or not student-athletes are statutory employees.

Early in the Biden administration, NLRB General Counsel (GC) Jennifer Abruzzo signaled she would bring the issue of whether student-athletes are employees to the Board. In September 2021, GC Abruzzo issued a memorandum providing updated guidance to all NLRB field offices regarding her position that certain student-athletes are employees under the NLRA.[4] The memo states that "the law fully supports a finding that scholarship football players at Division I Football Bowl Subdivision (FBS) private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA."[5]

The memo relies on a common law definition of employee, which includes a person "who perform[s] services for another and [is] subject to the other's control or right of control." The memo also argues

[1] Northwestern Univ., 13–RC–121359 (NLRB Mar. 6, 2014) (decision & direction of election).
[2] Northwestern Univ., 362 NLRB No. 167, at 1 (2015).
[3] Id.
[4] https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of.
[5] *Id*.

that payment is "strongly indicative of employee status." The memo further claims that student-athletes perform services for their respective academic institutions and the National Collegiate Athletic Association (NCAA) in return for compensation and are subject to their control. In support of this position, the memo cites the "significant developments in the law, NCAA regulations, and the societal landscape." Specifically, the memo notes the NCAA's suspension of name, image, and likeness (NIL) rules for student-athletes and the collective action that is occurring at "unprecedented levels" by student-athletes.[6]

Since this memo was issued, two cases involving the status of student-athletes have reached NLRB regional offices. In May 2023, GC Abruzzo filed a complaint against the University of Southern California (USC), the Pac–12 Conference, and the NCAA, seeking that these entities "cease and desist from misclassifying" players as student-athletes and instead label them as employees.[7] The complaint says misclassifying student-athletes as non-employees intentionally discourages student-athletes from exercising their rights to engage in protected concerted activity under the NLRA. The complaint also alleges that the three entities maintained illegal "handbook rules," and it highlights USC's social media and interview policies that require student-athletes to "be positive" and not "do anything to embarrass yourself, the team, your family, or the University."[8]

As a remedy, GC Abruzzo is seeking an order from the NLRB directing USC, the Pac–12, and the NCAA to reclassify the "student athletes" as "employees" in their files, handbooks, and rules.[9] In December 2023 and January 2024, NLRB Region 31 held hearings on the GC's unfair labor practice charges against USC, the Pac–12, and the NCAA.[10] Region 31 has not yet issued a decision.

On February 5, 2024, in the *Dartmouth College* case involving Dartmouth men's basketball players petitioning for a union, the NLRB Region 1 Director found that because "Dartmouth has the right to control the work performed by the Dartmouth men's basketball team, and the players perform that work in exchange for compensation, I find that the petitioned-for basketball players are employees within the meaning of the [NLRA]."[11] The bargaining unit consists of all basketball players on the men's varsity basketball team. The Regional Director issued a direction of election on union representation to allow the 15 members of the team to vote on whether a majority support the Service Employees International Union (SEIU), Local 560.

The Regional Director determined that the NLRA defines "employee" broadly to include "any employee" subject to only a few enumerated exceptions that do include players at academic institutions or students. She also found that the basketball players at issue perform work that benefits Dartmouth; that Dartmouth exercises significant control over the players' work; that the players are

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[6] *Id.*
[7] https://www.law360.com/articles/1679404/attachments/0.
[8] *Id.*
[9] University of S. Cal., 31–CA–290326, at 5–6 (NLRB May 18, 2023) (complaint & notice of hearing) https://www.nlrb.gov/case/31-CA-290326.
[10] https://apnews.com/article/usc-ncaa-nlrb-b261dd0164b4bd17e00e4c7da5ca3f98.
[11] Trustees of Dartmouth Coll., 01–RC–325633, at 2 (NLRB Feb. 5, 2024) (decision & direction of election), https://www.nlrb.gov/case/01-RC-325633.

required to provide their basketball services to Dartmouth only; and that the student-athlete handbook in many ways functions as an employee handbook, detailing the tasks athletes must complete and the regulations they may not break.

Finally, the Regional Director found that the Dartmouth men's basketball team performs work in exchange for compensation. She noted the basketball players receive the benefits of "early read" for admission prior to graduating high school. The players also receive equipment and apparel—including basketball shoes valued in excess of $1,000 per player per year—as well as tickets to games, lodging, meals, and the benefits of Dartmouth's "Peak Performance" program.

On March 5, 2024, the Dartmouth men's basketball players voted to form the first labor union in college sports. The 15-player roster voted 13–2 in favor of joining SEIU Local 560. Hours after the vote, Dartmouth administrators filed a formal appeal to the full NLRB to challenge the vote.[12]

Federal Courts and State Legislatures Have Not Considered Student-Athletes To Be Employees

Federal courts have consistently recognized the difference between professional and college athletes. Professional athletes are full-time employees paid cash compensation by for-profit leagues. Student-athletes are full-time students at nonprofit institutions of higher education with limits on how much time can be dedicated to athletic pursuits and with educational standards that must be met to remain eligible to compete in athletics.

On March 12, 2024, Matthew Mitten, Professor and Executive Director of the National Sports Law Institute at Marquette University Law School, testified before joint subcommittees of the Committee about how federal courts and state legislatures have consistently held that student-athletes are not employees:

> Federal and state appellate courts have rejected assertions that college athletes are university employees under the federal Fair Labor Standards Act, *Berger v. NCAA*, 843 F.3d 285, 293 (7th Cir. 2016), or state worker's compensation laws. *See, e.g., Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983); *Waldrep v. Texas Employers Insurance Ass'n*, 21 S.W.3d 692 (Tex. Ct. App. 2000).
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> For purposes of worker's compensation insurance coverage, no state legislatures have characterized college athletes as university employees. Some states expressly exclude intercollegiate athletes from coverage under their worker's compensation laws. See, e.g., Cal. Labor Code § 3352(a)(7) ("employee" excludes "[a] person, other than a regular employee, participating in sports or athletics who does not receive compensation for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto").; N.Y. Workers' Comp. Law § 2(4) (McKinney 2022) ("'employee' shall not include persons who are mem-

[12] Trustees of Dartmouth Coll., 01–RC–325633 (NLRB Mar. 5, 2024) (request for review of decision & direction of election), https://www.nlrb.gov/case/01-RC-325633.

> bers of a supervised amateur athletic activity operated on a non-profit basis"). Notably, without characterizing intercollegiate athletes as "employees," Nebraska has legislatively mandated that the University of Nebraska "establish an insurance program which provides coverage to student athletes for personal injuries or accidental death while participating in university-organized play or practice in an intercollegiate athletic event." Neb. Rev. St. § 85–106.05 (West's 2024).[13]

Tyler Sims, a shareholder at Littler Mendelson, testified at the same hearing that states have enacted various laws limiting public employees' right to bargain collectively and classifying student-athletes to not be employees:

> Ohio and Michigan have laws stating that student-athletes at public universities are not employees. See Ohio Rev. Code Sec. 3345.56; Mich. Comp. Laws Sec. 423.201(1)(e)(iii). Wisconsin and several other states have laws limiting public sector union collective bargaining. *See* Wis. Stat. § 111.91(3)(a) (wages only). And other states like North Carolina, Texas, and Georgia prohibit public sector collective bargaining all together. See N.C. Gen. Stat. Ann. § 95–98; Tex. Gov't Code § 617.002(a); Ga. Code Ann. 20–2–09989.10.[14]

College Athletes Are Not Employees Under the NLRA

As stated in the *Northwestern* decision, Congress did not explicitly address "whether the Board should exercise jurisdiction" over student-athletes.[15] Without any clear direction from Congress, it is important to note that the NLRA's overall statutory scheme's purpose and focus is to address economic relationships between employers and employees in an industrial setting, not an academic one.

In 2014, Bradford Livingston, partner at Seyfarth Shaw, testified before the Committee about why student-athletes are not employees under the NLRA:

> Students who participate in intercollegiate athletics are not "employees," regardless of whether the program generates revenue for the university. The term "employee" in Section 2(3) of the NLRA is not defined in any meaningful way, and as a result, its parameters must be examined based on the Act's purpose and focus, which is to address economic relationships between employer and employees. But "principles developed for the industrial setting cannot be imposed blindly on the academic world." Yet claiming that college student-athletes are employees begets "the problem of attempting to force the student-university relationship into the traditional employer-employee frame-

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[13] *Safeguarding Student-Athletes from NLRB Misclassification: Hearing Before the Subcomm. on Health, Emp't, Lab. & Pensions and the Subcomm. on Higher Educ. & Workforce Development of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2024) (statement of Matthew Mitten, Exec. Dir. of the Nat'l Sports Law Inst., Marquette Univ. Law Sch., at 5), https://edworkforce.house.gov/uploadedfiles/mitten_testimony.pdf.

[14] *Id.* (statement of Tyler Sims, Shareholder, Littler Mendelson, at 8), https://edworkforce.house.gov/uploadedfiles/sims_testimony.pdf.

[15] Northwestern Univ., 362 NLRB No. 167, at 1 (2015).

> work." An analysis of the relationship between the academic institution and its student-athletes can only lead to the conclusion that the NLRA's fundamental purpose does not cover such a relationship, nor should it.[16]

Another reason why treating student-athletes as employees under the NLRA is unworkable is that it would undermine a key goal of the NLRA to limit industrial strife and create labor stability. Mr. Sims testified on March 12, 2024, about how treating student-athletes as employees would undermine the goal of the NLRA to improve labor stability:

> Union representation and bargaining will be complicated for student-athletes because of the rapid turnover of college sports teams. At most, a student-athlete will graduate and leave the school every 4–5 years. However, there are new rules related to the transfer portal, which make it more likely that student-athletes will transfer to a new school before their four years of athletic eligibility are over. In short, students who transfer schools are no longer required to sit out for a year, which was the case when I played at P[rovidence]C[ollege], and students who transfer multiple times can play immediately as well. There are also student-athletes who will choose to leave the team or leave school to turn pro or for other reasons. The Board has recognized the serious administrative issues involved in conducting elections and effectively remedying alleged violations of the NLRA within industries with this type of employee turnover. It is possible that at the end of the CBA [collective bargaining agreement], there will be an entirely new bargaining unit that never voted on unionization. As such, the instability of the potential bargaining unit comprised of student-athletes does not promote stability in labor relations and is inconsistent with the purpose of the Act.[17]

Recent NLRB decisions make treating student-athletes as employees under the NLRA unworkable. Nearly all institutions of higher learning impose a number of commonsense rules on student behavior that student-athletes must follow, including basic standards of decorum that students and collegiate athletes must follow. However, under the current Board doctrine, employers are limited in their ability to maintain rules requiring civility in the workplace.[18]

Negative Impact of Employee Status on College Athletics

Classifying student-athletes as employees with the ability to unionize will cause immense legal uncertainty and will harm athletes participating in intercollegiate sports as well as academic institutions sponsoring intercollegiate athletics. In recent years, the NCAA has undergone transformational change and has improved

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[16] *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong. 25–26 (2014) (statement of Bradford Livingston, Partner, Seyfarth Shaw, LLP).

[17] Statement of Tyler Sims, *supra* note 16, at 4–5, https://edworkforce.house.gov/uploadedfiles/sims_testimony.pdf.

[18] See Stericycle, Inc., 372 NLRB No. 113 (2023) (broadening the standard for evaluating employer worker rules that are challenged as facially unlawful).

conditions for student-athletes. Treating student-athletes as employees would undermine recent NCAA rule changes that have been beneficial to intercollegiate athletes.

Mr. Sims testified about some of the potential consequences of classifying student-athletes as employees:

> In a typical workplace (or in professional sports), employees must perform well, or they risk losing their job. If student-athletes were to unionize and be subject to the typical terms of a collective bargaining agreement ("CBA"), would schools insist on a clause allowing them to terminate or "cut" a student-athlete for poor performance, which is what happens in professional sports?
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> The federal tax code exempts certain scholarships from gross income, including those given to student-athletes. However, if scholarships are provided as compensation in exchange for their athletic services, those scholarships are not tax-exempt. The tax code specifically states that the exemptions for a "qualified scholarship" do not apply to any "portion of any amount received which represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship." Athletic scholarships can cover the traditional tuition, room, board, books, meals, and fees, but also may include the incidental costs of attending college like transportation and miscellaneous personal expenses. If all of this is classified as "compensation" to employees, that compensation would be in exchange for a service, i.e. playing college sports, and would be taxable.[19]

Jill Bodensteiner, Vice President and Director of Athletics at Saint Joseph's University, testified before joint subcommittees of the Committee on March 12, 2024, about how universities would not be able to afford the increased costs of treating student-athletes as employees:

> Current NCAA rules require institutions to sponsor a minimum number of sports to compete in Division I. Several institutions (including Saint Joseph's) exceed the minimum required sports, so they can maximize the benefits of intercollegiate athletics for the student-athletes who participate. Those additional sports most often do not generate revenue for institutions. If colleges and universities are required to deploy the resources necessary to support an athlete workforce, such as human resources personnel to manage hundreds (or thousands, at some institutions) of student-athlete job postings; compensable time; hiring, termination and discipline; union negotiations; workers' compensation; and more, those institutions likely will not be able to support many sports that do not generate revenue for the institution. The outcome, therefore, could be many

[19] Statement of Tyler Sims, supra note 16, at 9, https://edworkforce.house.gov/uploadedfiles/sims_testimony.pdf.

> fewer opportunities for student-athletes to participate in collegiate athletics at all.[20]

Professor Mitten also discussed the potential negative consequences of classifying student-athletes as employees:

> The broad scope of mandatory subjects of collective bargaining (i.e., "wages, hours, and other terms and conditions of employment") between a union representing intercollegiate athletes and their respective educational institutions and possibly others (e.g., athletic conference and/or national governing body) potentially includes: a) a sport-specific player draft, which would result in the loss of or restrictions on intercollegiate student-athletes' current individual freedom to initially chose to attend a particular educational institution; b) collectively bargained wages, which are less than the value of a full costs of attendance scholarship and other cash and in-kind educational benefits permitted under current NCAA rules; c) more restrictive limits on student-athletes' NIL earning capacity; for example, the collectively bargained NBA Uniform Player Contract ¶13(a)(b) prohibits all players from "sponsor[ing] commercial products without the written consent of the Team, which shall not be withheld except in the reasonable interests of the Team or the NBA; d) reduced team size limits (e.g., the current maximum of 85 football scholarships for each Division I FBS team is 30 more than the maximum 55 players for NFL team rosters); and e) contract and free agency restrictions resulting in student-athletes" lost or limited current freedom to transfer schools.
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> Absent applicable CBA protections, intercollegiate athletes legally characterized as unionized employees who are *de facto* professional athletes generally could be fired with resulting loss of wages and/or other adverse economic consequences for unsatisfactory athletic performance or simply the coach's desire for replacements who will play better.
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> The legal characterization of private university student-athletes as "employees" and their unionization under the NLRA results in adverse economic consequences to them under federal intellectual property law. Most courts have ruled that the Copyright Act preempts professional athletes' claims that media broadcasts of games or athletic competitions in which they participate violate their state law NIL or publicity rights.[21]

Conclusion

Classifying collegiate athletes as employees does far more harm than good. Student-athletes receive considerable benefits—predominantly free or reduced tuition—from competing in the sports they

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[20] *Safeguarding Student-Athletes from NLRB Misclassification: Hearing Before the Subcomm. on Health, Emp't, Lab. & Pensions and the Subcomm. on Higher Educ. & Workforce Development of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2024) (statement of Jill Bodensteiner, Vice President & Dir. of Athletics, Saint Joseph's Univ., at 4), https://edworkforce.house.gov/uploadedfiles/bodensteiner_testimony.pdf.

[21] *Id.* (statement of Matthew Mitten, Exec. Dir. of the Nat'l Sports Law Inst., Marquette Univ. Law Sch., at 15–16), https://edworkforce.house.gov/uploadedfiles/mitten_testimony.pdf.

love. Treating student-athletes as employees would put these benefits at risk and strip many future collegiate athletes of the opportunity to compete. There are more than 20,000 intercollegiate sports teams with approximately 530,000 student-athletes. Without preserving collegiate athletes' status as students, the current intercollegiate sports model will be destroyed to the detriment of most current and future intercollegiate athletes.

SUMMARY

H.R. 8534 SECTION-BY-SECTION SUMMARY

Section 1 provides that the short title is the "Protecting Student Athletes' Economic Freedom Act."

Section 2 clarifies that student-athletes are not employees of an institution, a conference, or an association based on participation in a varsity intercollegiate athletics program or competition under any federal or state law or regulation.

Section 3 defines the following terms related to student-athletes and intercollegiate athletics programs and competitions: "association," "conference," "institution," "student athlete," "varsity intercollegiate athletics competition," "varsity intercollegiate athletics program," and "varsity sports team."

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 8534 prohibits student athletes from being considered employees of an institution, a conference, or an association under any federal or state law. H.R. 8534 is applicable to student-athletes who participate in a varsity intercollegiate athletics program or competition and therefore does not apply to the Legislative Branch.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344 (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4), the Committee adopts as its own the estimate of mandates prepared by the Director of the Congressional Budget Office (CBO).

EARMARK STATEMENT

H.R. 8534 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes

for and against and the names of the Members voting for and against.

Date: 6/13/24

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 14 Bill: H.R. 8534 Amendment Number: n/a

Disposition: Motion to Report H.R. 8534, as amended, passed by a Full Committee Roll

Call Vote (23 y – 16 n)

Sponsor/Amendment: Rep. Good / ANS

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. GRIJALVA (AZ)			X
Mr. THOMPSON (PA)	X			Mr. COURNTEY (CT)		X	
Mr. WALBERG (MI)	X			Mr. SABLAN (MP)		X	
Mr. GROTHMAN (WI)	X			Ms. WILSON (FL)		X	
Ms. STEFANIK (NY)	X			Ms. BONAMICI (OR)		X	
Mr. ALLEN (GA)	X			Mr. TAKANO (CA)		X	
Mr. BANKS (IN)	X			Ms. ADAMS (NC)		X	
Mr. COMER (KY)	X			Mr. DESAULNIER (CA)		X	
Mr. SMUCKER (PA)	X			Mr. NORCROSS (NJ)			X
Mr. OWENS (UT)	X			Ms. JAYAPAL (WA)			X
Mr. GOOD (VA)	X			Ms. WILD (PA)		X	
Mrs. MCCLAIN (MI)	X			Ms. MCBATH (GA)		X	
Mrs. MILLER (IL)	X			Mrs. HAYES (CT)		X	
Mrs. STEEL (CA)	X			Ms. OMAR (MN)		X	
Mr. ESTES (KS)	X			Ms. STEVENS (MI)		X	
Ms. LETLOW (LA)			X	Ms. LEGER FERNÁNDEZ (NM)		X	
Mr. KILEY (CA)	X			Ms. MANNING (NC)		X	
Mr. BEAN (FL)	X			Mr. MRVAN (IN)		X	
Mr. BURLISON (MO)	X			Mr. BOWMAN (NY)			X
Mr. MORAN (TX)	X						
Ms. CHAVEZ-DEREMER (OR)	X						
Mr. WILLIAMS (NY)	X						
Ms. HOUCHIN (IN)	X						

TOTALS: Ayes: 23 Nos: 16 Not Voting: 5

Total: 44 / Quorum: / Report:

(24 R - 20 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 8534 is to provide that student-athletes are not employees under federal or state law.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 8534 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

REQUIRED COMMITTEE HEARING

In compliance with clause 3(c)(6) of rule XIII the following hearing held during the 118th Congress was used to develop or consider H.R. 8534: On March 12, 2024, the Subcommittee on Health, Employment, Labor, and Pensions and the Subcommittee on Higher Education and Workforce Development held a joint hearing on "Safeguarding Student-Athletes from NLRB Misclassification.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Act of 1974, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office.

At a Glance

Subject of the Legislation

As ordered reported by the House Committee on Education and the Workforce on June 13, 2024

On June 13, 2024, the House Committee on Education and the Workforce ordered reported eight bills and one joint resolution. This comprehensive document provides estimates for seven of those bills and the resolution.

- H.R. 618 would have an insignificant effect on direct spending; thus, pay-as-you-go procedures apply. The other six bills and the resolution would not affect direct spending or revenues; thus, pay-as-you-go procedures do not apply to those pieces of legislation.
- H.R. 8606 would increase spending subject to appropriation by $8 million over the 2024-2029 period. The other pieces of legislation would increase spending subject to appropriation by less than $500,000.
- H.R. 8534 would impose an intergovernmental mandate by prohibiting states from designating varsity athletes of a school, conference, or association as employees of that entity. None of the other pieces of legislation would impose intergovernmental mandates. None of the bills or the resolution would impose private-sector mandates.

Details of the estimated costs of each piece of legislation are discussed in the text.

Bill	Net Increase or Decrease (-) in the Deficit Over the 2024-2034 Period (Millions of Dollars)	Changes in Spending Subject to Appropriation Over the 2024-2029 Period (Outlays, Millions of Dollars)	Mandate Effects?
H.J Res. 165	0	*	No
H.R. 618	*	*	No
H.R. 5567	0	*	No
H.R. 6816	0	*	No
H.R. 8534	0	*	Yes
H.R. 8606	0	8	No
H.R. 8648	0	*	No
H.R. 8649	0	*	No

* = between -$500,000 and $500,000.

Legislation summary: On June 13, 2024, the House Committee on Education and the Workforce ordered to be reported eight bills and one joint resolution. This document provides estimates for seven of those bills and the resolution.

Generally, the legislation would:

- Repeal a rule submitted by the Department of Education relating to "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance;"
- Allow nurse practitioners and physician assistants to diagnose, treat, and certify an injury and extent of disability for the purposes of federal workers' compensation;
- Require elementary and secondary schools and institutions of higher education to meet new requirements in order to maintain eligibility for funding from the Department of Education;
- Prevent student athletes from being considered the employees of an institution of higher education; and
- Authorize appropriations for the educational activities of the United States Holocaust Memorial Museum.

Estimated Federal cost: The estimated costs of the legislation fall within budget function 500 (education, training, employment, and social services).

Basis of estimate: For this estimate, CBO assumes that the legislation will be enacted near the end of fiscal year 2024. The estimated costs do not include any interaction effects among the pieces of legislation. If all seven bills and the resolution were combined and enacted as a single piece of legislation, the estimated costs could be different than the sum of the separated estimates, although CBO expects that any difference would be small.

CBO estimates that implementing H.R. 8606 would cost $8 million over the 2024–2029 period. Implementing the remaining bills and the joint resolution would each cost less than $500,000 over the same period. Any related spending would be subject to the availability of appropriated funds.

H.J. Res. 165, a joint resolution providing for Congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Education relating to "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance:" H.J. Res 165 would disapprove the rule submitted by the Department of Education relating to "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," as published in the Federal Register on April 29, 2024.

The rule amends title IX of the Education Amendments of 1972 (title IX), which prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. The rule clarifies definitions related to sex-based discrimination and harassment and specifies the requirements for grievance procedures, and requirements for preventing sexual discrimination and remedying its effects.

Institutions that fail to comply with title IX, as amended by the rule, could lose federal funding. However, CBO expects that institutions will comply with the regulations to avoid doing so. On that basis, CBO estimates that disapproving the rule would not affect institutions' eligibility for federal student aid.

Based on the costs of similar activities, CBO estimates that implementing the resolution would cost less than $500,000 over the 2024–2029 period. Any related spending would be subject to the availability of appropriated funds.

H.R. 618, Improving Access to Workers' Compensation for Injured Federal Workers Act: H.R. 618 would allow nurse practitioners and physician assistants to diagnose, prescribe treatment, and certify an injury and the extent of disability for the purpose of compensating federal workers under the Federal Employees' Compensation Act (FECA). Using information from the Department of Labor, CBO expects that nonphysician providers would be compensated at the same rate as physicians and that total benefits provided to injured federal workers would not significantly change. Some people may receive treatment more quickly under the bill, which could increase costs over the 10-year period because some payments to medical providers that would have occurred in 2035 under current law could be paid in 2034. On the other hand, if injured workers receive treatment faster, some may return to work more quickly, which could reduce costs. CBO has no basis to estimate which effect would predominate, but we expect that those effects would roughly offset each other. Thus, CBO estimates that

enacting H.R. 618 would affect net direct spending by an insignificant amount.

The FECA payments are mandatory. The costs of those payments are charged to a claimant's employing agency, which reimburses the Department of Labor out of its salaries and expense accounts. Any effect on discretionary spending would be subject to future appropriation actions.

H.R. 5567, CLASS Act: H.R. 5567 would require public elementary and secondary schools that receive funding from the Department of Education to disclose to the department funds received or contracts signed with foreign sources that are more than $10,000.

CBO expects schools would comply with the new requirements; thus, enacting the bill would not affect their eligibility to receive federal funds. Based on the costs of similar activities, CBO estimates that implementing the bill would cost the Department of Education less than $500,000 over the 2024–2029 period. Any related spending would be subject to the availability of appropriated funds.

H.R. 6816, PROTECT Our Kids Act: H.R. 6816 would prohibit elementary and secondary schools that receive direct or indirect support from the government of the People's Republic of China (including Confucius Institutes), from receiving funds from the Department of Education.

The 2018 National Defense Authorization Act prohibited institutions of higher education from using federal funding for Chinese language programs at Confucius Institutes. As a result, nearly all Confucius Institutes at postsecondary institutions have closed, according to a Government Accountability Office report released in 2023.[1] On that basis, CBO expects schools would comply with the new requirements; thus, enacting the bill would not affect their eligibility to receive federal funds.

Based on the costs of similar activities, CBO estimates that implementing the bill would cost the Department of Education less than $500,000 over the 2024–2029 period. Any related spending would be subject to the availability of appropriated funds.

H.R. 8534, Protecting Student Athletes' Economic Freedom Act: The bill would prohibit student athletes from being considered an employee of an institution based on the athletes' participation in a varsity intercollegiate athletic program or competition. Based on the costs of similar activities, CBO estimates that implementing the bill would cost the Department of Education less than $500,000 over the 2024–2029 period. Any related spending would be subject to the availability of appropriated funds.

H.R. 8606, Never Again Education Reauthorization and Study Act of 2024: H.R. 8606 would authorize the appropriation of $2 million each year from 2026 through 2030 for the Director of the United States Holocaust Memorial Museum to support education and training related to the lessons of the Holocaust. Under current law, the authorization of appropriations for those activities expires at the end of 2025. The bill also would require the Director to conduct a study on the educational activities being carried out at the state and local level. Assuming appropriation of the authorized

[1] Government Accountability Office, *China: With Nearly All U.S. Confucius Institutes Closed, Some Schools Sought Alternative Language Support,* GAO–20–105981 (October 2023), www.gao.gov/products/gao-24-105981.

amounts and using historical spending patterns for those activities, CBO estimates that implementing H.R. 8606 would cost $8 million over the 2024–2029 period and $2 million after 2029.

H.R 8648, Civil Rights Protection Act of 2024: H.R. 8648 would require any institution of higher education that receives federal student aid to make publicly available its process for addressing violations of title VI of the Civil Rights Act and any complaints received regarding alleged violations. The bill also would require the Assistant Secretary for Civil Rights at the Department of Education to give monthly briefings on violations specific to race, color, or national origin, and report the findings of institutional complaints.

CBO expects institutions would comply with the new requirements; thus, enacting the bill would not affect their eligibility for federal student aid. Based on the costs of similar activities, CBO estimates that implementing the bill would cost the Department of Education less than $500,000 over the 2024–2029 period. Any related spending would be subject to the availability of appropriated funds.

H.R. 8649, Transparency in Reporting Adversarial Contributions to Education Act: The bill would require elementary and secondary schools that receive funding from the Department of Education to disclose to parents and the public any contributions received from foreign countries and the terms or conditions of such contributions.

CBO expects schools would comply with the new requirements; thus, enacting the bill would not affect their eligibility to receive federal funds. Based on the costs of similar activities, CBO estimates that implementing the bill would cost the Department of Education less than $500,000 over the 2024–2029 period. Any related spending would be subject to the availability of appropriated funds.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. CBO estimates that enacting H.R. 618 would affect net direct spending by less than $500,000 over the 2024–2034 period.

Increase in long-term net direct spending and deficits: CBO estimates that enacting the joint resolution or any of the seven bills in this estimate would not increase net direct spending or deficits in any of the four consecutive 10-year periods beginning in 2035.

Mandates: H.R. 8534 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting states from designating varsity athletes of a school, conference, or association as employees of that entity. CBO estimates that the net costs of the direct effects of the legislation would not result in additional expenditures or losses in revenue; therefore, the cost of the preemption would not exceed the threshold established in UMRA for intergovernmental mandates ($100 million in 2024, adjusted annually for inflation).

The bill would not impose a private-sector mandate as defined in UMRA.

Enacting the legislation may result in other secondary effects on private entities by denying employment-related benefits to varsity athletes that they may otherwise have qualified for as an employee. However, CBO's estimate of those effects is subject to un-

certainty because the question of whether athletes affected by the bill should be recategorized as employees of their institutions remains unsettled as court rulings, administrative decisions, and changes in policies of the National Collegiate Athletics Association are announced. What effect, if any, the bill would have on private entities would depend on the final adjudication of the matter.

None of the remaining pieces of legislation contained in this estimate would impose intergovernmental or private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Meredith Decker (Department of Labor); Leah Koestner (Department of Education); Susanne Mehlman (United States Holocaust Memorial Museum); Garrett Quenneville (Department of Education). Mandates: Erich Dvorak, Brandon Lever, and Grace Watson.

Estimate reviewed by: Elizabeth Cove Delisle, Chief, Income Security Cost Estimates Unit; Justin Humphrey, Chief, Finance, Housing, and Education Cost Estimates Unit; Kathleen FitzGerald, Chief, Public and Private Mandates Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis.

Estimate approved by: Phillip L. Swagel, Director, Congressional Budget Office.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 8534. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the Committee adopts as its own the cost estimate for the bill prepared by the Director of the Congressional Budget Office.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

As reported by the Committee, H.R. 8534 makes no changes to existing law.

MINORITY VIEWS

INTRODUCTION

H.R. 8534, the *Protecting Student Athletes' Economic Freedom Act* (Student Athletes Act), would exclude current or former "student athletes" from being determined *under any federal or state law* to be employees of their school or any collegiate athletics body on the basis of their participation in covered varsity sports or any control exerted over them as a condition of athletics participation.

Putative employers who would be shielded from any employment-related liability under this bill are institutions of higher education that sponsor varsity intercollegiate athletics; varsity intercollegiate athletic conferences; and the NCAA and any other associations that serve as governing bodies for varsity sports.

H.R. 8534 is opposed by the AFL–CIO, American Association for Justice, College Football Players Association, National College Players Association, and the Service Employees International Union. Additionally, individual college athletes have submitted letters in opposition to the bill.

BACKGROUND

The Business of College Sports

The National Collegiate Athletic Association (NCAA) is an association that regulates college athletics among nearly 1,100 member colleges and universities across 102 athletic conferences in North America.[1] NCAA member institutions are divided into three divisions: Division I (DI), Division II (DII), and Division III (DIII).[2] DI is the most competitive level of college athletics and is primarily populated by sizeable institutions with large athletic budgets, meanwhile DIII is not associated with the same intensity as DI and DII.[3] Each division is governed by the member schools in the division through committees.[4] In the 2021–2022 season, approximately 190,000 athletes participated in DI, 130,000 in DII, and over 200,000 in DIII.[5]

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[1] *Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx (last viewed Mar. 4, 2024); *What is the NCAA?*, NCAA, https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx (last viewed Mar. 4, 2024).

[2] *What is the NCAA?*, NCAA, https://www.ncaa.org/sports/2021/2/10/about-resources-media-center-ncaa-101-what-ncaa.aspx (last viewed Mar. 4, 2024). (Of the 1,098 members schools in the NCAA, 350 are in DI, 310 in DII, and 438 in DIII.)

[3] *The Differences Between NCAA Divisions*, NCSA COLLEGE RECRUITING, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions (last viewed Mar. 4, 2024).

[4] *Our Three Divisions*, NCAA, https://www.ncaa.org/sports/2016/1/7/about-resources-media-center-ncaa-101-our-three-divisions.aspx (last viewed Mar. 4, 2024).

[5] *NCAA Sports Sponsorship and Participation Rates Report*, NCAA (Oct. 27, 2022), https://ncaaorg.s3.amazonaws.com/research/sportpart/2022RES_SportsSponsorshipParticipationRatesReport.pdf at 87 & 88.

The NCAA has long asserted that the draw of collegiate sports is amateurism.[6] Meanwhile, college sports have become a multi-billion-dollar industry.[7] In the 2022–2023 fiscal year, the NCAA brought in almost $1.3 billion in revenue, a $140 million increase from the prior fiscal year.[8] The NCAA's Power Five conferences—the most prominent athletic conferences—collectively reported "more than $3.3 billion in revenue during their 2022 fiscal years."[9] In 2019, NCAA member institutions across the three divisions generated more than $18.9 billion in revenue from athletics, with DI schools accounting for $15.8 billion.[10]

Students who participate in varsity intercollegiate athletics report significant time demands, being subject to substantial control by colleges over their time and activities, and constraints on their ability to pursue their studies. One NCAA survey found that,"[o]n average, football, men's basketball, women's basketball, and baseball players in [DI] spend about 40 hours a week on athletic activities."[11] The issue persists in the offseason, with a majority of DI and DII college athletes engaging in athletic related activities for the same or greater number of hours as their regular season.[12] Beyond the hours spent on the activity, college athletes have also spoken out about the control institutions have on their lives off the field. As noted in Mark Gaston Pearce's testimony before the Committee in March 2024:

> Former University of Southern California football players testified that USC officials retained rigid control over their lives almost year-round including fingerprint scanning players to mark their presence at daily meals and conducting hydration testing and weigh-ins multiple times a week. USC hired other students to check that the athletes went to class. One former football player testified that there was so much pressure to attend practices that he would rather study into the wee hours of the night than miss practice.[13]

Moreover, the demands of sports reportedly impinge on students' ability to pursue the academic path of their choice:

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[6] *Safeguarding Student-Athletes from NLRB Misclassification: Hearing Before the Subcomm. on H, Employ., Lab., & Pensions of the H. Comm. on Educ. & the Wrkf.*, 118th Cong. (2024) (statement of Mark Gaston Pearce, Exec. Dir., Workers' Rights Inst. at Geo. L. Ctr.) (accessible at https://democrats-edworkforce.house.gov/imo/media/doc/31424pearcetestimony.pdf) [hereinafter Pearce Testimony].

[7] Andrew Zimbalist, *Analysis: Who is Winning in the High-Revenue World of College Sports?*, PBS (Mar. 18, 2023), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports.

[8] *NCAA Generates Nearly $1.3 Billion in Revenue for 2022–23*, ESPN (Feb. 1, 2024), https://www.espn.com/college-sports/story/_/id/39439274/ncaa-generates-nearly-13-billion-revenue-2022-23.

[9] Steve Berkowitz, *NCAA's Power Five Conferences Are Cash Cows. Here's How Much Schools Made in Fiscal 2022*, USA Today (May 19, 2023), https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/.

[10] *15-Year Trends in Division I Athletics Finances*, NCAA Research, https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf (last viewed Mar. 5, 2024).

[11] Jake New, *What Off-Season?*, INSIDE HIGHER ED. (May 7, 2015), https://www.insidehighered.com/news/2015/05/08/college-athletes-say-they-devote-too-much-time-sports-year-round.

[12] *Id.*

[13] Pearce Testimony, *supra* note 6, at 10.

> Student athletes at NCAA [DI] schools must schedule classes around their required NCAA athletic activities and cannot reschedule their NCAA athletic activities around their academic programs. As a result, Villanova University only excuses a student athlete from participating in required athletic activities if there is a conflict between practice and a mandatory core class. For example, when [one student] played football at Villanova University he was required to participate in NCAA athletically related activities on weekdays between 5:45 a.m. and 11:30 a.m. and could not enroll in a non-core class during that time, including classes that were prerequisites for academic degree programs. . . . Because student athletes have to schedule their classes around their required athletic activities, many student athletes have reported that participation in NCAA [DI] sports have prevented them from taking classes that they wanted to take. Many student athletes have also reported that their participation in NCAA [DI] sports has prevented them from majoring in their preferred major.[14]

Workplace Laws

Many laws afford protections or allot responsibilities based on an employment relationship.[15] These laws differ in their definitions and the tests used to determine the existence of an employment relationship, but the relevant factors tend to include the nature of the enterprise, the distribution of capacity to control the nature of the work performed, and the economic relationship between the putative employer and putative employee. Two laws of particular relevance for this bill are the *Fair Labor Standards Act of 1938* (FLSA)[16] and the *National Labor Relations Act* (NLRA).[17]

FLSA is the core federal workplace standards law governing the minimum wage,[18] overtime,[19] oppressive child labor,[20] discrimination in pay on the basis of sex,[21] and the right of nursing mothers to take paid breaks at work for the purpose of expressing breast milk.[22] FLSA is enforced by both the U.S. Department of Labor and private litigants.[23] In FLSA, the term "employ" includes "to suffer or permit to work."[24] When establishing this broad definition of employment, Congress consciously rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over an employee. Congress instead sought to expand the employment relationship to hold ac-

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[14] Johnson v. NCAA, 556 F. Supp. 3d 491, 496–97 (E.D. Pa. 2021).

[15] *See generally* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PENN. J. BUS. L. 605 (2012); Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law, in* THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31 (Annette Bernhardt *et al*. eds. 2008).

[16] Pub. L. No. 75–718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201 *et seq*.).

[17] Pub. L. No. 74–198, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151 *et seq*.).

[18] *Id*. § 6.

[19] *Id*. § 7.

[20] *Id*. § 12.

[21] *Id*. § 6(d).

[22] *Id*. § 18D.

[23] *Id*. § 16.

[24] *Id*. § 3(g).

countable employers who would not be liable for violations under a control test.[25] Courts test the applicability of this definition using the "economic realities" test, which looks underneath whatever terms the parties to a relationship use to describe it and focuses instead on the reality of the relationship based on the totality of the circumstances to determine whether the putative employee is economically dependent on the potential employer.[26] Ultimately, the application of the economic realities factors is guided by the overarching principle that the FLSA should be "construed liberally to apply to the furthest reaches consistent with congressional direction."[27] The FLSA definition of employment is the "broadest definition that has ever been included in any one act."[28]

The NLRA is the foundational federal law governing labor relations. Administered by the National Labor Relations Board (NLRB), the NLRA protects the rights of employees to organize and collectively bargain with their employers for improved working conditions and benefits, among other things. Under the NLRA, the question of whether a worker is an employee or an independent contractor is governed by a common law test of control.[29] Among the factors courts and the NLRB apply when examining whether workers are employees within the meaning of the NLRA are "the extent of control the employer has over the work; . . . whether the worker is engaged in a distinct occupation or business . . . ; whether the kind of occupation is usually done under the direction of the employer or by a specialist without supervision; [and] whether the employer is or is not in business."[30]

Workplace Law and College Sports Before 2021

Challenges around student athletes and labor and employment law date back decades. In fact, the term "student-athlete" was originally concocted by "the NCAA's president and legal team in the 1950s as part of a legal strategy designed to avoid paying a worker's compensation claim."[31] Student athletes also attempted, generally unsuccessfully in the past, to bring wage theft claims under FLSA.[32]

College athletes attempted in 2014 to unionize. The College Athletes Players Association filed an election petition seeking to represent football players at Northwestern University who received

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[25] Bruce Goldstein *et al., Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 991 (1999).

[26] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985) (reiterating that the test of employment under the FLSA is economic reality); Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33 (1961).

[27] Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959).

[28] United States v. Rosenwasser, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)). The FLSA's definition of "employ" is a standard of "striking breadth" that "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Nationwide Mut. Ins. Co v. Darden, 503 U.S. 318, 323 (1992).

[29] *See* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1125 (D.C. Cir. 2017).

[30] *Id.* (internal citations omitted).

[31] Pearce Testimony, *supra* note 6, at 3.

[32] *See, e.g.*, Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019) (holding that a student athlete was not an "employee" of either NCAA or conference under FLSA or under California Labor Code); Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016) (holding that former student athletes had not been employees of university).

grant-in-aid scholarships.[33] An NLRB Regional Director determined that players on Northwestern University's football team who received grant-in-aid scholarships were employees within the meaning of section 2(3) of the NLRA[34] and directed that a representation election be conducted. On review, the NLRB explicitly did not decide whether the scholarship football players were employees. Instead, the NLRB determined that, even if the players were statutory employees, asserting jurisdiction in the case would not effectuate the policies of the NLRA. Essentially, the NLRB was concerned that if Northwestern University players were determined to be statutory employees there would be a risk of unionized, non-unionized, and non-employee teams all in the same conference.

The Turning Point: NCAA v. Alston

The distinctive nature of amateurism in college sports and the student athlete was questioned in a 2021 U.S. Supreme Court case applying antitrust law. In *NCAA v. Alston*, the Court considered claims by college athletes that the NCAA system's limits on education-related compensation amounted to an undue restraint of trade. A unanimous Court recognized that college sports are a profit-making enterprise and rejected the NCAA's antitrust defense based on the supposed distinctiveness of amateurism in college athletics.[35]

The *Alston* Court did not explicitly address employment status of college athletes, but Justice Kavanaugh's concurrence suggested a direct line from that case to the applicability of workplace laws. "[T]he NCAA[']s argument] that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid . . . is circular and unpersuasive," wrote Justice Kavanaugh. "[I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. . . . Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on a theory that their product is defined by not paying their workers a fair market rate."[36]

Workplace Law Challenges in the Wake of Alston

A FLSA case brought by student athletes is now moving in the federal courts. *Johnson v. NCAA*, a post-*Alston* case raising FLSA and state wage and hour claims in addition to common law unjust enrichment claims, survived a motion to dismiss in 2021, with the federal district court extensively quoting Justice Kavanaugh's *Alston* concurrence.[37] The court certified that decision for interlocu-

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[33] *Northwestern University*, 362 NLRB 1350 (2015) (docket accessible at https://www.nlrb.gov/case/13-RC-121359).
[34] *See* 29 U.S.C. § 151(2)(3).
[35] NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021).
[36] *Id.* at 2168–2169.
[37] *Johnson*, 556 F. Supp. 3d at 501.

tory appeal,[38] which was recently argued before a three-judge panel of the Third Circuit Court of Appeals.[39]

Players on Dartmouth College's men's varsity basketball team voted March 2024 by a margin of 13 to 2 in favor of representation by the Service Employees International Union (SEIU), Local 560—becoming the first ever bargaining unit comprised of college athletes.[40] The union election came after a NLRB Regional Director concluded that the players were employees for the purposes of the NLRA.[41] The school has filed a Request for Review of the Regional Director's decision, and the NLRB's decision is pending on the matter.[42]

Neither the *Johnson* litigation nor the Darthmouth College basketball unionization effort has reached a final disposition.

DISCUSSION

Open Door for Abuse

With its broad carve-out from state and federal laws, the Student Athletes Act appears to exclude varsity athletes from any and all laws protecting employees in any way—including labor rights, wage and hour protections, occupational safety standards, and workers' compensation programs. It is a categorical exclusion no matter what facts on the ground exist that might demonstrate arrangements of compensation, control over students' time and conditions, or limitations on their educational opportunities belying the "student-athlete" ideal. It would preempt any contrary state law.[43]

Oddly, the Student Athletes Act does not explicitly limit its applicability to actual students. Section 3(4) of the bill defines *student athlete* as "an individual who participates in a varsity intercollegiate athletics program." Neither that definition nor the interrelated definitions in the bill of *varsity intercollegiate athletics program and competition* limit the coverage to athletes who are students enrolled in institutions of higher education. The only limiting factor beyond athletics participation is any rule of eligibility set by intercollegiate sports governing bodies (although, even then, the bill does not restrict the exclusion to student athletes who actually comply with an association's eligibility rules).

Moreover, the Student Athletes Act does not explicitly limit the employment and labor law exclusion to involvement in athletics. It declares that employment status cannot be established under any law "based on participation . . . in [varsity sports] or the existence of rules or requirements for being a member of any varsity sports

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[38] Johnson v. NCAA, No. 19–5230, 2021 U.S. Dist. LEXIS 246324 (E.D. Pa. Dec. 28, 2021).

[39] Maryclaire Dale, *NCAA Asks US Appeals Court to Block Pay for Student-Athletes*, ASSOC. PRESS (Feb. 15, 2023), https://apnews.com/article/sports-compensation-in-education-college-6f6feb3a3973dee785ad2b778a490e0e.

[40] Jimmy Golen, *Dartmouth Men's Basketball Team Votes to Unionize, Though Steps Remain Before Forming Labor Union*, AP NEWS (Mar. 5, 2024), https://apnews.com/article/dartmouth-union-ncaa-basketball-players-2fd912fade62ffd81218a6dc91461962; *NLRB Certifies Union to Represent Dartmouth Basketball Players*, AP NEWS (Mar. 14, 2024), https://apnews.com/article/dartmouth-basketball-union-b27e5702df9a92d0f2ec0ae791ca1916.

[41] Decision and Direction of Elections, *Trustees of Dartmouth College* (No. 01–RC–325633 Feb. 5, 2024), https://apps.nlrb.gov/link/document.aspx/09031d4583c5ebe4.

[42] *Trustees of Dartmouth College*, 01–RC–325633, https://www.nlrb.gov/case/01-RC-325633.

[43] *See, e.g.*, Rick Maese, *Proposed Legislation Would Give Maryland College Athletes the Right to Organize*, WASH. POST (Feb. 8, 2019), https://www.washingtonpost.com/sports/colleges/proposed-legislation-would-give-maryland-college-athletes-the-right-to-unionize/2019/02/07/d3f80368-2b0c-11e9-984d-9b8fba003e81_story.html.

team." Students in the *Johnson v. NAACP* lawsuit have pointed out that varsity athletics participation requires much more of them than just training and competing: for example, NCAA Division 1 rules "require student athletes to participate in Required Athletically Related Activities like fundraising and community service."[44] The bill could, conceivably, exclude student athletes from workplace protections in any work required of them as a condition of continued participation in college sports—including work other than just playing sports.

Premature Action

This bill appears to be a solution in search of a problem. Decisions about employment status under employment and labor laws are still pending. Instead of letting the process play out, this bill would simply push college athletes out of all employment and labor protections before it is even clear if they apply.

Nostalgia for a Lost Cause

The Majority's case for the bill calls for the preservation of the amateur athletics ideal. Bill sponsor Rep. Bob Good (R–VA–5) invoked "America's long tradition of college sports."[45] Rep. Rick W. Allen (R–GA–12) referred to the "distinctive and valuable experience of being a student athlete" and the "invaluable lessons" of college sports.[46] The thrust of the Majority's argument was that defining the economic relationship between college athletes and the collegiate sports industry would be an affront to the spirit of amateur sports.

The history of college athletics tells a different story. In *Alston*, the Supreme Court traced a path in the history of American college sports that starts with money and ends with more money:

> American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. He offered the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol . . . .
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> [I]t was football that really caused college sports to take off. "By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues." Schools regularly had "graduate students and paid ringers" on their teams.
>
> Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the ex-

[44] *Johnson*, 556 F. Supp. 3d at 497 (internal citations omitted).
[45] *Rep. Good Protects Economic Freedoms for Student Athletes*, REP. BOB GOOD (May 23, 2024), https://good.house.gov/media/press-releases/rep-good-protects-economic-freedoms-student-athletes.
[46] Comm. on Educ. & Wrkf. Dems., *Markup: H.R. 618, H.R. 8606, H.R. 8648, H.J. RES. 165, H.R. 6816, H.R. 5567, H.R. 8649, H.R. 7227, H.R. 8534*, YOUTUBE (June 13, 2024), https://www.youtube.com/watch?v=-CfZUIFBSR0 [hereinafter June 13 Markup].

> clusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. The absence of academic residency requirements gave rise to "tramp athletes" who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." The next week, he "was back at West Virginia's law school." College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that "Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction."[47]

The institution that ultimately became the NCAA, born to address the crisis of death and disabling injury in college football, quickly ruled that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession,"[48] but "[r]eality did not always match aspiration":[49]

> [Just] two decades [after creation of the NCAA], the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. College football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable."
>
> The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." One coach estimated that a rival team "spent over $200,000 a year on players." In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.'" He reportedly said: "[A] wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate." In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general under-

[47] *Alston*, 141 S. Ct. at 2148.
[48] *Id.*
[49] *Id.* at 2149.

cover work behind the scenes, big-time college football is in a class by itself."

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." The code reiterated the NCAA's opposition to "promised pay in any form." But for the first time the code also authorized colleges and universities to pay athletes' tuition. And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders". . . .

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. Since 2015, disbursements to individual students have sometimes been *tens of thousands of dollars above the full cost of attendance.*

The NCAA has also allowed payments "incidental to athletics participation," including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). The NCAA permits its member schools to award up to . . . two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events."[50]

[50] *Id.* at 2149–2150 (emphasis added and internal citations omitted).

If the world imagined by the Majority ever had existed, it is long over. At the end of May 2024, the NCAA and its major conferences announced settlements in three post-*Alston* antitrust cases brought by college athletes. The proposed settlement would, among other things, implement a new revenue sharing model to distribute a portion of proceeds from revenue streams such as broadcast rights, ticket sales, and sponsorships to the athletes. In the first year, each school would be allowed to distribute as much as $20 million to athletes, and that amount would increase with total revenues.[51] The deal is "a change that would crush any last notions of amateurism in major college sports."[52]

College athletes, acting through counsel in the context of antitrust litigation, advocated for their interests in these negotiations. If the pending NLRB case is decided in favor of college athletes, future negotiations could take place in the context of labor relations, with workers acting through their own democratically elected leadership. There is no better way to safeguard the economic freedom of college athletes.

Real Problems Being Ignored

Ranking Member Robert C. "Bobby" Scott (D–VA–3) and Workforce Protections Subcommittee Ranking Member Alma Adams (D–NC–12) have asked *twice* for the Committee on Education and the Workforce to hold a hearing on the crisis of child labor and consider the legislation offered to solve that crisis.[53] Democratic members also have been pressing for action to raise the minimum wage, address heat stress, expand protections for workers to exercise their rights to join a union and bargain collectively, and much more.[54] H.R. 8534, the so-called *Protecting Student Athletes' Economic Freedom Act*, does nothing to address the very real problems that Americans face. In fact, as Ranking Member Scott put it during the Committee's markup, the only "freedom" it protects is Committee Republicans' freedom to strip varsity athletes of their rights and protections under fundamental labor and employment statutes.[55]

CONCLUSION

For the reasons stated above, Committee Democrats unanimously opposed H.R. 8534 when the Committee on Education and

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[51] Becky Sullivan, *What We Know and What We Don't About a Historic Settlement to Pay College Athletes*, NPR (May 24, 2024), https://www.npr.org/2024/05/24/nx-s1-4978680/house-ncaa-settlement-pay-college-athletes.

[52] Jesse Dougherty, *In Major Change, College Athletes Set to Be Paid Directly by Schools*, WASH. POST (May 23, 2024), https://www.washingtonpost.com/sports/2024/05/23/ncaa-settlement-revenue-sharing/.

[53] *See* Letter from Reps. Robert C. "Bobby" Scott & Alma S. Adams to Rep. Virginia Foxx (Sept. 13, 2023), https://democrats-edworkforce.house.gov/download/scott-adams-second-letter-to-foxx-re-request-for-child-labor-hearing; Letter from Reps. Robert C. "Bobby" Scott & Alma S. Adams to Rep. Virginia Foxx, (June 6, 2023), https://democrats-edworkforce.house.gov/download/scott-adams-letter-to-foxx-re-request-for-child-labor-hearing.

[54] *See, e.g.*, Asunción Valdivia Heat Illness, Injury, and Fatality Prevention Act of 2023, H.R. 4897, 118th Cong. (2023); Protecting America's Workers Act, H.R. 2998, 118th Cong. (2023); Protecting Children Act, H.R. 4440, 118th Cong. (2023); Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. (2023); Raise the Wage Act, H.R. 3264, 118th Cong. (2023); Wage Theft Prevention and Wage Recovery Act, H.R. 5402, 118th Cong. (2023; Workplace Violence Prevention for Health Care and Social Service Workers Act, H.R. 2663, 118th Cong. (2023).

[55] June 13 Markup, *supra* note 46.

the Workforce considered it on June 13, 2024. We urge the House of Representatives to do the same.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
GREGORIO KILILI CAMACHO SABLAN,
SUZANNE BONAMICI,
MARK TAKANO,
MARK DESAULNIER,
PRAMILA JAYAPAL,
Members of Congress.

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