

# The Path to Employee Status for College Athletes Post-*Alston*

## ABSTRACT

*College athletics are in a state of flux following the Supreme Court’s decision in NCAA v. Alston. While student athletes can now earn money from their name image and likeness (NIL) through endorsement deals, the NCAA and its member schools can still exploit college athletes to earn billions of dollars. To remedy this injustice, courts should classify student athletes as employees under the Federal Labor Standards Act (FLSA) to compensate these students for their work. Whether student athletes should be eligible for minimum wage and employment benefits has been a hot-button topic in the legal community for many years. Fortunately, the Alston decision and subsequent NIL policy changes give student athletes their strongest argument to be classified as an employee to date.*

*Because of Alston’s effects on the legal status of NIL, courts should classify student athletes as employees—not independent contractors—under the various employment tests, and thus grant student athletes FLSA protections. Employee classification for student athletes would require NCAA member schools to alter their business models in order to compensate student athletes for the labor they provide; the NCAA has no other option but to subsidize schools that cannot meet this new expense. If the NCAA fails to do so, other amateur sports organizations may soon take its place.*

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For decades, the National Collegiate Athletic Association (NCAA) has controlled college athletics under the guise of “amateurism.”<sup>1</sup> By classifying college athletes as amateurs, the NCAA has prevented student athletes from receiving any sort of compensation and has imposed stiff penalties on student athletes and schools that break NCAA rules.<sup>2</sup> Student athletes received little in return from their contributions to the multibillion-dollar industry of college athletics, despite the fact that schools, conferences, and—most importantly—the NCAA, reaped large amounts of money from the fruits of student athletes’ labor.<sup>3</sup> However, on June 21, 2021, the Supreme Court

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1. See *Amateurism*, NCAA, <https://www.ncaa.org/student-athletes/future/amateurism> (last visited Mar. 16, 2022).

2. See Brent Schrotenboer, *NCAA Punishes USC; Infractions Linked to Bush*, SAN DIEGO UNION-TRIB. (June 10, 2010, 12:00 PM), <https://www.sandiegouniontribune.com/sdut-ncaa-finds-usc-athletics-program-guilty-2010jun10-htmlstory.html> [<https://perma.cc/2VGM-PSWN>] (discussing how the NCAA banned the University of Southern California football team from the 2010 and 2011 postseasons and penalized Reggie Bush after he (and his family) received money from the school).

3. See Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), [https://www.nber.org/system/files/working\\_papers/w27734/w27734.pdf](https://www.nber.org/system/files/working_papers/w27734/w27734.pdf) [<https://perma.cc/D6K4-8TMK>] (noting that NCAA

reversed course in *NCAA v. Alston* from its previous decisions and found that the NCAA's restrictions on education-related benefits violated the Sherman Act, which sparked the NCAA to allow student athletes to profit from their name, image, and likeness (NIL).<sup>4</sup>

Despite *Alston's* holding, it is unlikely that many student athletes will benefit from their NIL because the sports that they play are not profitable at the college level, and many students do not have “brand names.”<sup>5</sup> Indeed, the large amounts of money in college athletics that “flow to seemingly everyone except the student athletes” was a conundrum that Justice Kavanaugh wrestled with in his *Alston* concurrence.<sup>6</sup> Under previous NCAA rules, to maintain eligibility to play collegiate sports, student athletes were prohibited from accepting any form of payment.<sup>7</sup> The *Alston* decision does not require schools to pay student athletes; it only permits schools to offer “academic achievement awards.”<sup>8</sup> Some athletes now may receive upwards of \$5,980 per year through these awards, and some schools give athletes relatively small monetary academic achievement awards.<sup>9</sup> While

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Division I college football generated schools \$8.5 billion, up from \$4.4 billion one decade prior, yet only about 7 percent of revenue went back to players through in-kind benefits).

4. See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.com/news/ncaa/article/2021-06-30/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/3VAF-WAY9]. Compare *NCAA v. Alston*, 141 S. Ct. 2141, 2164–66 (2021), with *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

5. See *Alston*, 141 S. Ct. at 2166; Hosick, *supra* note 4; Kristi Dosh, *Which Sports Turn a Profit?*, BUS. OF COLL. SPORTS (July 19, 2011), <https://businessofcollegesports.com/football/which-sports-turn-a-profit/> [https://perma.cc/3ZPP-9YFB]; Mark Emmert, *If College Athletes Could Profit Off Their Marketability, How Much Would They Be Worth? In Some Cases, Millions*, USA TODAY, <https://www.usatoday.com/story/sports/college/2019/10/09/college-athletes-with-name-image-likeness-control-could-make-millions/3909807002/> [https://perma.cc/C5R6-87QU] (Oct. 10, 2019, 9:16 AM).

6. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring) (“Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.”); see Garthwaite et al., *supra* note 3 (noting that NCAA schools’ revenues from football alone more than doubled from \$4.4 billion in 2006 to \$8.5 billion 2018 and increase each year).

7. See Max Molski & Kelley Ekert, *16 College Athletes Already Getting Paid Under New NCAA Rule*, NBC SPORTS CHI. (July 2, 2021), <https://www.nbcsports.com/chicago/15-college-athletes-already-getting-paid-under-new-ncaa-rule> [https://perma.cc/6VEZ-BPVV] (noting that many student athletes who profit from their NIL can do so with their social media accounts that in some cases have upwards of one million followers).

8. See *Alston*, 141 S. Ct. at 2153, 2164.

9. See *id.* at 2153; Ross Dellenger, *Ole Miss Breaks Ground on Post-Alston Ruling ‘Extra Benefits’*, SPORTS ILLUSTRATED (Nov. 20, 2021), <https://www.si.com/college/2021/11/20/ole-miss-begins-extra-benefits-alston-ruling> [https://perma.cc/4AJR-HN4R] (reporting that Ole Miss dispersed \$2,990 checks to its athletes).

student athletes now can receive some form of compensation for their labor, the Justices in *Alston* questioned, albeit in dicta, if student athletes still required “fuller relief.”<sup>10</sup>

This Note analyzes the potential implications of *Alston* on student-athlete compensation. Part I examines college athletics, *Alston*’s holding,<sup>11</sup> Justice Kavanaugh’s concurrence,<sup>12</sup> and the various circuit-court tests for employee status under the Federal Labor Standards Act (FLSA).<sup>13</sup> Part II analyzes how student athletes fare under these tests. Finally, Part III argues that courts should classify student athletes as employees under the FLSA and that college athletes should receive a minimum wage from their schools that is separate from certain in-kind benefits.

## I. UNPAID “LABOR” IN COLLEGE SPORTS

### A. *Lead-Up to Alston*

College athletics is a multibillion-dollar industry that grows each year, yet only about 7 percent of profits make it back to the industry’s key players, student athletes, solely through scholarships and living expenses.<sup>14</sup> From 2003 to 2018, the annual revenue of college sports programs soared from \$4 billion to \$14 billion; this exceeded the revenues of three professional sports organizations, the National Hockey League, the National Basketball Association, and Major League Baseball, in 2016.<sup>15</sup> Some universities sign lucrative apparel deals and also earn up to \$250 million per year from creating their own school-specific television channels for athletics.<sup>16</sup> The NCAA itself generates

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10. *Alston*, 141 S. Ct. at 2166.

11. *See id.*

12. *See id.* at 2168 (Kavanaugh, J., concurring).

13. *See* 29 U.S.C. §§ 203–219.

14. *See* Garthwaite et al., *supra* note 3, at 1–2 (noting that professional basketball and football players receive approximately 50 percent of the share of revenues generated by the NBA and NFL).

15. SEN. CHRIS MURPHY, MADNESS, INC.: HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS - EXCEPT THE PLAYERS 1, 3 (2019), [https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report\\_FINAL.pdf](https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf) [<https://perma.cc/DHL2-UCLP>]; *see* Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season — See How It Stacks Up Against Other Pro Sports Leagues*, MARKETWATCH (July 2, 2016, 10:53 AM), <https://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01> [<https://perma.cc/VA4E-FLDW>] (noting that no other professional sports league in the United States had more than \$9.5 billion in revenue in 2016).

16. *See* Darren Rovell, *Breaking Down College Shoe and Apparel Deals*, ESPN (Sept. 27, 2017), [https://www.espn.com/mens-college-basketball/story/\\_/id/20837463/a-look-colleges-apparel-shoe-deals](https://www.espn.com/mens-college-basketball/story/_/id/20837463/a-look-colleges-apparel-shoe-deals) [<https://perma.cc/E7FP-YJAK>] (stating that UCLA and Under Armour have a fifteen-

large amounts of revenue from college sports and, starting in 2025, will earn more than \$1.1 billion annually by licensing the television broadcasting rights for March Madness games.<sup>17</sup> Meanwhile, conferences within the NCAA generate millions of dollars in profit; the Power Five (an informal designation for the five conferences with the highest quality sports programs) had a combined revenue that rose by nearly 260 percent from 2008 to 2018.<sup>18</sup> Many college coaches also have six- or seven-figure salaries—a college coach is the highest-paid state employee in 80 percent of states, while at least eighty-six college coaches make at least \$1 million per year.<sup>19</sup>

Student athletes can only benefit from these profits through scholarships, meals, or living stipends, and on average are no better off financially than the average American at their age.<sup>20</sup> Depending on the sport, student athletes typically spend upwards of fifty hours per week on athletic activities.<sup>21</sup> The amount of time spent on athletics causes

year \$280 million agreement, Ohio State and Nike have a fifteen-year \$252 million agreement, and Texas and Nike have a fifteen-year \$250 million agreement); Spencer Hall, *The Longhorn Network and ESPN Sign Texas-Sized Deal (Yeehaw!)*, SBNATION (Jan. 19, 2011, 11:51 AM), <https://www.sbnation.com/ncaa-football/2011/1/19/1944110/texas-longhorn-network-espn-sign-deal> [<https://perma.cc/59K6-FR7N>] (stating that the University of Texas and ESPN agreed to a twenty-year \$300 million deal to create Longhorn Network).

17. See MURPHY, *supra* note 15, at 11 (noting that March Madness advertising nets the NCAA around \$250 million annually and continues to ensure steady revenue streams because the contracts run for up to thirty years).

18. See *id.* (stating that some conferences negotiate lucrative television deals, and the Big Ten Conference signed a six-year broadcast rights deal worth \$2.64 billion); Garthwaite et al., *supra* note 3, at 8 (noting that from 2008 to 2018, NFL revenues only grew 90 percent and NBA revenues only grew 110 percent).

19. See Charlotte Gibson, *Who's Highest-Paid in Your State?*, ESPN, [https://www.espn.com/espn/feature/story/\\_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees](https://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees) [<https://perma.cc/DU46-DS8S>] (last visited Mar. 16, 2022) (detailing how college football coaches and college basketball coaches are the highest-paid state employee in forty states); *College Football Head Coach Salaries*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries/football/coach> [<https://perma.cc/V82T-RM6J>] (last updated Oct. 14, 2021, 9:09 AM); Garthwaite et al., *supra* note 3, at 13 (noting that average salaries of Power Five football coaching staffs at public schools grew from \$4.8 to \$9.8 million from 2008 to 2018). University of Alabama's football coach, Nick Saban, is the highest paid coach in the country and made \$9.5 million per year as of 2021, which is more than 881 times the price of the school's in-state tuition. See *Cost of Attendance*, UNIV. OF ALA., <https://financialaid.ua.edu/cost/> [<https://perma.cc/NLG2-XZCP>] (last visited Mar. 16, 2022); *College Football Head Coach Salaries*, *supra*.

20. See Garthwaite et al., *supra* note 3, at 27 (pointing out that athletes participating in revenue sports came from families with a median family income in the 49th percentile).

21. See Lynn O'Shaughnessy, *Do College Athletes Have Time to Be Students?*, CBS NEWS, <https://www.cbsnews.com/news/do-college-athletes-have-time-to-be-students/> [<https://perma.cc/U5JS-7ULE>] (Feb. 18, 2011, 10:56 AM); PENN SCHOEN BERLAND, *STUDENT-ATHLETE TIME DEMANDS: APRIL 2015*, at 2 (2015), <https://sports.cbsimg.net/images/Pac-12-Student-Athlete-Time-Demands-Obtained-by-CBS-Sports.pdf> [<https://perma.cc/T5H9-3VAM>]

many student athletes to feel as though they do not have the time for academic obligations.<sup>22</sup> For example, 80 percent of PAC-12 student athletes reported missing at least one class due to athletic commitments during the 2014–15 school year.<sup>23</sup> Despite the sacrifices that most student athletes make, their time commitment rarely results in a professional sports career—less than 2 percent of NCAA student athletes go on to play professionally.<sup>24</sup> Notwithstanding the statistics, many student athletes believe that they will play at the next level and thus do not sufficiently plan for a different career, resulting in scores of student athletes leaving school with little-to-no financial benefit from their time in college.<sup>25</sup>

### B. Alston's Holding and Justice Kavanaugh's Concurrence

The *Alston* decision wiped away dicta from the Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents*, which the NCAA had relied on for decades to prevent student athletes from receiving compensation.<sup>26</sup> In *Board of Regents*, the majority touted the NCAA's "revered tradition of amateurism in college sports."<sup>27</sup> However, the Court sided with the respondent and decided that the NCAA's decision to restrict member schools from televising certain games "restricted output and was hardly consistent" with the preservation of the tradition of amateurism, thus violating the Sherman Act.<sup>28</sup>

Despite the NCAA's loss in the *Board of Regents* decision,<sup>29</sup> the NCAA highlighted the Court's use of the word "amateurism," which was used twelve times during the opinion as dicta.<sup>30</sup> The NCAA has used

[hereinafter STUDENT-ATHLETE TIME DEMANDS] (finding that some athletes report spending more than fifty hours per week on athletics).

22. See STUDENT-ATHLETE TIME DEMANDS, *supra* note 21.

23. *Id.*

24. NCAA (@NCAA), TWITTER (Mar. 24, 2018, 4:01 PM), <https://twitter.com/ncaa/status/977651518060072960> [<https://perma.cc/YH55-7Y59>]; Elsa Kircher Cole, *For the Win: A Story of Academic Fraud and Its Cover-Up to Keep "Student"-Athletes Eligible in Big-Time College Sports*, 42 J. COLL. & U.L. 227, 234 (2016) (reviewing JAY M. SMITH & MARY WILLINGHAM, *CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS* (2015)).

25. See Maggie Wood, *The End Game: How the NCAA Has Failed to Prepare Student-Athletes for Careers After Sports*, 4 ARIZ. ST. SPORTS & ENT. L.J. 466, 467–68 (2015).

26. See *NCAA v. Alston*, 141 S. Ct. 2141, 2158 (2021); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

27. *Bd. of Regents*, 468 U.S. at 120.

28. *Id.*

29. See *id.*

30. See *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) ("The Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [*NCAA*] *v.*

amateurism as the basis for its entire business model in order to continue to prohibit student athletes from receiving compensation; *Alston* has significantly drawn this practice back.<sup>31</sup> Specifically, the *Alston* Court disagreed with the NCAA that the restriction on amateur athletes' compensation had any direct connection to consumer demand.<sup>32</sup> While antitrust law accords wide latitude to business models with a unique product, the Court stated that the NCAA cannot restrain competition under the rationale of amateurism by referring to this impermissible "restraint [on competition] as a product feature" immune from scrutiny.<sup>33</sup> As a result, the NCAA could not place as stringent restrictions as it had in the past on universities to offer education-related benefits to student athletes.<sup>34</sup> The *Alston* decision also forced the NCAA to institute a new policy that allows student athletes to profit from their NIL.<sup>35</sup> But, even though the majority held against the NCAA, the Justices admitted that some would find their decision to be "a poor substitute for fuller relief," hinting that the case was about more than just antitrust law.<sup>36</sup>

The NCAA's business model has relied on unpaid student athletes to generate billions of dollars, and the NCAA justified depriving compensation because "the defining characteristic of college sports [was] that the colleges do not pay student athletes."<sup>37</sup> Justice Kavanaugh found this reasoning "circular."<sup>38</sup> He stated, "[t]he NCAA's business model would be flatly illegal in almost any other industry in America," noting that large sums of money generated by student athletes have built school facilities, paid coaches, and compensated the NCAA, but very little went back to the student athletes themselves.<sup>39</sup> Justice Kavanaugh outlined five policy and practical questions that remained after the majority found the NCAA's amateurism argument moot, also posing questions about a salary cap and student-athlete

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*Board of Regents of University of Oklahoma* were dicta and have no bearing on whether the NCAA's current compensation rules are lawful.") (cleaned up).

31. See *id.* at 2144 (majority opinion) (arguing that the NCAA asked courts to defer to its conception of "amateurism" but failed to define the term).

32. See *id.* at 2163.

33. *Id.* at 2162–63.

34. See *id.* at 2166.

35. See *id.*; Hosick, *supra* note 4.

36. *Alston*, 141 S. Ct. at 2166.

37. *Id.* at 2167 (Kavanaugh, J., concurring).

38. *Id.*

39. *Id.* at 2167–68 (noting that the majority did not address the legality of the NCAA's remaining compensation rules).

wages.<sup>40</sup> The concurrence all but called on legislators to remedy the continuing concerns of student-athlete compensation.<sup>41</sup> The majority and Justice Kavanaugh agreed that “the NCAA is not above the law,” but Justice Kavanaugh’s definition of “the law” clearly includes more than just antitrust law.<sup>42</sup> For instance, if the courts subjected the NCAA and college athletes to employment law under the FLSA, student athletes would enjoy unemployment benefits, overtime benefits, anti-discrimination protections, and a minimum wage.<sup>43</sup>

### C. Alston’s *Fallout*

The first major change that resulted from *Alston* was the NCAA instituting a policy allowing student athletes to profit from their NIL.<sup>44</sup> The policy shift allows athletes to profit from their NIL through social media and other endorsement deals.<sup>45</sup> While some student athletes could earn millions, most are unable to profit from their NIL either because of the low profile and profitability of their sport or the prohibitively high investment required to secure endorsement deals.<sup>46</sup> The limitations on NIL leave many student athletes wanting additional opportunities to compensate their labor.<sup>47</sup> Following *Alston*,<sup>48</sup> student athletes from five universities argued that they are employees under the FLSA in *Johnson v. NCAA*, and that their universities, as their true

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40. *Id.* at 2168 (highlighting the practical difficulties of how all athletes can be compensated regardless of the sport and whether compensation could comply with Title IX).

41. *See id.*

42. *See id.* at 2169 (“Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate.”).

43. *See* 29 U.S.C. §§ 201–219.

44. *See* Hosick, *supra* note 4; *Alston*, 141 S. Ct. at 2141.

45. *See* Kristi Dosh, *LSU Gymnast Olivia Dunne Announces First NIL Brand Deal Is with Activewear Brand Vuori*, FORBES (Sept. 14, 2021, 9:00 AM), <https://www.forbes.com/sites/kristidosh/2021/09/14/lsu-gymnast-olivia-dunne-announces-first-nil-brand-deal-is-with-activewear-brand-vuori/?sh=728ebb32c781> [<https://perma.cc/QP42-NSS8>].

46. *See id.* (predicting that LSU gymnast Olivia Dunne—who has millions of followers on TikTok and Instagram—signed endorsement deals will net her more than \$1 million); Elizabeth Karpen, *Alabama QB Bryce Young Making ‘Ungodly’ Income from NIL Deals*, N.Y. POST, <https://nypost.com/2021/07/20/alabama-qb-is-making-ungodly-amounts-from-nil-deals/> [<https://perma.cc/PBU2-8DU8>] (July 20, 2021, 5:58 PM); Lawrence D. Sprung, *Op-Ed: Here’s the Financial Impact of the NCAA Permitting College Athletes to Profit Off Their Name, Image and Likeness*, CNBC, <https://www.cnbc.com/2021/09/13/heres-impact-of-ncaa-letting-college-athletes-profit-off-their-marketability.html> [<https://perma.cc/K7Z8-TK5D>] (Sept. 13, 2021, 8:36 AM) (noting that student athletes will likely need agents and legal counsel before signing NIL deals).

47. *See* *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*44 (E.D. Pa. Aug. 25, 2021).

48. *See generally Alston*, 141 S. Ct. at 2141–66.



employers, should pay student athletes for time spent on athletics.<sup>49</sup> Judge John R. Padova denied the NCAA's motion to dismiss, arguing that the holding in *Alston* is distinguishable from the Supreme Court's prior decision in *Board of Regents* and the United States Court of Appeals for the Seventh Circuit's opinion in *Berger v. NCAA*.<sup>50</sup> In *Berger*, the Seventh Circuit rejected the student athletes' argument that they were employees under the FLSA because student athletes were amateurs in the NCAA's business model.<sup>51</sup> After the Court in *Alston* rejected the NCAA's amateurism arguments, Judge Padova rejected the argument that the student athletes were not employees due to a "long tradition of amateurism" and evaluated various non-dispositive *Glatt* factors to determine employee status, which include:

(1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment; (3) the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship).<sup>52</sup>

Judge Padova decided that the student athletes could survive the motion to dismiss because three of the *Glatt* factors indicated that the student athletes were employees, two did not, and two were inconclusive.<sup>53</sup> The student athletes satisfied three factors pointing

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49. See *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*2–3.

50. *Id.* at \*44; see *Alston*, 141 S. Ct. at 2141–69; *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

51. See *Berger*, 843 F.3d at 293 (noting that the tests for employee status presented by the student athletes failed to account for the tradition of amateurism and the fact that amateur athletes "participate in their sports for reasons wholly unrelated" to being paid).

52. *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*18, \*34–36; see *Alston*, 141 S. Ct. at 2163–66; *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016).

53. *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*43–44 (arguing that student-athletes conditions weighed toward employee status on the following factors:

(1) the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (2) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; and (3) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern);

toward employee classification: (1) athletic activities were not sufficiently tied to academic credit; (2) schools forced student athletes to participate in more than thirty hours per week of athletic commitments, which interfered with student athletes' academic commitments; and (3) student athletes' participation in athletics did not provide any significant educational benefits.<sup>54</sup> Judge Padova stated that two of the factors were neutral because the complaint did not allege that participation in sports provided training similar to an educational environment or that time was limited to "beneficial learning."<sup>55</sup> The student athletes could not satisfy two of the factors that favored employment status because it was understood that prior to arriving on campus that the student athletes could not receive compensation for college athletics.<sup>56</sup>

Regulatory agencies also took notice of *Alston's* holding.<sup>57</sup> The National Labor Relations Board (NLRB) enforces labor laws that relate to collective bargaining and unfair labor practices, including the National Labor Relations Act (NLRA).<sup>58</sup> In a memorandum, the NLRB stated that student athletes are employees because they are people "who perform services for another and [are] subject to the other's control or right of control."<sup>59</sup> The memorandum brought up the same collective bargaining possibilities that Justice Kavanaugh posed and added that the NCAA's new NIL policy made student athletes more like professional athletes, who are employees, rather than students, who are not.<sup>60</sup> State legislatures also attempted to promulgate rules to allow for better compensation for student athletes, but the states' rules lack

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*Glatt*, 811 F.3d at 536–37.

54. *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*35–36, \*43–44.

55. *Id.* at \*39.

56. *Id.* at \*37–38, \*43.

57. See Letter from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd. (Sept. 29, 2021) (on file with author).

58. *Your Rights*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights> [<https://perma.cc/BD8F-LVKC>] (last visited Mar. 16, 2022).

59. Letter from Jennifer A. Abruzzo, *supra* note 57, at 3–4 (noting that athletes perform a service for their respective universities, generating tens of millions of dollars of profit while universities control "the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules" on a routine basis).

60. See *id.* at 5–6; *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) ("Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues.").

consistency with one another making remedies at the state level insufficient to solve this issue.<sup>61</sup>

#### D. The FLSA and Common Law Test

The FLSA requires all employers to pay a minimum wage, provide all employees unemployment benefits and overtime, and also conform to various anti-discrimination standards.<sup>62</sup> The FLSA defines “employees” as “any individual employed by an employer.”<sup>63</sup> This intentionally broad definition requires courts to define the ambiguous term, which has led to a variety of judicial tests that classify workers as either employees or independent contractors.<sup>64</sup> The most basic test is the common law agency test.<sup>65</sup> In the common law agency test, the main inquiry in determining whether a worker is an employee or not is whether the hiring party has the right to control “the manner and means by which the product is accomplished.”<sup>66</sup>

“Control” is the linchpin of the analysis, but the common law test instructs courts to consider the following non-determinative factors:

(1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when and how long to work; (7) the method of payment; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.<sup>67</sup>

While the common law test suggests that courts consider these additional factors, a worker is highly likely to be considered an

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61. See Jack Kelly, *Newly Passed California Fair Pay to Play Act Will Allow Student Athletes to Receive Compensation*, FORBES (Oct. 1, 2019, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/?sh=7607ca8057d0> [https://perma.cc/DAN4-JYJG].

62. See 29 U.S.C. §§ 206, 218(c).

63. *Id.* § 203(e)(1).

64. Compare *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 7 (Cal. 2018) (utilizing the ABC Test), with *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989) (utilizing the common law test).

65. See *Reid*, 490 U.S. at 731.

66. *Id.* at 742–51 (arguing that “independent contractors who are so controlled and supervised in the creation of a particular work are deemed ‘employees’” under the control test for the meaning of “employee” under the FLSA).

67. *Id.* at 751–52.

employee if the hiring party exerts significant control over that individual.<sup>68</sup>

### *E. The Economic Reality Test*

Other jurisdictions follow the economic reality test; most notably, the Department of Labor (DOL) endorsed the economic reality test as the primary standard for determining a worker's employment status under the FLSA.<sup>69</sup> Like the common law test, the economic reality test also instructs courts to determine the nature and degree of control the employer has over an employee's work.<sup>70</sup> However, the economic reality test also evaluates a worker's opportunity for profit or loss based on initiative or investment.<sup>71</sup> Moreover, the economic reality test outlines other non-dispositive factors relevant to determine whether a worker is an employee or independent contractor: (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is an integral part of the employer's business.<sup>72</sup> Courts and the DOL also note that the test requires an analysis of the economic reality of the working conditions rather than an inquiry into whether these factors are theoretically possible.<sup>73</sup>

### *F. The ABC Test and Other Tests*

Other courts use different tests that alter the existing standards; a prominent example is the California Supreme Court's "ABC" test.<sup>74</sup> The ABC test incorporates aspects from both the common law and economic reality tests.<sup>75</sup> The ABC test begins with the presumption that a worker is an employee and places the burden on the employer to show that the worker is an independent contractor based on three dispositive

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68. See *id.* at 751–52; see also *Common Law Employee Test*, SUREPAYROLL, <https://www.surepayroll.com/resources/terminology/payroll/common-law-employee-test> [<https://perma.cc/4SKN-DHZG>] (last visited Mar. 28, 2022).

69. See *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168, 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1171.

74. See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 34 (Cal. 2018) (noting that the ABC test is used often in the gig economy context); *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*29, \*44 (E.D. Pa. Aug. 25, 2021) (utilizing the *Glatt* test in addition to the economic reality test); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382, 1398 (3d Cir. 1985) (utilizing the *Donovan* Test in addition to the economic reality test).

75. See *Dynamex*, 416 P.3d at 7.

factors: “(A) whether the worker is free from the control and direction of the hiring party; (B) whether the worker performs work that is outside the hiring party’s business; and (C) whether the worker is engaged in an independently established trade.”<sup>76</sup> While the ABC test does not call for courts to use a balancing test in which factors compete with one another, factors A and B are the same as the common law and economic reality tests.<sup>77</sup>

### *G. Treatment of In-Kind Benefits Under the FLSA*

Student athletes often receive in-kind benefits, such as scholarships, food, and housing from their universities.<sup>78</sup> The FLSA defines “wage” to include “the reasonable cost to the employer of furnishing such employee with board, lodging, or other facilities,” but to satisfy this definition, the employer must customarily provide these benefits to employees.<sup>79</sup> The DOL determined that an employer can credit in-kind benefits offered to employees if the employer meets five criteria:

- (1) the employer must regularly provide the benefit; (2) the employee must voluntarily accept the benefit; (3) the benefit must be furnished in compliance with applicable federal, state, or local laws; (4) the benefit must primarily benefit the employee, rather than the employer; and (5) the employer must maintain accurate records of the costs incurred in the furnishing of the benefit.<sup>80</sup>

If student athletes do become employees under the FLSA, 29 U.S.C. § 203(m) may credit some of the benefits that universities already give to student athletes toward a minimum wage,<sup>81</sup> thereby lowering any further monetary amount student athletes would receive.<sup>82</sup>

76. *Id.*

77. *See id.* at 41; *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 742 (1989); *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. at 1168.

78. Kevin Allen, *Here Are Some Benefits NCAA Athletes Already Are Eligible for that You Might Not Know About*, USA TODAY (Oct. 1, 2019, 4:06 PM), <https://www.usatoday.com/story/sports/college/2019/10/01/ncaa-football-basketball-benefits-college-athletes-now-can-receive/2439120001/> [<https://perma.cc/4EGG-UMMJ>].

79. 29 U.S.C. § 203(m).

80. *Credit Towards Wages Under Section 3(m) Questions and Answers*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq#1> [<https://perma.cc/39H7-3F5X>] (last visited Mar. 16, 2022).

81. *See* 29 U.S.C. § 203(m).

82. *See* Sam C. Ehrlich, “*But They’re Already Paid*”: *Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1, 59–60 (2020).

## II. HOW STUDENT ATHLETES FARE UNDER EMPLOYEE TESTS

*A. The Control Factor*

Because different jurisdictions use different analyses to determine whether a worker is an employee under the FLSA, a student athlete will have to satisfy the specific test for his or her school's respective jurisdiction.<sup>83</sup> One element that every test begins with and places a large emphasis on is control.<sup>84</sup> If the hiring party exerts a large amount of control over the worker, the worker is more likely to be an employee under the FLSA and thus entitled to the law's benefits.<sup>85</sup> On the other hand, if the hiring party does not control the worker very much, the worker is more likely to be an independent contractor and cannot enjoy the FLSA's benefits and protections.<sup>86</sup> In *Johnson*, Judge Padova stated that NCAA schools "exercise significant control" over student athletes and argued that student athletes clearly met their burden to establish an inference that student athletes are employees under the FLSA.<sup>87</sup>

For example, the NCAA bylaws restrict student athletes' recruitment, eligibility, hours of participation, duration of eligibility, and discipline.<sup>88</sup> The NLRB also noted that the NCAA controls the maximum number of practice and competition hours, scholarship eligibility, and minimum grade point average necessary for students to maintain athletic eligibility.<sup>89</sup> NCAA member schools also enforce these

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83. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 35 (Cal. 2018); *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*44 (E.D. Pa. Aug. 25, 2021); *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168, 1168 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

84. See *Reid*, 490 U.S. at 751 (suggesting that control is the inquiry driving the common law test); *Dynamex*, 416 P.3d at 41 (explaining that under the ABC test, a worker free from control by the hiring party is less likely to be an employee than if the hiring party has significant control over the worker); *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. at 1168 (instructing courts utilizing the economic reality test that the degree of control a party has over a worker implies employee status); *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*36 (utilizing the economic reality test supplemented by *Glatt* factors).

85. See *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. at 1168; 29 U.S.C. § 203.

86. See *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. at 1168; 29 U.S.C. § 203.

87. *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*9.

88. *Id.*

89. Letter from Jennifer A. Abruzzo, *supra* note 57, at 4.

requirements by punishing players who violate team or NCAA rules through removal from the team and loss of scholarships.<sup>90</sup>

The NCAA further restricts a student athlete's ability to transfer schools to play for another team.<sup>91</sup> While the NCAA removed some restrictions, student athletes who transfer more than once may not play for their new school for an entire season.<sup>92</sup> Players may not communicate with any other school's athletics staff prior to entering the NCAA's transfer portal and must obtain a written request from their current school before entering the portal.<sup>93</sup>

Additionally, coaches and training staff constantly supervise student athletes on and off the field.<sup>94</sup> The NCAA requires that schools have adult supervision to maintain timesheets for student athletes, also requiring administrations to create handbooks that control student athletes' standards of conduct and performance.<sup>95</sup> The handbooks also govern sports agents and prohibit certain kinds of legal gambling.<sup>96</sup>

Judge Padova noted that school handbooks also restrict social media use, including provisions prohibiting players from making derogatory comments about other teams.<sup>97</sup> Many schools require student athletes to friend coaches on Facebook and submit the names of all social media accounts for third-party monitoring, sometimes even forcing student athletes to provide school administrators with access to their accounts.<sup>98</sup> Other schools require student athletes to avoid social media during the athletics season or force them to relinquish accounts altogether.<sup>99</sup>

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90. *Id.*

91. *See* NCAA, NCAA DIVISION I ONE-TIME TRANSFER FAQs 1 (2022), [http://fs.ncaa.org/Docs/eligibility\\_center/Transfer/OneTime\\_Transfer.pdf](http://fs.ncaa.org/Docs/eligibility_center/Transfer/OneTime_Transfer.pdf) [<https://perma.cc/FFD9-6TCZ>] [hereinafter NCAA DIVISION I ONE-TIME TRANSFER FAQs].

92. *Id.*

93. *Id.*

94. *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*10 (E.D. Pa. Aug. 25, 2021).

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* Brett Barocas, *An Unconstitutional Playbook: Why the NCAA Must Stop Monitoring Student-Athletes' Password-Protected Social Media Content*, 80 BROOK. L. REV. 1029, 1030–31 (2015) (stating that third parties constantly monitor University of Kentucky and University of Louisville student athletes' Facebook and Twitter accounts). Moreover, in 2012, the University of Oklahoma required student athletes to add coaches on Facebook as friends, and Utah State required school officials to have access to student athletes' social media accounts. *Id.*

99. *See id.* at 1030 (noting that in 2012, Boise State's football coach, Chris Peterson, banned his players from using Twitter during the season, and Florida State's football program forced players to give up their Twitter accounts to avoid "embarrassing" the team).

Furthermore, the NCAA and schools have policies that restrict student athletes' use of alcohol, nicotine, or other drugs.<sup>100</sup> The NCAA bans nine categories of substances and requires that all NCAA student athletes get drug tested.<sup>101</sup> If a student athlete tests positive for a banned substance, they will be unable to participate in athletics for months, sometimes even being ruled out for an entire season.<sup>102</sup>

Now, student athletes have more freedom to profit from their NIL.<sup>103</sup> However, *Alston* makes it clear that the NCAA and schools may still limit the Court's holding to educational benefits.<sup>104</sup> There are restrictions on certain types of endorsement deals such as nicotine or alcohol products which leave the schools and the NCAA a large degree of control over NIL on the whole.<sup>105</sup> Therefore, even post-*Alston*, the NCAA and its member schools retain considerable control over student athletes.<sup>106</sup>

*B. The "Regular Business" or "Independently Established Trade" Factor*

The common law, economic reality, and ABC tests instruct courts to examine whether the worker completes their job outside of the hiring party's business or engages in an independently established trade.<sup>107</sup> Essentially, a worker who is free to perform other work separate from the hiring party's business is more likely to be an

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100. *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*10.

101. NCAA, NCAA DRUG-TESTING PROGRAM 2020-21, at 6 (2020), <https://studenthealth.mst.edu/media/student-support/student-health/documents/NCAA%20Drug%20Testing%20Program%2020-21.pdf> [<https://perma.cc/64KG-FMPZ>].

102. *Id.* at 8 (stating that student athletes have even lost eligibility for taking nutritional or dietary supplements).

103. Hosick, *supra* note 4.

104. See *NCAA v. Alston*, 141 S. Ct. 2141, 2164 (2021) (enjoining the NCAA only from restricting "education-related compensation," but the NCAA was free to continue "to prohibit compensation from sneaker companies, auto dealerships, [and] boosters" to student athletes).

105. See Lauren Withrow, *Money Moves: NCAA NIL Laws Take Effect*, FANNATION: WILDCATS DAILY (July 1, 2021), <https://www.si.com/college/northwestern/ncaa/money-moves-ncaa-nil-laws-take-effect> [<https://perma.cc/P2XZ-KFAY>]; Hosick, *supra* note 4 (noting that student athletes must report their NIL activities consistent with state law or school and conference requirements to their school).

106. See *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*9 (E.D. Pa. Aug. 25, 2021).

107. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 35 (Cal. 2018); *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*29; Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1170 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).



independent contractor.<sup>108</sup> Conversely, when a hiring party restricts the worker's ability to engage in his or her own business outside of the hiring party's enterprise, the worker is more likely to be an employee.<sup>109</sup>

The NCAA and most schools do not explicitly prevent student athletes from working part-time jobs so long as the student athlete's employer does not pay the athlete more than similarly situated workers.<sup>110</sup> However, the economic reality test instructs courts to look at the true nature of the relationship between the hirer and hired, not merely what is "possible," and most student-athletes are unable to pursue other work.<sup>111</sup> A recent survey of PAC-12 athletes noted that most students say they are currently unable to have a part-time job because of their time commitments to athletics.<sup>112</sup> The survey indicated that 73 percent of student athletes believed that "voluntary" athletic activities were not truly voluntary, and also that 62 percent of student athletes wished that these purported "voluntary" activities were actually voluntary so that they could work part-time jobs.<sup>113</sup> Therefore, student athletes are largely unable to enter a profitable business for themselves and are dependent on schools and the NCAA.<sup>114</sup>

NCAA changes to rules regarding NIL complicate whether student athletes are free to work outside of the school's athletic activities.<sup>115</sup> College athletes can now profit from their NIL via social media advertising and endorsement deals.<sup>116</sup> Some student athletes have sponsorships with a variety of businesses, such as clothing lines and restaurants.<sup>117</sup> Therefore, because student-athletes can now

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108. See *Reid*, 490 U.S. at 751; *Dynamex*, 416 P.3d at 35; Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1170.

109. See *Reid*, 490 U.S. at 751; *Dynamex*, 416 P.3d at 35; Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1170.

110. Jon Solomon, *10 Ways College Athletes Can Get Paid and Remain Eligible for Their Sport*, CBS SPORTS (June 21, 2016, 5:20 PM), <https://www.cbssports.com/college-football/news/10-ways-college-athletes-can-get-paid-and-remain-eligible-for-their-sport/> [<https://perma.cc/9UG7-ZY3R>].

111. See Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1168; *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*29–30.

112. STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 3.

113. See *id.* ("[S]tudents say making it easier to find part-time jobs would have the most beneficial impact on their experience.").

114. See Solomon, *supra* note 110.

115. See Hosick, *supra* note 4.

116. See *id.*

117. See Dosh, *supra* note 45 (discussing LSU gymnast Olivia Dunne's endorsement deal with a clothing brand named Vuori); Molski & Ekert, *supra* note 7 (highlighting that Auburn quarterback Bo Nix signed an endorsement deal with Milo's sweet tea; Minnesota wrestler Gabe Steveson signed an endorsement deal with the delivery service Gopuff; Nebraska volleyball player Lexi Sun signed an endorsement deal with the clothing line, The Sunny

independently pursue a wide array of income-generating activities, it is harder for student athletes to argue that they only perform work within their athletic departments.<sup>118</sup> However, student athletes can counter that they are only able to obtain endorsements or generate revenue from social media because of their work as athletes, and that these athletics takes up most of their time.<sup>119</sup> Nevertheless, *Alston* and NIL rules complicate this employee-status factor.<sup>120</sup>

### C. The “Degree of Permanence” Factor

Another factor that courts consider in several tests is the job’s degree of permanence or the duration of the relationship between the worker and hiring party.<sup>121</sup> If a worker performs services for the hiring party periodically and for short periods of time, the worker is less likely to be an employee under the FLSA.<sup>122</sup> By contrast, if the worker performs services continuously, for a long duration, and exclusively for the hiring party, the worker is more likely to be an employee under the FLSA.<sup>123</sup> The NCAA and its member schools would likely argue that student athletes do not have a significant degree of permanence because student athletes can transfer to other schools.<sup>124</sup> The NCAA has removed certain previous restrictions on transferring and now allows any student athlete to transfer once without losing athletic eligibility for a season.<sup>125</sup> This change and other recent changes to NCAA transfer rules have led to an increased transfer rate for student athletes.<sup>126</sup>

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Crew; and Arkansas wide receiver Trey Knox signed an endorsement deal with PetSmart); Ryan Gaydos, *UConn Star Paige Bueckers Inks Gatorade NIL Deal*, FOX BUS. (Nov. 29, 2021), <https://www.foxbusiness.com/sports/uconn-paige-bueckers-gatorade> [https://perma.cc/BF5S-K54M].

118. See Hosick, *supra* note 4.

119. See Dosh, *supra* note 45; STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 3.

120. See NCAA v. Alston, 141 S. Ct. 2141, 2164 (2021); Hosick, *supra* note 4.

121. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) (noting that the common law test considers the duration of the relationship between the parties when analyzing whether a worker is an employee under the FLSA); Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1169 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795) (discussing how the economic reality test considers the permanence of the relation between the parties when determining whether a worker is an employee under the FLSA).

122. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1247.

123. *Id.*

124. NCAA DIVISION I ONE-TIME TRANSFER FAQs, *supra* note 91.

125. *Id.*

126. Ross Dellenger, *It’s Going to Change the Landscape: The NCAA’s Transfer Revolution Is Here, and Its Impact Will Be Felt Far and Wide*, SPORTS ILLUSTRATED (Apr. 14, 2021), <https://www.si.com/college/2021/04/14/ncaa-transfers-rule-change-football-basketball>

However, players who transfer more than once must sit out an entire season.<sup>127</sup> The NCAA further directs which schools and staff members the transferring players can speak to and when they may do so.<sup>128</sup> In addition, schools recruit student athletes with four-year scholarships, but many student athletes play five years or more due to “redshirt” rules, injury rules, or COVID-19 eligibility extensions.<sup>129</sup> Five years is a large degree of permanence under the FLSA, and courts have held that the seasonal nature of the work does not indicate that a worker is an independent contractor when the worker performs repeated work over the course of multiple seasons for the hiring party.<sup>130</sup> Moreover, even when a college athlete’s sport is “out of season,” student athletes continue to participate in offseason practices, workouts, and training.<sup>131</sup>

#### D. The “Skill Required” Factor

The common law and economic reality tests also consider the amount of skill required for the job to determine whether a worker is an employee.<sup>132</sup> If the work requires specialized training or skills separate from standard on-boarding training that the potential employer provides, then the worker is more likely to be an independent

[<https://perma.cc/N2NJ-AU7K>] (explaining how the number of men’s college basketball players that transferred increased from 10 percent to 16 percent between 2010 and 2020, and the number of college football players that transferred in 2020 was 2 percent greater than in 2019).

127. NCAA DIVISION I ONE-TIME TRANSFER FAQs, *supra* note 91 (noting that student athletes must provide their current school with a written request to enter the NCAA Transfer Portal by July 1, 2021 to use the one-time exception).

128. *Id.*

129. See NCAA, NCAA ELIGIBILITY CENTER COVID-19 RESPONSE FAQs 1, 6 (2020), [http://fs.ncaa.org/Docs/eligibility\\_center/COVID19\\_Fall2021\\_Public.pdf](http://fs.ncaa.org/Docs/eligibility_center/COVID19_Fall2021_Public.pdf) [<https://perma.cc/C8SW-F82K>]; Jacob Imm, *What Does Redshirt Mean in College Sports?*, N. CENT. COLL. (Sept. 13, 2021), <https://www.northcentralcollege.edu/news/2021/09/13/what-does-redshirt-mean-college-sports> [<https://perma.cc/QTC5-Z25G>] (explaining that a redshirt year is a year in which a student athlete sits out for a playing season but still maintains his or her eligibility to play in games for four seasons and thus, be on the team for additional seasons).

130. See, e.g., *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1237 (10th Cir. 2018).

131. See STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 3 (explaining how student athletes believe that even when these offseason workouts and practices are “voluntary,” they are really mandatory because athletes face adverse treatment if they do not participate); NCAA, NCAA DIVISION I TIME MANAGEMENT 1 (2020), [https://ncaaorg.s3.amazonaws.com/research/goals/Jul2020D1RES\\_StudentAthleteTimeManagement.pdf](https://ncaaorg.s3.amazonaws.com/research/goals/Jul2020D1RES_StudentAthleteTimeManagement.pdf) [<https://perma.cc/6VE4-TTCN>].

132. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168, 1190–92 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

contractor.<sup>133</sup> If the work requires no specialized training or skills, or if the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job, then the worker is more likely to be an employee.<sup>134</sup> While student athletes play sports in high school (and often during elementary and middle school as well) before they play in college, NCAA athletics require specialized training from each school.<sup>135</sup> For example, each NCAA football team has a unique playbook with potentially hundreds of plays that each player must master before gameday.<sup>136</sup> Student athletes often practice and perform necessary athletic activities for upwards of forty hours per week to prepare themselves for gamedays.<sup>137</sup> Therefore, this factor weighs more toward a finding of employee status.<sup>138</sup>

*E. The “Source of Instrumentalities and Tools” and “Location of Work” Factors*

Most of the prominent employee-status tests use the factors detailed above; however, the common law and economic reality tests analyze certain other non-dispositive factors.<sup>139</sup> For example, the common law test instructs courts to analyze the source of instrumentalities and tools to complete a job.<sup>140</sup> If a worker supplies her own tools or machinery to complete the hiring party’s services, the worker is more likely to be an independent contractor and not entitled to FLSA benefits.<sup>141</sup> If the hiring party provides all of the tools, equipment, and machinery, the worker is more likely to be an employee and entitled to FLSA benefits.<sup>142</sup> The NCAA sets equipment policies, and its member schools provide student athletes with equipment, fields,

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133. See Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1190–92.

134. See *id.*

135. See College Football on FOX, *Urban’s Playbook: Coach Meyer Breaks Down Art of Play Calling from Ohio State’s Offense*, YOUTUBE (Nov. 15, 2020), <https://www.youtube.com/watch?v=lqthYWr806E> [<https://perma.cc/892Y-YRAA>].

136. See *id.*

137. See STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 2.

138. See *id.*

139. See Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1170; Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989); Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 42 (Cal. 2018).

140. Reid, 490 U.S. at 751.

141. See *id.* at 752–53 (noting Reid supplied his own tools, which indicated independent contractor status).

142. See *id.*

courts, weight rooms, etc., to train and play sports.<sup>143</sup> Therefore, the “sources of instrumentalities and tools” factor weighs more toward a finding of employee status.<sup>144</sup>

This factor coincides with another common law factor—the location of work.<sup>145</sup> If workers conduct work for the hiring party at locations of their choosing or off-site, they are more likely to be independent contractors.<sup>146</sup> If workers conduct services at designated locations controlled and supervised by the hiring party, they are more likely to be employees.<sup>147</sup> Much like the equipment student athletes use, NCAA member schools dictate work location by creating athletics and training facilities for practices and games.<sup>148</sup>

*F. The “Hiring Party’s Discretion over How Long and When to Work” and “Additional Side Projects” Factors*

Another factor in the common law test is whether the hired party has discretion over how long and when to work.<sup>149</sup> The more the worker is able to dictate when they want to work and for how long, the more likely they are an independent contractor.<sup>150</sup> While student athletes may transfer between schools, each NCAA member school sets practice and workout times.<sup>151</sup> Additionally, the NCAA and conferences jointly dictate game schedules.<sup>152</sup> Each sport has a designated season (fall, winter, or spring) in which teams play games; student athletes cannot

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143. See NCAA, 2021-22 NCAA DIVISION I MANUAL 43–44 (2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/TK4B-AA88>] [hereinafter NCAA DIVISION I MANUAL].

144. See *id.*; *Reid*, 490 U.S. at 752–53.

145. *Reid*, 490 U.S. at 751.

146. See *id.* at 752–53 (noting *Reid* worked in his own off-site studio, which weighed in favor of independent contractor status).

147. See *id.*

148. See, e.g., *Alabama Athletic Facilities*, UNIV. OF ALA., <https://rolltide.com/sports/2016/6/10/facilities-alab-facilities-html.aspx> [<https://perma.cc/S26P-HW4U>] (last visited Mar. 16, 2022).

149. *Reid*, 490 U.S. at 751.

150. See *id.* at 753 (noting *Reid* had absolute authority to decide when and how long to work, which pointed more toward a finding of independent contractor status as opposed to employee status).

151. See NCAA DIVISION I ONE-TIME TRANSFER FAQs, *supra* note 91; *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*9 (E.D. Pa. Aug. 25, 2021).

152. See *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*9; see also Michael Felder, *How Is a College Football Schedule Made?*, BLEACHER REP. (Sep. 27, 2012), <https://bleacherreport.com/articles/1350023-how-is-a-college-football-schedule-made> [<https://perma.cc/7UL6-B4CR>] (describing how the NCAA schedules football games and the actors that are involved in the scheduling process).

alter game schedules.<sup>153</sup> As detailed above, “voluntary” workouts are not truly voluntary, and student athletes may face repercussions from coaches for skipping “voluntary” training.<sup>154</sup> Therefore, student athletes have little discretion over how long and when they work.<sup>155</sup>

The common law test also focuses on whether the hiring party has the right to assign additional side projects, coinciding with the analysis on voluntary workouts.<sup>156</sup> If a hiring party can add projects to a worker’s schedule, the worker is more likely to be an employee, but if the worker has the freedom to decline additional projects, the worker is more likely to be an independent contractor.<sup>157</sup> Based on the involuntary nature of “voluntary” workouts, coaches can add to the schedules, which makes this factor point toward employee status.<sup>158</sup>

*G. The “Hired Party’s Role in Hiring and Paying Assistants” and Remaining Common Law Factors*

If a worker can freely hire assistants to complete tasks, they are more likely to be an independent contractor under the common law test.<sup>159</sup> If the worker is unable to hire assistants, and the hiring party has sole discretion to do so, then the worker is more likely an employee.<sup>160</sup> Student athletes do not hire assistants, and only college coaches and athletic officials can determine which players to recruit and which assistants to hire.<sup>161</sup> Therefore, this factor weighs toward a finding of employee status.<sup>162</sup>

The final three common law factors are: the method of payment, whether or not the employee is provided with benefits, and the tax treatment of the hired party.<sup>163</sup> Each factor is difficult to apply to

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153. See, e.g., *2021 Football Schedule*, MUTIGERS, <https://mutigers.com/sports/football/schedule/2021> [<https://perma.cc/6GXD-F8FL>] (last visited Mar. 16, 2022); see also Felder, *supra* note 152.

154. See STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 3 (addressing that a recent PAC-12 survey indicated 75 percent of student athletes believed voluntary workouts were not truly voluntary).

155. See *id.*; *Reid*, 490 U.S. at 751.

156. See *Reid*, 490 U.S. at 751.

157. See *id.* at 731 (noting that CCTV could not assign Reid additional projects that he was forced to accept, which pointed toward independent contractor status).

158. See *id.*; STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 3.

159. See *Reid*, 490 U.S. at 731 (noting Reid had sole discretion to hire assistants to complete tasks, which indicated a finding of independent contractor status).

160. See *id.*

161. See, e.g., *id.*; NCAA DIVISION I MANUAL, *supra* note 143, at 78 (outlining the NCAA’s guidelines for college coaches to recruit players).

162. See NCAA DIVISION I MANUAL, *supra* note 143, at 78; *Reid*, 490 U.S. at 731.

163. *Reid*, 490 U.S. at 751–52.

student athletes, but NCAA member schools do not contribute to unemployment insurance or Social Security for student athletes, which are common benefits given to employees.<sup>164</sup> Therefore, this factor weighs toward a finding of independent contractor status.<sup>165</sup> Because student athletes do not earn money from schools and scholarships are tax-exempt, the tax treatment of student athletes is neutral when it comes to a finding of employee or independent contractor status.<sup>166</sup> The same goes for the method of payment because the NCAA and member schools do not directly pay student athletes; thus, this factor is neutral.<sup>167</sup>

*H. The “Opportunity for Profit or Loss Based on Initial Investment” Factor*

The economic reality test instructs courts to analyze the opportunity a worker has for profit or loss based on the worker’s initial investment.<sup>168</sup> A worker is more likely to be an independent contractor the more they can earn profits or incur losses based on their own extra initiative.<sup>169</sup> Like the common law test, the opportunity for profit or loss factor in the economic reality test indicates that workers who are unable to hire assistants are more like employees than independent contractors, and student athletes have little to no say over hiring within an athletic department.<sup>170</sup> However, the NCAA’s current policies regarding NIL complicates this factor.<sup>171</sup> Now that a student athlete can profit from their NIL, athletes can earn profits by utilizing their own business enterprise and ambition.<sup>172</sup> While in theory the increase in value of student athletes’ NIL may allow them to realize profits, in actuality, many are unable to financially benefit from their NIL.<sup>173</sup> In

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164. See *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J., concurring) (“The rest of the NCAA’s compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports.”).

165. See *id.*; *Reid*, 490 U.S. at 751–52.

166. See 26 U.S.C. § 117 (indicating that qualified scholarships are not included in taxable gross income); *Reid*, 490 U.S. at 751–52.

167. See *Reid*, 490 U.S. at 752; *Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

168. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1185–86 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

169. *Id.* (noting that “initiative” can include a worker’s managerial skill, business judgment, or management investment in capital expenditures such as helpers or equipment).

170. *Id.*; see NCAA DIVISION I MANUAL, *supra* note 143, at 53.

171. See Hosick, *supra* note 4.

172. See *id.*

173. See Sprung, *supra* note 46; Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1185–86.

addition, the DOL stated that this factor weighs toward employee status “to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.”<sup>174</sup> It seems impossible for a student athlete to be able to affect their earnings through their NIL without increasing the hours they work to publish content and create advertisements.<sup>175</sup> Therefore, this factor points both ways, and it is unclear how a court would analyze this element of the test.<sup>176</sup>

### III. STUDENT ATHLETES ARE EMPLOYEES UNDER THE FLSA

#### A. Weighing the FLSA Factors

The rise of NIL and the *Alston* decision should make it easier for student athletes to satisfy the FLSA factors for employee status.<sup>177</sup> Therefore, student athletes should continue to argue that they are employees under the FLSA, and courts should classify student athletes as such regardless of the specific legal test used. Even if one is generous toward the NCAA’s position, nine of the twelve common law test factors,<sup>178</sup> five of the six economic reality test factors,<sup>179</sup> and two of the three ABC test factors favor student athletes.<sup>180</sup> The remaining factors are neutral.<sup>181</sup> Outside of the ABC test, no single factor is dispositive.<sup>182</sup> In addition, the opportunity for profit or loss factor, which is present in all three tests, weighs heavily toward employee status because of the DOL regulations.<sup>183</sup> Therefore, if student athletes plead sufficient facts on the opportunity for profit or loss factor, all of the ABC and economic reality test factors point toward employee status, and only two common law factors remain neutral.

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174. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1186.

175. See STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 3.

176. See Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1185–86.

177. See *NCAA v. Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

178. See *supra* note 67.

179. See *supra* notes 70–72.

180. See *supra* note 76.

181. See *supra* notes 67, 70–72, and 76.

182. See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 42 (Cal. 2018); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989); Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1200 (Jan. 7, 2021) (codified at 29 C.F.R. pts. 780, 788, 795).

183. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1185–86.



Although the NCAA will argue that the opportunity for profit or loss factor is determinative, control is the predominant benchmark for all employee tests.<sup>184</sup> Student athletes satisfy this factor comfortably. The NCAA and its member schools have rules and regulations in place to control student athletes' lives on and off the field.<sup>185</sup> Judge Padova characterized the degree of control best when he stated that "NCAA D1 member schools exercise significant control over their student athletes."<sup>186</sup> The *Alston* decision also irreparably undermines any potential argument from the NCAA that pertains to the control factor.<sup>187</sup> Justice Kavanaugh's concurrence questions the significant restrictions on student-athlete compensation that the NCAA still has in place and notes the high degree of control the restrictions place on student athletes.<sup>188</sup>

In addition to the control factor, student athletes can show that they meet: (1) the skill required factor; (2) the source of instrumentalities factor; (3) the location of work factor; (4) the duration of relationship or degree of permanence factor; (5) the whether or not the hiring party has the right to assign additional projects factor; (6) the hired party's discretion over how long and when to work factor; (7) the hired party's role in hiring assistants factor; and (8) the integral part of the employer's business factor.<sup>189</sup> This overwhelmingly supports a finding of employee status under the FLSA, and if student athletes plead sufficient facts, a court should classify them as such.

Once courts choose to identify student athletes as employees, the athletes can begin to receive FLSA benefits such as overtime, anti-discrimination protection, and minimum wage.<sup>190</sup> These wages can help student athletes profit off of their athletic abilities despite the small chance of a successful professional sports career.<sup>191</sup> Otherwise, the NCAA and its member schools will continue to exploit student athletes to support an unsustainable business model that would be "flatly illegal" in another industry.<sup>192</sup> However, to achieve employee

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184. See *id.* at 1168; *Reid*, 490 U.S. at 751; *Dynamex*, 416 P.3d at 35.

185. *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*9 (E.D. Pa. Aug. 25, 2021).

186. *Id.*

187. See *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J., concurring).

188. See *id.* at 2167.

189. See *Reid*, 490 U.S. at 751; *Dynamex*, 416 P.3d at 35; Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. at 1168.

190. 29 U.S.C. §§ 201–219.

191. See @NCAA, *supra* note 24.

192. *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

status and obtain the necessary relief, student athletes must overcome more hurdles.

*B. Ways for Student Athlete Plaintiffs in Johnson to Answer the Remaining Glatt Factors*

*Johnson* offers a glimpse at how courts may analyze FLSA status for college athletes post-*Alston* and lays out the necessary steps for achieving employee status.<sup>193</sup> Judge Padova held that the student athletes pled sufficient facts to survive a motion to dismiss by showing that they met three *Glatt* factors and the economic reality test factors.<sup>194</sup> Two factors were neutral: (1) the extent that “the internship provided training which would be similar to that offered in an educational environment, including clinical and other hands-on training provided by educational institutions,” and (2) the extent that the “internship’s duration is limited to a period that provides the intern with beneficial learning.”<sup>195</sup> Two factors were not satisfied: (1) the extent that the “intern and employer clearly understand that there is no expectation of compensation,” and (2) the extent that the “intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.”<sup>196</sup>

While student athletes cannot show that they play sports with an understanding of entitlement to a job in sports after college, there are ways that student athletes can allege further facts to meet three of the other four factors that the plaintiffs failed to meet at the motion to dismiss stage in *Johnson*.<sup>197</sup> First, student athletes can raise new arguments that college athletes and NCAA member schools clearly understand that there is no expectation of compensation after *Alston*.<sup>198</sup> The new NIL rules allow for an increasing number of student athletes to earn money during their time as college athletes.<sup>199</sup> Increasingly, NCAA member schools use the potential for NIL deals to entice recruits to play for their schools.<sup>200</sup> For example, Clark Field Collective and the

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193. See *id.* at 2169; *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*44 (E.D. Pa. Aug. 25, 2021).

194. *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*44.

195. *Id.* at \*38–39.

196. *Id.* at \*35, \*43.

197. See *id.* at \*43.

198. See *id.* at \*37–38; *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring); Hosick, *supra* note 4.

199. See Hosick, *supra* note 4.

200. See Matthew Postins, *How Big Is Recruiting, NIL Making Texas’ Offensive Line’s Future?*, SPORTS ILLUSTRATED (Dec. 16, 2021), <https://www.si.com/college/texas/recruiting/longhorns-nil-recruiting-offensive-line-future> [<https://perma.cc/9FZZ-FRJX>].

charity Horns with a Heart partnered to compensate University of Texas (UT) offensive linemen around \$150,000 in NIL deals before the athletes even step on campus.<sup>201</sup> While this money does not come “directly” from UT, Longhorns’ coaches can use this money to motivate top players to play for the university.<sup>202</sup> Therefore, NIL’s involvement in recruiting makes it increasingly difficult for NCAA member schools to argue that student athletes “clearly understand” that there is no expectation of payment.<sup>203</sup>

Second, student athletes can show that participation in college sports does not provide training similar to the education gained in a traditional internship.<sup>204</sup> NCAA member schools argued in *Johnson* that student athletes receive training in “discipline, work ethic, strategic thinking, time management, leadership, goal-setting, and teamwork,” much like they would in a classroom.<sup>205</sup> However, Judge Padova disagreed and found this factor neutral.<sup>206</sup> Student athletes develop skills on the court or field vastly far different from proficiencies they develop in the classroom.<sup>207</sup> For example, there is no way to perfect the responsibilities of an outside cornerback in man coverage in a classroom.<sup>208</sup> Judge Padova only said that the student athletes’ complaint did not allege facts stating whether college athletics provided training similar to the education typical of the traditional internship.<sup>209</sup> Therefore, college athletes should highlight in subsequent filings the numerous skills they learn through playing sports that they cannot learn in a classroom.

Finally, student athletes can plead more facts to show that the duration of time they play college sports is not limited to that which provides “beneficial learning.”<sup>210</sup> NCAA member schools again raised the fact that student athletes learn valuable skills while playing sports.<sup>211</sup> However, Judge Padova found this factor neutral because the plaintiffs did not allege any facts on this issue.<sup>212</sup> Student athletes can

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201. *Id.* (discussing that three top offensive linemen recruits committed to Texas within one week of Horn with a Heart and Clark Field Collective announcing the NIL initiative).

202. *Id.*

203. *See id.*; *Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*38–39.

204. *See Johnson*, 2021 U.S. Dist. LEXIS 160488, at \*38–39.

205. *Id.*

206. *Id.* at \*39.

207. *See id.* at \*38–39.

208. *See id.*

209. *See id.* at \*39.

210. *See id.* at \*38.

211. *See id.*

212. *Id.* at \*39.

show that the time they spend playing sports is not limited to “beneficial learning” because aspects of their work, such as playing games that earn NCAA member schools money, go beyond educationally benefitting student athletes.<sup>213</sup> It is unclear how a court would analyze this factor, but if student athletes plead more facts, they should be able to meet five or six of the non-dispositive *Glatt* factors and the economic reality test factors, suggesting that they are employees under the FLSA.<sup>214</sup>

*C. Treatment of In-Kind Benefits that Student Athletes Receive Under § 203(m)*

Once student athletes achieve employee classification under the FLSA, the next challenge will be to determine how the benefits that student athletes currently receive factor into minimum-wage laws required by the FLSA and state law.<sup>215</sup> NCAA member schools provide student athletes with scholarships, meal plans, and housing stipends.<sup>216</sup> If all of these benefits counted toward a minimum wage, then the monetary benefits that student athletes would receive from employee classification would be minimal.<sup>217</sup>

The FLSA defines the term “wage” broadly to include “the reasonable cost to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.”<sup>218</sup> The DOL guidance outlines five requirements for a benefit to count toward a wage under the FLSA: (1) the benefit must be regularly provided by the employer or similar employers; (2) the employee must voluntarily accept the benefit; (3) the benefit must be furnished in compliance with applicable federal, state, or local laws; (4) the benefit must primarily benefit the employee, rather than the employer; and (5) the employer must maintain accurate records of the costs incurred in the furnishing of the benefit.<sup>219</sup>

Sam Ehrlich, in the *West Virginia Law Review*, presents a strong case for how courts should classify student-athlete benefits.<sup>220</sup> It is likely that both meals and housing satisfy the DOL’s five regulations,

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213. See *id.* at \*40–41.

214. See *id.* at \*43–44.

215. See 29 U.S.C. § 203(m).

216. Ehrlich, *supra* note 82, at 2.

217. See *id.* at 4.

218. 29 U.S.C. § 203(m).

219. *Credit Towards Wages Under Section 3(m) Questions and Answers*, *supra* note 80.

220. See Ehrlich, *supra* note 82, at 58–59.

and thus a court would classify these benefits toward a wage.<sup>221</sup> However, NCAA member schools should be able to credit scholarships, which are the greatest financial benefit that student athletes receive in terms of dollars provided.<sup>222</sup> While schools can prove that student athletes accept scholarships voluntarily, and that the scholarships do not violate positive law, the first DOL requirement presents issues for NCAA member schools.<sup>223</sup> However, not all schools offer athletic scholarships, and those that do often have walk-on players who do not receive scholarships.<sup>224</sup> Much of the employment case law strongly disfavors crediting a benefit towards a minimum wage when the employers do not provide that benefit to all employees within the same class of work.<sup>225</sup>

Additionally, the fourth DOL requirement presents complications for NCAA member schools.<sup>226</sup> While scholarships benefit student athletes, NCAA member schools use them (at very little cost to the school) to entice recruits.<sup>227</sup> Without these scholarships, it would be difficult for teams to keep pace with other schools that still offer scholarships.<sup>228</sup> Furthermore, the NCAA and its member schools have repeatedly emphasized the presence of athletic scholarships to shield themselves from unfavorable litigation.<sup>229</sup> Therefore, the largest benefit

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221. *See id.*

222. *See* Ehrlich, *supra* note 82, at 45–46; Jeffrey Dorfman, *Pay College Athletes? They're Already Paid Up To \$125,000 Per Year*, FORBES (Aug. 29, 2013, 8:00 AM), <https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/?sh=2f14064d2b82> [<https://perma.cc/9WW7-57S7>] (The approximate value of an athletic scholarship noted in the article (\$125,000) is likely now much higher as a result of inflation).

223. *See* Ehrlich, *supra* note 82, at 46.

224. *Id.* at 49; Joe Leccesi, *The 5 Most Commonly Asked Questions About Being a College Walk-On*, USA TODAY HIGH SCH. SPORTS (Apr. 13, 2017, 10:01 AM), <https://usatodayhss.com/2017/the-5-most-commonly-asked-questions-about-being-a-college-walk-on> [<https://perma.cc/8973-FDRK>]; *Prospective Athlete Information*, IVY LEAGUE, <https://ivyleague.com/sports/2017/7/28/information-psa-index.aspx> [<https://perma.cc/K7QT-WFLF>] (last visited Mar. 16, 2022) (highlighting that there are no athletic scholarships allowed for student athletes at any Ivy League school).

225. *See* Ehrlich, *supra* note 82, at 50; *Roces v. Reno Hous. Auth.*, 300 F. Supp. 3d 1172, 1185 (D. Nev. 2018); *Herman v. Collis Foods, Inc.*, 176 F.3d 912, 921 (6th Cir. 1999).

226. Ehrlich, *supra* note 82, at 51.

227. *Id.* at 51–52.

228. *Id.* at 52; *see* Deborah Ziff Soriano & Emma Kerr, *5 Myths About Athletic Scholarships*, U.S. NEWS & WORLD REP. (Mar. 24, 2021, 11:23 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/myths-about-athletic-scholarships> (highlighting that more than 180,000 Division I and II student athletes receive around \$3.6 billion in athletic scholarships per year).

229. Ehrlich, *supra* note 82, at 51–52; *see* *Dawson v. NCAA*, 932 F.3d 905, 914 (9th Cir. 2019); *O'Bannon v. NCAA*, 802 F.3d 1049, 1083 (9th Cir. 2015).

that schools provide student athletes would probably not count toward a minimum wage under the FLSA.<sup>230</sup> This would force the NCAA and its member schools to pay more money to student athletes once they achieve employee status, which will equally benefit student athletes regardless of the sport they play and their ability to earn from their NIL.

#### *D. Who Will Pay?*

There are more than 176,000 NCAA Division I student athletes in the United States; to pay each of them a minimum wage plus overtime will cost hundreds of millions of dollars per year.<sup>231</sup> The NCAA and its supporters will argue that this cost is too high to sustain, and thus will destroy the entire structure of college sports. This could cause NCAA member schools to cut less profitable sports, which would hurt many student athletes rather than help them. However, there are already laws in place to prevent this from happening.<sup>232</sup> Title IX, for example, calls for equal treatment of men and women for athletic opportunities.<sup>233</sup> Each NCAA member school is obligated to maintain an equivalent number of scholarships for men and women.<sup>234</sup> Therefore, if a school wants to maintain its profitable football team composed of men, it must offset those scholarships with scholarships for female athletes in other sports.<sup>235</sup> If NCAA member schools can still cut out certain athletic programs, it may be necessary for legislators to amend Title IX, but there are regulations in place that should prevent this outcome.<sup>236</sup>

Regardless, NCAA member schools have the money to pay student athletes.<sup>237</sup> It is just a matter of allocating resources within the school. Each university's average endowment in 2020 was \$905 million,

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230. Ehrlich, *supra* note 82, at 58–59.

231. *The Difference in the College Division Levels*, NCSA SPORTS, <https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts> [<https://perma.cc/9KT2-6JSU>] (last visited Mar. 16, 2022).

232. See 34 C.F.R. § 106.41 (2022).

233. See *id.*

234. See *id.*; Marcella Mercer & Aidan Connolly, *How Title IX Requirements Affect Sports Scholarships*, DAILY NEBRASKAN (Apr. 29, 2016), [http://www.dailynebaskan.com/news/how-title-ix-requirements-affect-sports-scholarships/article\\_936af37e-0da9-11e6-9707-bfbebfbdb4160.html](http://www.dailynebaskan.com/news/how-title-ix-requirements-affect-sports-scholarships/article_936af37e-0da9-11e6-9707-bfbebfbdb4160.html) [<https://perma.cc/NV4H-PCCV>].

235. See 34 C.F.R. § 106.41; Mercer & Connolly, *supra* note 234.

236. See Mercer & Connolly, *supra* note 234; 20 U.S.C. § 1681.

237. See NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, 2020 NACUBO-TIAA STUDY OF ENDOWMENTS 1 (2020).

which was a 1.6 percent increase from 2019.<sup>238</sup> Vanderbilt University has an endowment greater than \$10 billion as of June 30, 2021;<sup>239</sup> Harvard University's endowment was \$53.2 billion in 2021, the largest endowment of any school in the United States.<sup>240</sup> Thus, there is money to pay student athletes a minimum wage, especially after housing and meal credits lower the cost.

Because of the increased expense a student-athlete minimum wage would impose on schools, there may be schools that struggle to operate. Accordingly, the NCAA must subsidize schools to fill the gap. Revenues from college sports increase annually nationwide, as do NCAA profits.<sup>241</sup> Along with the potential need for legislation and Title IX regulation, the NCAA must ensure that the schools pay student athletes and do not cut athletic programs to save costs. This can be accomplished by, for example, internal rules from the NCAA and a yearly application that schools must submit to request aid from the NCAA.

Detractors may argue that this will overburden the NCAA with administrative and financial costs. However, if the NCAA's business model cannot sustain this burden, it must change. This is no different than any business that seeks to survive in the free market, and if the NCAA fails or refuses to adjust, there will be entities to fill the void. College sports are a lucrative business, and competitors have already started to present alternative leagues for young athletes who would otherwise play college sports.<sup>242</sup> NCAA alternatives will only continue to increase in power and number if the NCAA and its member schools fail to compensate student athletes. As the post-*Alston* NIL policy indicates, the NCAA is willing to adapt to changing times.<sup>243</sup> And if the

238. *Id.*

239. *Office of Investments*, VAND. UNIV., <https://www.vanderbilt.edu/investments/> [<https://perma.cc/94QN-3ZX3>] (last visited Mar. 16, 2022).

240. *Supporting Our Mission*, HARV. UNIV., <https://www.harvard.edu/about-harvard/endowment/> [<https://perma.cc/6897-SRTV>] (last visited Mar. 16, 2022).

241. See Garthwaite et al., *supra* note 3; Matt Norlander, *NCAA, CBS, Turner Extend NCAA Tournament Deal Through 2032*, CBS SPORTS (Apr. 12, 2016, 2:15 PM), <https://www.cbssports.com/college-basketball/news/ncaa-cbs-turner-extend-ncaa-tournament-deal-through-2032/> [<https://perma.cc/73PL-YPP8>].

242. Kyle Boone, *NBA's G League to Offer Top Prospects \$125K Contracts as an Option to a 'One-and-Done' Season in College Basketball*, CBS SPORTS (Oct. 18, 2018, 12:41 PM), <https://www.cbssports.com/nba/news/nbas-g-league-to-offer-top-prospects-125k-contracts-as-an-option-to-a-one-and-done-season-in-college-basketball/?mscl-kid=1a0c803fcf0d11eca94909cddea58937> [<https://perma.cc/6644-KKGGH>] (noting the G League offers contracts worth up to \$125,000 per year for basketball players who are at least eighteen years old prior to being eligible for the NBA draft).

243. See Hosick, *supra* note 4; *NCAA v. Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring); see also Dan Murphy, *NCAA Member Schools Vote to Ratify New Streamlined*

NCAA is to survive, it must continue to do so because the days of amateurism are over, and its “highly questionable” business model is unsustainable.<sup>244</sup>

#### IV. CONCLUSION

Student athletes are overworked and underpaid. Although *Alston* provided a much-needed victory for student athletes off the field, the relief it provided is incomplete.<sup>245</sup> To supplement *Alston*, courts should classify student athletes as employees under the FLSA because they meet an overwhelming majority of the various employment test factors.<sup>246</sup> Under the FLSA, NCAA member schools would only be able to credit housing and meals (and *not* scholarships) toward the minimum wage guaranteed by federal and state law.<sup>247</sup> This would force member schools to pay student athletes a minimum wage and provide various FLSA benefits.<sup>248</sup> The NCAA must change its business model and act as a safety net for its member, who also must adjust their business models, by subsidizing these wages or succumb to free-market forces. As Justice Kavanaugh asserted in *Alston*, the NCAA’s business model would be “flatly illegal” in almost any other industry.<sup>249</sup> It is the burden of the NCAA and member schools’ athletic programs to rectify this illegality.

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*Constitution*, ESPN (Jan. 20, 2022), [https://www.espn.com/college-sports/story/\\_id/33110069/ncaa-member-schools-vote-ratify-new-streamlined-constitution](https://www.espn.com/college-sports/story/_id/33110069/ncaa-member-schools-vote-ratify-new-streamlined-constitution) [<https://perma.cc/YUP3-XJ7F>] (explaining that the new constitution seeks to update an “outdated” rulebook to allow for student athletes to have a larger role in decision-making).

244. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

245. *See id.* at 2166.

246. *See* STUDENT-ATHLETE TIME DEMANDS, *supra* note 21, at 1; *Johnson v. NCAA*, No. 19-5230, 2021 U.S. Dist. LEXIS 160488, at \*43–44 (E.D. Pa. Aug. 25, 2021).

247. *See* 29 U.S.C. § 203(m); Ehrlich, *supra* note 82, at 58–59.

248. *See* 29 U.S.C. §§ 201–219.

249. *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

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