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Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics Notes

Shaun Loughlin

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Note

Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics

SHAUN LOUGHLIN

As everyone involved in college athletics continues to profit off of the millions of dollars in television contracts, student-athletes remain the sole contributors who are left out of the benefits. Student-athlete compensation debates have grown in recent years, while animosity toward the National Collegiate Athletic Association continues to grow as well. While jumping from no compensation to full salary and benefits similar to a professional athlete is unlikely, there are other ways in which universities can compensate their student-athletes. One way to partially compensate athletes for their contributions on the field can come in the form of workers' compensation payments.

This Note argues that recent decisions in the Ninth Circuit and the National Labor Relations Board have begun to redefine student-athletes as employees, and because of this, they should be entitled to workers' compensation payments. While this is not a full salary, providing workers' compensation is feasible for universities and it can be the first step to compensating student-athletes who make millions of dollars for their schools, conferences, and the NCAA as a whole.

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Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics

SHAUN LOUGHLIN*

I. INTRODUCTION

Attacking the National Collegiate Athletic Association (NCAA) for its treatment of student-athletes has become very much in vogue in the year 2016. For years now, there have been rallying cries to change the way the “non-profit”¹ organization treats the athletes. Whether it be for cutting them out of the highly lucrative television deals orchestrated with ESPN/ABC, FOX, NBC, or CBS,² or changing endorsement rules to avoid punishments of players caught in inappropriate relationships with boosters or agents,³ the argument for the revocation of “amateur” status for student-

* University of Connecticut School of Law, J.D. Candidate 2017; Syracuse University, B.A. 2013. I would like to thank the editors of Volume 48 of the *Connecticut Law Review* for their guidance and feedback throughout the publication process. Specifically, I would like to thank my Notes & Comments Editor, Nicole Palermo, and Professor Lewis Kurlantzick for their continued support and guidance, from a fledgling research idea, all the way through to final drafting. I would like to thank my friends and family for their support throughout the drafting of this Note and for my entire time in law school. Lastly, many thanks to Matthew Sponheimer for suggesting this topic and influencing my research efforts.

¹ See Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/7QH-XF6GW] (“From the summary tax forms required of non-profits, [attorney Rick Johnson] found that the NCAA had spent nearly \$1 million chartering private jets in 2006. ‘What kind of non-profit organization leases private jets?’”). See generally Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 621 (2010) (using court transcripts from the *Oliver* case to research how the NCAA appropriates portions of its revenue, such as private jet travel).

² See Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 110 (2012) (challenging the assumption that student-athletes do not have any interest in the multi-billion dollar television deals, and therefore, do not have any share of the broadcast licensing revenues).

³ See Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 374 (2012) (suggesting that the NCAA should lower its stance on “amateurism” while looking at rectifying the seemingly constant reports of inappropriate relationships with sports agents); see also Branch, *supra* note 1 (highlighting multiple cases, including: the revocation of Reggie Bush's 2005 Heisman Trophy and the University of Southern California's 2004 national championship because Bush received airfare, limousine rides, and rent-free homes from an agent; the rumors surrounding former Auburn University quarterback, Cam

athletes, or at the very least some leniency in punishment, is nearly constant. Just about all of the benefits that the NCAA and its member universities receive from performance on the field, court, or ice are not shared with the athletes, which could be seen as unjust enrichment.⁴

These attacks are well-reasoned, however, because there is money to be had in the multi-billion dollar industry that universities, networks, and the NCAA enjoy. For example, the recent switch from the Bowl Championship Series postseason format to the College Football Playoff format for Division I Football Bowl Subdivision (FBS) teams included a new television deal between ESPN and the NCAA which has been estimated at about \$5.6 billion over twelve years (approximately \$470 million annually).⁵ Furthermore, in 2013, it was found that *thirty-nine* out of fifty states listed their highest-paid employee as either a state university football coach, or men's basketball coach (with the exception of Connecticut, which lists its women's basketball coach).⁶ Comparing these massive dollar amounts to complaints from scholarship athletes who claim that they cannot eat university food after 7:15 p.m. because of NCAA regulations⁷ creates a sentiment that something is out of balance and must be changed within the system. In order to alleviate these issues, some believe that unionization is the most effective way for athletes to collectively bargain for more rights, and that student-athletes should be viewed as employees under labor law.⁸ And we have seen recent attempts to do just that, with efforts by football players to unionize and collectively bargain at Northwestern University⁹ along with challenges against the

Newton, and his father's alleged attempt to solicit up to \$180,000 from Mississippi State University recruiters; and the investigation into a University of Miami booster that provided benefits and money to over seventy football players over the course of nearly a decade).

⁴ See Karcher, *supra* note 2, at 111 (providing a theory for recognition of student-athletes' interest in broadcast rights based on common law unjust enrichment, on behalf of the "defendant" universities and NCAA).

⁵ Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J. (Nov. 21, 2012), <http://www.wsj.com/articles/SB10001424127887324851704578133223970790516> [http://web.archive.org/web/*/http://www.wsj.com/articles/SB10001424127887324851704578133223970790516].

⁶ Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013, 3:23 PM), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228> [<https://perma.cc/3JLD-AE2H>].

⁷ Sara Ganim, *UConn Guard on Unions: I Go to Bed 'Starving'*, CNN (Apr. 8, 2014, 1:26 PM), <http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/> [<https://perma.cc/4UHV-26VY>] (discussing former basketball player, Shabazz Napier's comments regarding the Northwestern University football team's attempts to unionize and his complaints of the overall system of collegiate athletics).

⁸ See Northwestern Univ. (*Northwestern II*), No. 13-RC-121359, 2015 NLRB LEXIS 613, at *2 (Aug. 17, 2015) (declining an attempt by the Division I football team to collectively bargain with Northwestern University); Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1007 (2012) (asking whether current labor law would support a union of college athletes).

⁹ *Northwestern II*, 2015 NLRB LEXIS 613, at *1.

NCAA in federal court under the Sherman Antitrust Act.¹⁰ The overall effectiveness of these challenges is not yet fully known, but as more arise, the status of college athletes as employees of their respective universities could change.

Currently, the closest form of compensation that athletes receive from their universities is in the form of a scholarship equal to the full cost of attendance to their university, rather than the grant-in-aid scholarship that athletes used to receive.¹¹ This change in the scholarship award, of course, is insufficient for many who still believe athletes are being exploited, and litigation is now aimed towards revoking the caps placed on compensation by the NCAA.¹² But aside from compensation, the status of an athlete and his role within the university is also up for debate. What *is* a “student-athlete,” and can athletes be deemed “employees” of their university, by law? If the answer to this question is in the affirmative, then an entire new set of rights become available to these athletes—one of which being the ability to file workers’ compensation claims.

It has been argued that the creation of the term “student-athlete” was developed by the NCAA “not in a disinterested ideal but in a sophistic formulation designed . . . to help the NCAA in its ‘fight against workmen’s compensation insurance claims for injured football players.’”¹³ The term was deliberately crafted by the NCAA to be ambiguous—it was important to avoid thinking about these individuals as students simply playing a game, because that undermined their athletic commitment to the school, but also to avoid thinking about them as just athletes who happened to be enrolled at a college.¹⁴ The latter of the two characterizations would potentially imply that they were professionals, and thus, entitled to compensation claims.¹⁵ Instead, these athletes now fall into legal purgatory, in which they are subject to control by their “employer” university, without the legal protections provided for traditional employees.

The Knight Commission, which works closely with the NCAA to “recommend a reform agenda that emphasize[s] academic values in an arena where commercialization of college sports often overshadow[s] the

¹⁰ *O’Bannon v. NCAA (O’Bannon II)*, 802 F.3d 1049 (9th Cir. 2015); *O’Bannon v. NCAA (O’Bannon I)*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

¹¹ *O’Bannon II*, 802 F.3d at 1054–55.

¹² See *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-02541-CW, 2015 U.S. Dist. LEXIS 163878, at *15–16 (9th Cir. 2015) (certifying three classes of collegiate athletes to sue the NCAA for compensation beyond the full cost of tuition).

¹³ See Branch, *supra* note 1 (quoting sports economist Andrew Zimbalist).

¹⁴ *Id.*

¹⁵ *Id.*

underlying goals of higher education,”¹⁶ has reported that “[a]pproximately one percent of NCAA men’s basketball players and two percent of NCAA football players are drafted by NBA or NFL teams.”¹⁷ Despite the very slim odds of a lucrative career, injuries are very common in college athletics, and many can linger beyond the time an athlete leaves school. The NCAA has provided a catastrophic insurance plan, which as of 2013 carried a \$90,000 deductible.¹⁸ Beyond this coverage, however, there is no requirement by the NCAA for schools to provide workers’ compensation coverage, and the main source of injury coverage for athletes is their families’ health insurance plans.¹⁹ This coverage is insufficient,²⁰ given that major injuries with potentially long-term effects on athletes could still fail to reach the catastrophic coverage deductible, rendering an athlete without benefits.

The goal of this Note is to revisit the availability of workers’ compensation, given recent legal developments in the status of student-athletes. First, it will discuss the two recent decisions handed down in 2015 by the National Labor Relations Board (NLRB) and the Ninth Circuit. While their jurisdictions do not overlap with state-run workers’ compensation, their legal effects will have a ripple effect down to workers’ compensation claims, and their evidentiary records are instrumental in helping to illuminate on how a college athlete could potentially be viewed as an employee under state common law. Secondly, this Note will explain the common law jurisprudence behind determining whether one is an employee, capable of receiving workers’ compensation benefits. Several cases which are often discussed in the realm of student-athletes and workers’ compensation now seem outdated and could potentially see a reversal from the precedents that they hold. Third, this Note will attempt to take the modern college athlete and show how his current commitment and responsibilities under the agreement to play for his university create an employer-employee relationship in which the university has the right to

¹⁶ *About*, KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, <http://www.knightcommission.org/about/about-background> [https://perma.cc/3A7K-5TFF] (last visited Feb. 11, 2016).

¹⁷ Branch, *supra* note 1.

¹⁸ See *NCAA Catastrophic Injury Insurance Program Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs> [https://perma.cc/4494-ENFZ] (last visited Sept. 12, 2016) (“Anyone who meets the deductible is eligible for Medical, Dental, Rehabilitation, and Custodial Care benefits, but there are other policy benefits that are available only to individuals who are Totally Disabled as a result of a covered injury.”).

¹⁹ See Frank P. Tiscione, *College Athletes and Workers’ Compensation: Why the Courts Get it Wrong in Denying Student-Athletes Workers’ Compensation Benefits When They Get Injured*, 14 SPORTS LAW. J. 137, 139–40 (2007) (explaining historical payouts of the catastrophic plan, which used to cover \$10,000 per athlete).

²⁰ See *infra* Part V (calculating a basic workers’ compensation claim and discussing the difficulty in reaching a \$90,000 deductible, even for fairly serious injuries).

exercise control over the athlete, and thus, the athlete has the right to file claims for workers' compensation. That is followed by an example of how claims could be calculated in the current landscape of collegiate athletics, where one is deemed to be compensated by his scholarship, which now equals the full cost of attendance.

Before concluding, the final section reviews the necessity and feasibility of actually providing these benefits. Despite the fact that it seems as though current athletes should and *could* make workers' compensation claims against their universities, is it feasible to provide the coverage, and do the athletes need it? Reviewing not only the legal right to benefits, but also the cost effects and potential issues with NCAA tenets of amateurism are important.

Discrepancies between the revenue-generation among different sports, or laws separating public or private universities may cause the allowance of workers' compensation to ask more questions than it answers, but if an athlete is to be granted the position of employee at a university, or treated as such, he has statutorily guaranteed rights that include receiving coverage for injuries suffered while in the scope of his employment. As the profiteering through college athletics continues, the push towards providing financial security for student-athletes will push forward as well. Workers' compensation is but a modest and reasonable expansion of the benefits that athletes currently receive.

II. RECENT DEVELOPMENTS IN THE EMPLOYEE STATUS OF COLLEGIATE ATHLETES

A. *Northwestern University and the National Labor Relations Act*

The two most recent pushes toward recognizing student-athletes as more than merely amateurs have come from claims under the National Labor Relations Act (NLRA) and the Sherman Antitrust Act, respectively.²¹ In January 2014, Kain Colter, former quarterback for the Northwestern University Wildcats football team, joined with a representative from an organization titled the College Athletes Players Association to appeal to the NLRB to form the first student-athlete labor union.²² One example among the myriad of claims that Colter and his committee made was the lack of medical coverage that athletes received in

²¹ See *O'Bannon II*, 802 F.3d at 1052–53 (holding that allowing NCAA member schools to provide scholarships up to full cost of attendance was a sufficient remedy to antitrust violations, but that cash compensation up to \$5,000 was erroneous); *Northwestern II*, 2015 NLRB LEXIS 613, at *1–2 (declining to assert jurisdiction over whether college football players are statutory employees under the National Labor Relations Act).

²² Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES, Jan. 29, 2014, at B10 (describing the NCAA model as a “dictatorship” in his efforts to form a union).

order to alleviate any injuries suffered while participating in collegiate sporting events.²³ Petitioners argued that student-athletes are “employees” within the NLRA, because the NCAA provides them grant-in-aid scholarships,²⁴ and thus, are entitled to representation for the purposes of collective bargaining.²⁵ The regional director presiding over the hearing agreed, ruling that the players be allowed to conduct an election to create a union under the direction of the Board.²⁶

The Director chose to construe the word “employee” broadly, relying on the common law definition of one who performs services for another under a contract of hire, subject to one’s control, and in return for payment.²⁷ This reasoning began with the fact that the football program had made upwards of \$235 million over the previous decade—a total that has *directly* benefitted the university which these players attend.²⁸ Further, the services that the players performed in order to provide the benefit to the university were compensated in the form of the scholarships.²⁹ This scholarship is provided much like a “tender” that one must sign before his employment begins, and the Director found the players to be so financially dependent on the scholarship, regardless of their position/role on the team, that it was akin to an employment contract.³⁰

The second, and more pertinent factor in determining whether one is an employee in state workers’ compensation law, as explained below,³¹ is the level of control that the employer had the right to exercise over its employees.³² The Director relied on the evidentiary record provided by the

²³ See *id.* (“The same medical issues that professional athletes face are the same medical issues collegiate athletes face, except we’re left unprotected,” Colter said.”).

²⁴ The act defines an “employee” as:

[A]ny employee, and shall not be limited to the employees for a particular employer, unless the [NLRA] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

National Labor Relations Act, 74 Pub. L. No. 198, 49 Stat. 449, 450 § 2(3) (1935) (codified at 29 U.S.C. § 152(3) (2012)).

²⁵ *Northwestern Univ.* (*Northwestern I*), No. 13-RC-121359, 2014 NLRB LEXIS 221, at *1, *2 (Mar. 26, 2014).

²⁶ See *id.* at *2–3 (“Eligible to vote are all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by [Northwestern University].”).

²⁷ *Id.* at *39–40 (citing *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995)).

²⁸ *Id.* at *41.

²⁹ See *id.* at *41–42 (valuing the scholarship up to as much as \$76,000 per year, which is not provided in the form of paychecks, but is still a “substantial economic benefit for playing football”).

³⁰ See *id.* at *42–44 (adding that the potential threat of losing one’s scholarship added to the goal of performing at the highest level for the university).

³¹ See *infra* Part IV.

³² *Northwestern I*, 2014 NLRB LEXIS 221, at *45.

parties to show that the hourly commitment, both in and out of season,³³ the ability of coaches to discipline athletes for absence or tardiness,³⁴ and the stranglehold that the football program places on the athletes' academic schedules³⁵ all amounted to a case in which an employer had the right to control its employees, and the university exercised that right on a daily basis.

This major win for the Northwestern University football team was short-lived, however, when the case reached the NLRB in August 2015. The five-member panel of the Board, whose decision was binding on the lower regional director, chose to not assert their jurisdiction *at all*, and decided not to answer the penultimate question of whether or not student-athletes are statutory employees.³⁶ The Board determined that even if the athletes were statutory employees, "it would not effectuate the policies of the [NLRA] to assert jurisdiction."³⁷ One of the main issues that caused the Board to avoid asserting jurisdiction was the fact that Northwestern was just one university in a group of twelve member schools of the Big Ten Conference and one of 128 that participate in Division I FBS within the NCAA.³⁸ Any labor dispute at one university would have ramifications at other member universities.³⁹

In addition to Northwestern University's relationship with the Big Ten and the NCAA, the Board worried about the distinction between public and private universities, which would invoke state collective bargaining agreement legislation.⁴⁰ Before concluding, however, the Board made sure to limit the reach of its decision to just this opinion—even making sure to explicitly note that the Northwestern University football team could file a

³³ See *id.* at *45–47 (summarizing the hourly commitment at approximately fifty to sixty hours per week in the preseason and training camp, forty to fifty when in season with class in session, and even allotting twenty-five hours for two-day trips to away games).

³⁴ See *id.* at *47 (explaining how athletes are required to attend additional study hall periods or run laps at practice as punishment for violations of team rules).

³⁵ See *id.* at *49 (explaining how players are sometimes forced to miss class for travel requirements, and also that they cannot take some classes at all because it would interfere with football practice).

³⁶ See *Northwestern II*, 2015 NLRB LEXIS 613, at *2 ("We conclude that asserting jurisdiction in this case would not serve to promote stability in labor relations.").

³⁷ *Id.* at *12.

³⁸ See *id.* at *18–19 ("As a result, labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions.").

³⁹ *Id.* at *19. The Board did attempt to reason that the NCAA's control over member institutions is not the sole reason for declining to assert jurisdiction, but rather bargaining at a single-team level does not "promote labor stability." *Id.* at *19 n.15.

⁴⁰ See *id.* at *22–23 (looking to state laws that explicitly prohibit collective bargaining by state employees).

claim in the future, to reassess the issue.⁴¹ The changing landscape of collegiate athletics caused the Board to leave this topic open for future adjudication, admitting that “recent changes, as well as calls for additional reforms, suggest that the situation of scholarship players may well change in the near future.”⁴² One of the stated recent changes came just forty-four days later, in federal court.

B. O’Bannon and the Sherman Antitrust Act

On September 30, 2015, the Court of Appeals for the Ninth Circuit ruled in *O’Bannon v. NCAA*,⁴³ which some have deemed a “hollow victory”⁴⁴ for college athletes, but still a step in the right direction, nonetheless. Despite “the latter part of the decision echoing the NCAA’s hoary rationale that amateurism is the *sine qua non* of college sports,”⁴⁵ the court found that the NCAA’s amateurism rules are subject to antitrust scrutiny.⁴⁶ In seeking alternatives to antitrust violations, and provide some form of compensation for using athletes’ names, images, and likenesses, the court affirmed the lower court’s ruling that allowing NCAA members to provide scholarships up to the full cost of attendance would be appropriate.⁴⁷ However, the circuit court decision departed from the district court after the full cost of attendance holding, stating that “the district court’s other remedy, allowing students to be paid cash compensation of up to \$5,000 per year, was erroneous.”⁴⁸ Still, it was concluded that there were no other alternatives to the market that Division I student-athletes were entering from high school, and thus colleges and the NCAA were agreeing to value the players’ likenesses at zero dollars without any other market

⁴¹ See *id.* at *29 (“[I]f the circumstances of Northwestern’s players or FBS football change such that the underpinnings of our conclusions regarding jurisdiction warrant reassessment, the Board may revisit its policy in this area.”) (internal citations omitted).

⁴² *Id.*

⁴³ 802 F.3d 1049 (9th Cir. 2015).

⁴⁴ See, e.g., Joe Nocera, Op-Ed, *In a First, O’Bannon’s Hollow Victory*, N.Y. TIMES, Oct. 3, 2015, at A23 (arguing that the “[d]ecades of propaganda” about amateurism from the NCAA has had an effect on arbiters that will not fully go against the Association). It is also worth noting that Nocera deemed the NLRB’s decision to not assert jurisdiction in the Northwestern case was a “remarkable act of cowardice.” *Id.*; see also Sasha Volokh, Op-Ed, *No Slam Dunk in Ninth Circuit Antitrust Ruling in O’Bannon v. NCAA*, WASH. POST (Sept. 30, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/30/no-slam-dunk-in-ninth-circuit-antitrust-ruling-in-obannon-v-ncaa/> [<https://perma.cc/8WWW-RGNV>] (calling the decision a “partial victory”).

⁴⁵ Nocera, *supra* note 44.

⁴⁶ See *O’Bannon II*, 802 F.3d at 1053 (holding the NCAA’s tenet of amateurism to scrutiny under antitrust law’s Rule of Reason).

⁴⁷ *Id.* (affirming in part, but reversing the attempt to provide \$5,000 compensation to each athlete).

⁴⁸ *Id.*

competing for the athletes.⁴⁹ The Ninth Circuit saw this reasoning as a way to equate the NCAA and its member schools to a cartel—"a group of sellers who have colluded to fix the price of their product."⁵⁰

The circuit court agreed with the NCAA, however, when it came to the argument that its compensation rules serve the procompetitive purposes of integrating academics and athletics and preserving the product of "amateurism."⁵¹ The NCAA argued on appeal that the district court paid no attention to the fact that providing the opportunity for student-athletes to attend a Division I university is "the only opportunity [they will] have to obtain a college education while playing competitive sports *as students*."⁵² While the court agreed with the sentiment that sometimes restraints can broaden a student's choices, there was no way that a student-athlete would have more educational choices solely because he was *not* allowed to be compensated.⁵³ Rather, the court believed that "if anything, loosening or abandoning the compensation rules might be the best way to 'widen' recruits' range of choices."⁵⁴ Allowing student-athletes to earn income with the knowledge that schools are competing for them might not only encourage students to attend school in the first place, but also keep them in school longer once they arrive.⁵⁵

In the time that passed between the district and circuit court opinions, the NCAA had begun to allow schools to provide athletic scholarships for the full cost of attendance to student-athletes.⁵⁶ The "cost of attendance" scholarships that are now allowed include the same goods that made up a grant-in-aid, plus additional books and supplies, transportation expenses, and other personal expenses.⁵⁷ The difference between the full cost of attendance and its former form of scholarship was valued to be a difference

⁴⁹ See *id.* at 1057 (quoting *O'Bannon I*, 7 F. Supp. 3d at 968, 972) (arguing that without these anticompetitive rules, schools would be able to compete for athletes, which would lower the price they pay to go to school).

⁵⁰ *Id.* at 1058.

⁵¹ *Id.* at 1073 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).

⁵² *Id.* at 1072 (emphasis in original).

⁵³ See *id.* at 1072–73 (arguing that the opportunity to obtain a college education would still exist, regardless of whether athletes got paid or not).

⁵⁴ *Id.* at 1073 (citing Jeffrey L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopoly Rights*, 54 ANTITRUST BULL. 923, 948 (2009)).

⁵⁵ *Id.* (citing Harrison & Harrison, *supra* note 54, at 948); see also Harrison & Harrison, *supra* note 54, at 948 (arguing that the current policy of non-compensation lowers the quality of collegiate athletics).

⁵⁶ *O'Bannon II*, 802 F.3d at 1054–55; see also Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills*, N.Y. TIMES, Jan. 18, 2015, at SP8 (stating that the universities the "Power Five" conferences 79–1 for the resolution, with the lone dissenter worrying that this further separates student-athletes from the rest of the student body).

⁵⁷ *O'Bannon II*, 802 F.3d at 1054 n.3.

of “a few thousand dollars at most schools.”⁵⁸ In a continuation of the “hollow victory”⁵⁹ sentiment previously mentioned, Dr. Mark Emmert, president of the NCAA, admitted during testimony that this movement toward full cost of attendance scholarships would have little impact on the Association and its tenet of amateurism.⁶⁰

These two cases have been the most recent, but they are hardly the last attempts to dismantle the NCAA’s model of amateur athletics. Two months after the *O’Bannon* decision, the Ninth Circuit was discussing compensation of collegiate athletes once more, with the certification of three classes of individuals—Division I football players, Division I men’s basketball players, and Division I women’s basketball players.⁶¹ This ongoing suit is aimed directly at striking down NCAA bylaws barring compensation for top-tier Division I football and basketball players, and will most likely be consolidated with previous classes that have been certified in New Jersey.⁶² While litigation was pending, the NCAA agreed to allow schools to provide scholarships to players up to the full cost of attendance.⁶³ Still, the class of plaintiffs seeks to enjoin the cap that the NCAA set on grant-in-aid scholarships, although they do not ask for unlimited compensation of collegiate athletes.⁶⁴ Rather, they would welcome the NCAA to “maintain a role in determining how compensation would be set without the current [grant-in-aid] cap.”⁶⁵

Regardless of the outcome in this pending litigation, and regardless of whether people pessimistically view the recent developments as a “partial victory,”⁶⁶ the fact remains that there are shifting tides in the debate over the employment status of collegiate athletes. Public opinion may still be against the “pay-for-play” system,⁶⁷ but advocates for compensation and

⁵⁸ *Id.*

⁵⁹ See *supra* note 44 and accompanying text.

⁶⁰ See *O’Bannon II*, 802 F.3d at 1075 (mentioning Emmert’s testimony at trial and how he essentially conceded to cost of attendance scholarships).

⁶¹ *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 14-2541, 2015 U.S. Dist. LEXIS 163878, at *15–16 (N.D. Cal. Dec. 4, 2015).

⁶² Marc Tracy, *Case that Could Erode Amateur Model Takes a Small Step*, N.Y. TIMES, Oct. 2, 2015, at B13 (examining the potential effects of the pending lawsuit). The case has been orchestrated by Jeffrey Kessler, a N.Y. antitrust lawyer who represented the NFL union in obtaining free agency and Tom Brady in the “Deflategate” scandal. *Id.*

⁶³ *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2015 U.S. Dist. LEXIS 163878, at *16–17; see also *supra* note 56 and accompanying text.

⁶⁴ *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 2015 U.S. Dist. LEXIS 163878, at *44–45.

⁶⁵ *Id.* at *45.

⁶⁶ Volokh, *supra* note 44.

⁶⁷ See Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes*, *Washington Post–ABC News Poll Finds*, WASH. POST (Mar. 23, 2014), https://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html [<https://perma.cc/QC2N-6N47>] (reporting that 33% of

employment status have let their voices be heard in the courtroom, which is why it is valuable to revisit what the implications for workers' compensation would be if the status of student-athletes is eventually changed. With a change in status of student-athletes as employees, workers' compensation benefits will surely be affected.

III. COMMON LAW DEVELOPMENTS OF THE EMPLOYER-EMPLOYEE RELATIONSHIP IN COLLEGE ATHLETICS

Workers' compensation statutes across the country generally have the same characteristics, which allow for "modest but assured" benefit payments, within certain similar limitations.⁶⁸ The overarching policy behind the statute is that even if "the employer's conduct be flawless . . . and . . . the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award."⁶⁹ Before the implementation of these statutes, it was virtually impossible for employees to overcome affirmative defenses raised by the employer in tort cases.⁷⁰ In turn, workers' compensation laws render employers free from liability outside of the controlling workers' compensation statute, and employees lose the chance to file common law tort claims.⁷¹ Along with determining the rights that employees and employers have, one must also determine the actual employment status of the plaintiff, which "almost always takes the form of distinguishing an employee from an independent contractor."⁷² This is necessary because an employer is not liable for the payment of workers' compensation claims arising out of injuries suffered by

people polled supported paying college athletes, while 64% opposed). Those polled seemed to be more favorable towards allowing athletes to collectively bargain and negotiate as a union—47% of the same group supported unionization and 47% opposed. *Id.*

⁶⁸ See 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 1.01 (MB, rev. ed. 2015) (summarizing a typical workers' compensation statute).

⁶⁹ *Id.* § 1.03(1).

⁷⁰ See Mark R. Whitmore, Note, *Denying Scholarship Athletes Workers' Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 768–69 (1991) (describing contributory negligence, assumption of the risk, and the fellow servant doctrine as "formidable defenses" for employers).

⁷¹ See, e.g., CONN. GEN. STAT. § 31-284(a) (2015) ("An employer who complies with the requirements of [this act] shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . ."); see also *Isabella v. Koubek*, 733 F.3d 384, 392 (2d Cir. 2013) (holding that exclusive remedy under New York workers' compensation law is a trade-off between providing immediate coverage for an employee and protecting employers from suit) (citations omitted); *Rettig v. Town of Woodbridge*, 41 A.3d 267, 274 (Conn. 2012) (stating that the employee surrenders his right to bring a common law action because the purpose of Connecticut workers' compensation law was to provide compensation for injuries, regardless of fault); see also Whitmore, *supra* note 70, at 770–71 (discussing the theory that employees must accept a statutorily designated amount as compensation).

⁷² LARSON, *supra* note 68, at § 60.02.

independent contractors.⁷³

A specific definition of “employee” is absent from most workers’ compensation statutes, which has led jurisdictions to adopt their own definition through the courts.⁷⁴ Typically, the definition that courts use derives from the *Restatement (Second) of Agency* § 220, defining what constitutes a “servant.”⁷⁵ Courts have used this section of the Restatement to determine whether or not one is an employee by looking at factors such as:

- (1) right to discharge;
- (2) mode of payment;
- (3) supplying tools or equipment;
- (4) belief of the parties in the existence of an employer-employee relationship;
- (5) control over the means used in the results reached;
- (6) length of employment;
- and (7) establishment of the work boundaries.⁷⁶

On the surface, different characterizations are used for defining an “employee,” depending on the governing body in question—for example, the Internal Revenue Service utilizes a twenty-factor test in determining one’s status as an employee.⁷⁷ Obviously, a test with twenty factors looks much different than the Restatement test provided above. However, where there *is* consistency among governing bodies, both state and federal, in determining the status of a person as an employee, is in the tests utilized by courts in common law.⁷⁸ The same three tests presented below, utilized by

⁷³ Compare *Rayner v. Aetna Cas. & Sur. Co.*, 245 S.E.2d 1 (Ga. Ct. App. 1978) (holding that claimant was not an employee just because defendant treated claimant’s employees as his own), and *Davis v. Perkins*, 620 S.W.2d 331, 332 (Ky. Ct. App. 1981) (holding that a carpenter who volunteered to work on a barn re-building project on his own was an independent contractor), with *Liggett Constr. Co. v. Griffin*, 629 S.W.2d 316, 317 (Ark. Ct. App. 1982) (finding a claimant to be employed by the company subcontracted to paint defendant’s building and subject to workers’ compensation coverage), and *Liberty Nw. Ins. Corp. v. Potts*, 850 P.2d 1135, 1136 (Or. Ct. App. 1993) (holding a “grip man” on a movie set, taught how to perform his job while on set, was an employee eligible for coverage, because not every factor in the test for employment needs to be present for coverage); see also Whitmore, *supra* note 70, at 773.

⁷⁴ See LARSON, *supra* note 68, at § 60.01 (describing most definitions of “employee” as general phrases such as “every person in the service of another under any contract of hire, express, or implied.”).

⁷⁵ *Id.*; see also RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

⁷⁶ *GKN Co. v. Magness*, 744 N.E.2d 397, 402 (Ind. 2001) (quoting *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991)). In addition to the Restatement, Larson’s definitions of “employee” from his treatise have also been utilized in court opinions. See, e.g., *Munson v. D.C. Dep’t of Empl. Servs.*, 721 A.2d 623, 625–26 (D.C. 1998) (examining Larson’s treatise to determine whether to rely on the “right to control” or the “relative nature of the work” when reviewing whether one is an employee or not) (internal citations omitted).

⁷⁷ Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., Jan. 2002, at 3, 5, www.bls.gov/opub/mlr/2002/01/art1full.pdf [<https://perma.cc/J9YB-ZZU6>].

⁷⁸ See *id.* at 5–6 (presenting three different common law tests, created by courts, and utilized by various federal agencies).

state supreme courts in various workers' compensation cases, are the same three tests that have been adopted by the likes of the National Labor Relations Act, Fair Labor Standards Act, Americans with Disabilities Act, and by the Immigration Reform and Control Act, to name just several examples.⁷⁹

When workers' compensation cases do reach court, typically courts to view both workers' compensation statutes and the above standard liberally, with the goal of benefitting employees and insuring the "equitable purposes" of workers' compensation laws.⁸⁰ Even still, it has been a near impossible challenge to lay out a bright line between employee and independent contractor.⁸¹ Thus, courts rely on different standards, which encapsulate parts of the Restatement test above, to determine the status of benefit claimants.⁸²

The "control test" seeks to determine whether one is an employee, based on four factors: (1) direct evidence of a right or exercise of control; (2) method of payment; (3) whether furniture or supplies are equipped; and (4) whether there is a right to terminate.⁸³ Since the control test is factor-based, there are times when one may be found to be an employee, despite the absence or insufficiency of one of these factors.⁸⁴ This test, perhaps more so than its counterpart described below, relies on factual findings determined through analysis under the Restatement § 220, before balancing them together in an attempt to determine the status of the claimant.⁸⁵

In contrast, the "relative nature of the work test" is more contextual than its counterpart, in that it asks whether the employee's duties are a

⁷⁹ *Id.* at 6.

⁸⁰ Whitmore, *supra* note 70, at 767–68. The attempts to construe the statutes liberally have led to broadening the body part that was deemed injured, so as to maximize payout, deeming someone an employee over an independent contractor to secure payment, and presuming that contracts between employer-employee included workers' compensation coverage. *Id.* at 768 n.23.

⁸¹ See LARSON, *supra* note 68, at § 60.02 (explaining that most jurisdictions lay out a factor test like Restatement § 220, and then let the trier of fact determine employment status).

⁸² See Tiscione, *supra* note 19, at 141–44 (discussing various tests commonly found across jurisdictions).

⁸³ See *Jenkins v. Am. Transp., Inc.*, No. 2140153, 2015 Ala. Civ. App. LEXIS 243, at *1, *7 (Oct. 16, 2015) (laying out factors to be determined) (citing *ex parte* Curry, 607 So.2d 230, 232–33 (Ala. 1992)); *Johnson v. Helicopter & Airplane Servs. Corp.*, 389 F. Supp. 509, 516 (D. Md. 1974) (using five factors, but highlighting the importance of the power to discharge) (internal citations omitted); see also *Beaverdale Mem. Park, Inc. v. Danaher*, 15 A.2d 17, 19 (Conn. 1940) ("The fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work.") (internal citations omitted); Tiscione, *supra* note 19, at 142 n.27 (listing other jurisdictions using the control test).

⁸⁴ See *Jenkins*, 2015 Ala. Civ. App. LEXIS 243, at *18–20 (concluding that the manner in which plaintiff was paid was not determinative of his employment status).

⁸⁵ See Tiscione, *supra* note 19, at 142 ("The Restatement focuses primarily on the master's ability to control the physical conduct of servants performing their duties."); see also RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

substantial and recurring part of the employer's business.⁸⁶ Lastly, the less commonly used "economic reality test" is similar to the "control test" in its application, despite the fact that the four factors utilized differ slightly: (1) the employer's right to control the employee; (2) the employer's right to discipline or fire the employee; (3) the payment of wages; and (4) whether the task performed was "an integral part of the proposed employer's business."⁸⁷ This test, too, does not have one factor that is controlling in every case, and cases can be viewed by the totality of the circumstances.⁸⁸

Despite the availability of these tests for courts to utilize, previous case law pertaining to collegiate athletes and workers' compensation benefits has seemingly focused on the intent of the parties—mainly the intent of the university when it provided a scholarship for the athlete.⁸⁹ Furthermore, challenges in court are few and far between, with many opinions arising in the mid-twentieth century.⁹⁰ Still, it is essential to review the cases to understand what past jurisprudence has provided when looking forward to potential workers' compensation benefits in the future.

Cases have formed on both sides of the workers' compensation for collegiate athletes debate, and what is intriguing about the reasoning of each side is that the various courts have either highlighted or ignored each of the various factors laid out in the tests above, leading to no true theme as to what factor makes college athletes either employees or non-employees. *University of Denver v. Nemeth*⁹¹ presented the first opportunity to see how a court reasoned with respect to a collegiate athlete's entitlement to workers' compensation benefits, when a football player suffered a back injury while he was on campus at the University of Denver.⁹² The claimant held an athletic scholarship, and also worked on campus as a maintenance worker, which was contingent on his participation on the football team.⁹³

⁸⁶ Whitmore, *supra* note 70, at 775 (citing *Evans v. Naihaus*, 326 So.2d 601, 604 (La. Ct. App. 1976)); *see also* Tiscione, *supra* note 19, at 142 n.32 (referencing various case supporting *Evans*).

⁸⁷ *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 225–26 (Mich. Ct. App. 1983) (citing *Askew v. Macomber*, 247 N.W.2d 288, 290 (Mich. 1976)).

⁸⁸ *See id.* at 226 ("[A]ll [factors are] taken into account in determining the existence of an employment relationship."); *see also* Tiscione, *supra* note 19, at 143 (citing *Coleman* in explaining the test in comparison to control and relative nature tests).

⁸⁹ *See* Michael J. Mondello & Joseph Beckham, Counterpoint, *Workers' Compensation and Collegiate Athletes: The Debate over the Pay for Play Model*, 31 J.L. & EDUC. 293, 297–98 (2002) (discussing how schools tend to argue that scholarships are provided with the intent of providing an education before any other priority).

⁹⁰ The cases examined in this Note were decided years ago, yet they are nonetheless the same opinions used in discussions regarding this topic in academic writing as recently as Tiscione's article from 2007.

⁹¹ 257 P.2d 423 (Colo. 1953) (en banc).

⁹² *Id.* at 424.

⁹³ *See id.* at 426 ("Nemeth was informed by those having authority at the University, that 'it would be decided on the football field who receives the meals and the jobs.' He participated in football practice . . . and he was then given free meals and a job.").

This contingent employment was a main determinant for the court, which concluded that an injury arises from the course of employment if it stems from the “conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects.”⁹⁴ Thus, the maintenance job that was tied to the injured student-athlete’s participation on the football team was incident to his employment as a member of the maintenance crew on campus.⁹⁵

A California Court of Appeals echoed the Supreme Court of Colorado’s opinion in *Van Horn v. Industrial Accident Commission*,⁹⁶ providing workers’ compensation benefits to the family of a scholarship athlete at California State Polytechnic College who had died in a plane crash.⁹⁷ Much like the claimant in *Nemeth*, the athlete in this case received free housing and some small compensation payments in return for working on campus; in this case, Van Horn worked in the cafeteria.⁹⁸ This employment, according to the Court, was only offered to athletes on the football team, through their coach.⁹⁹ The prima facie case for benefits that the claimant had proved in this case had to be upheld in the name of public policy.¹⁰⁰

The *Van Horn* decision, benefitting student-athletes, was short-lived, as the California legislature sought to exclude college athletes from workers’ compensation benefits through a statutory amendment shortly after this case.¹⁰¹ Additionally, Colorado also departed from its own holding in *Nemeth* in *State Compensation Insurance Fund v. Industrial Accident Commission*.¹⁰² That court did not necessarily overturn *Nemeth*, but it did distinguish *Nemeth* by stating that Fort Lewis A & M College did not directly benefit from the claimant’s participation on the football team, since the part-time job he held at the school was not contingent on playing

⁹⁴ *Id.* at 426 (quoting Caswell’s Case, 26 N.E.2d 328, 330 (Mass. 1940)); see also Tiscione, *supra* note 19, at 144–45 (discussing *Nemeth*).

⁹⁵ See *Nemeth*, 257 P.2d at 430 (explaining that *Nemeth* had the physical capability to play football, which is why the university hired him to work on campus).

⁹⁶ 33 Cal. Rptr. 169 (Dist. Ct. App. 1963), *superseded by statute* CAL. LAB. CODE § 3352 (West 2016), *as recognized in* Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829, 832–33 (Dist. Ct. App. 2002).

⁹⁷ See *id.* at 175 (declining to extend employment status to every scholarship athlete).

⁹⁸ *Id.* at 170.

⁹⁹ See *id.* at 172–73 (relying on coach’s testimony to show that a contract existed as part of claimant’s prima facie case for benefits as an employee).

¹⁰⁰ See *id.* at 174 (comparing college athletes to churches, charitable organizations, and other publicly supported institutions to argue for supporting benefits in this case) (internal citations omitted).

¹⁰¹ See Tiscione, *supra* note 19, at 146 (stating that amendments were passed in 1965 and again in 1981).

¹⁰² *Id.* (citing *State Comp. Ins. Fund v. Indus. Accident Comm’n*, 314 P.2d 288, 288 (Colo. 1957)).

football like the claimant in *Nemeth*.¹⁰³ According to the court, a contract between the student and the university in *Nemeth* clearly existed, but in this case it apparently did not—the court concluded that it could not extend the liberal construction of the workers’ compensation statute past the “plain, clear, and explicit language.”¹⁰⁴

Indiana also sided against providing workers’ compensation benefits for college athletes after a scholarship player fractured his spine while playing football.¹⁰⁵ The debate in *Rensing v. Indiana State University Board of Trustees* became whether or not a “grant-in-aid” scholarship was an employment contract.¹⁰⁶ That court found that the scholarship is not equivalent to “pay” because the NCAA did not allow schools to pay its athletes, it was reasonably tied to the student-athlete’s education on campus, and it was not taxable income under Indiana state law.¹⁰⁷ Finding that a player’s scholarship could not be taken away from him based on his performance on the field contravened the element of an employer’s right to discharge in defining the claimant as an “employee.”¹⁰⁸ In this case the claimant did not have a part-time job to help his argument, and therefore, the benefits were withheld.¹⁰⁹

In *Coleman v. Western Michigan University*,¹¹⁰ the court applied the previously mentioned economic reality test.¹¹¹ In that case, the court seemed to either side with the plaintiff, or at least concede some part of his argument, in three out of the four test factors, yet still ruled in the university’s favor, denying the plaintiff from workers’ compensation benefits.¹¹² The court emphasized that “[n]one of the foregoing factors is by itself dispositive”¹¹³ before concurring with the claimant that a university does have a sense of control and discipline over a scholarship athlete, in addition to the fact that a scholarship *does* constitute “wages” under Michigan law.¹¹⁴

¹⁰³ See *State Comp. Ins. Fund*, 314 P.2d at 290 (en banc) (stating that claimant obtained a job in order to stay in school, but not solely to continue playing football).

¹⁰⁴ *Id.*

¹⁰⁵ *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1170 (Ind. 1983).

¹⁰⁶ *Id.* at 1172.

¹⁰⁷ *Id.* at 1173.

¹⁰⁸ *Id.* at 1174.

¹⁰⁹ See *id.* at 1175 (“Rensing held no other job with the University and therefore cannot be considered an ‘employee’ of the University within the meaning of the Workmen’s Compensation Act.”).

¹¹⁰ 336 N.W.2d 224 (Mich. Ct. App. 1986).

¹¹¹ See *supra* note 87 and accompanying text.

¹¹² See *Coleman*, 336 N.W.2d at 227 (“The application of the ‘economic reality test’, and the determination of the existence of a ‘contract for hire’ . . . is a question of fact rather than one of law.”).

¹¹³ *Id.*

¹¹⁴ See *id.* (claiming that because a player could not lose his scholarship for an entire year after being removed from the team, the university did not have enough control to warrant an employee-employer relationship).

Where the court separated from the claimant's argument was on the final factor: whether the task performed by the proposed employee was an integral part of the employer's business.¹¹⁵ Because scholarships were offered for other achievements besides athletics (arts, music, etc.) and since the claimant stated that he used the football scholarship to fund his education, the court sided with the university because "the term 'integral' suggests that the task performed by the employee is one upon which the proposed employer depends in order to successfully carry out its operation."¹¹⁶

To address once more the idea of intent between the parties behind many of these court decisions, it is important to note that in both *Nemeth* and *Van Horn*, the claimants that received benefits were injured during football activities.¹¹⁷ They were both awarded compensation based on the fact that they held jobs on campus that were outside the scope of football, yet still inside the scope of employment with the university.¹¹⁸ This line of reasoning has led to a conclusion that there is a "flat proposition that it is an absolute prerequisite of employment relation that the parties intend to create an employment relation, and think of themselves as employer and employee."¹¹⁹ The same intent that the university has when hiring a groundskeeper¹²⁰ is apparently not present when one seeks to provide a four-year scholarship to a student-athlete.¹²¹ This judicial reliance on intent in the cases above is seen as a "fallacy,"¹²² however, and it is naïve to think that student-athletes do not believe that they are paying for play, and therefore cannot receive workers' compensation benefits.¹²³

Alvis Waldrep, the most recent unsuccessful claimant who sought workers' compensation benefits from Texas Christian University while permanently confined to a wheelchair due to football, was denied because there was no contract for hire within his scholarship, and the university did not withhold income taxes from his financial aid.¹²⁴ In regards to the intent

¹¹⁵ See *id.* at 226–27 (quoting the lower court's opinion that the primary function of the university was to provide education and not athletics).

¹¹⁶ *Id.*

¹¹⁷ LARSON, *supra* note 68, at § 22.04(1)(c).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *Univ. of Denver v. Nemeth*, 257 P.2d at 424 ("At the time [of his injury], he was receiving \$50 per month from the University for certain work in and about the tennis court on its campus.").

¹²¹ See Branch, *supra* note 1 (examining the string of cases described in this Note in which schools could hide behind the "myth of the student-athlete").

¹²² LARSON, *supra* note 68, at § 22.04(1)(c).

¹²³ See *id.* ("Anyone who reads the sports pages knows that the controversy about professionalism in college football is still a lively and ongoing one, either because NCAA rules are too lax or because they are not obeyed.").

¹²⁴ See *Waldrep v. Tex. Emp. Ins. Ass'n*, 21 S.W.3d 692, 698, 700 (Tex. App. 2000) (stating that one may receive a benefit from another in return for services and not become an employee) (internal citations omitted).

of the university, Waldrep was certainly *not* naïve: “[school officials] said they recruited me as a student, not an athlete,” which Waldrep claimed to be “absurd.”¹²⁵

Relying on the intent of the employer in these cases allows a university to tell the court whatever they would like, in regards to what their intent was at the time they recruited the athlete. The actions of the university, however, in their profiteering off of the athletes’ performance, speak to a much different intent than one that solely provides a free education, with participation in athletics coming along as a byproduct. Intent cannot be the main determining factor, when the right and exercise of control over the athletes are so great as to warrant employment status.

IV. EXAMINING THE RIGHT AND EXERCISE OF CONTROL OVER AN ATHLETE—MAKING AN EMPLOYEE OUT OF THE MODERN DAY COLLEGE FOOTBALL PLAYER

Admittedly, attempting to use the National Labor Relations Act to form an argument for providing benefits under a state statute is not ideal.¹²⁶ But what the Northwestern University case lacks in guidance for resolving workers’ compensation disputes, it makes up for with the NLRB’s tremendous insight into the day-to-day activities of a college athlete,¹²⁷ most specifically a Division I football player. This helps show a student-athlete’s status as an employee under one of the legal tests used in workers’ compensation cases, and supports Waldrep’s argument that recruiting is typically aimed towards those with athletic prowess, rather than solely academic potential. Despite the fact that Northwestern University is private, and a majority of universities that would be affected by the change in status of student-athletes are public, the schedule and overall work performed by the Northwestern University athletes, under the direction of their coaches, is akin to student-athletes at other universities at this level,¹²⁸ and therefore, still an example of the control that is exerted over athletes by their universities.

¹²⁵ Branch, *supra* note 1 (emphasis added).

¹²⁶ While the NLRB has authority to examine labor disputes at *private* universities only, the passage of the NLRA sought to hear disputes pertaining to the “inequality of bargaining power” between employees and their employers. 29 U.S.C. § 151 (2012). There is no jurisdiction for providing benefits under the Act. *Id.*

¹²⁷ *See generally Northwestern I*, 2014 NLRB LEXIS 221, at *10–26 (2014) (explaining the special rules that the athletes must adhere to, the daily schedules of their work, broken down by hour, and various other commitments to the program that are mandatory of all players on the roster).

¹²⁸ *See id.* at *3–4 (explaining that the University, and football team in particular, compete against other schools in the Big Ten conference, and in the Division I Football Bowl Subdivision (FBS)).

A. *Using Northwestern University's Year-Round Football Routine to Discuss the Right and Exercise of Control Over Athletes*

Northwestern University student-athletes must adhere to a Team Handbook, which is not required of students who do not participate in sports.¹²⁹ In addition to following this Handbook, players are told where they must live;¹³⁰ they must provide all information regarding their social media accounts;¹³¹ and if they want to obtain employment outside of the team, they must obtain permission from the University's athletic department.¹³² The University requires this last piece so that it may keep track of any type of compensation that an athlete may be receiving.¹³³ Lastly, athletes must wear specific formal attire on game days, and must adhere to academic standards or face disciplinary action.¹³⁴ These requirements, much stricter than what most employers require from their employees at almost any other job, do not include anything related to on-field activities—the reason why many of these student-athletes come to school in the first place.

The Northwestern football program begins its season in August with a one month training camp,¹³⁵ and continues for approximately five months—this year's team completed its season on January 1, 2016, in one of the NCAA's famed New Year's Day bowls.¹³⁶ This August training camp consists of an itinerary for each player, booked straight through from 8:30 a.m. to 10:30 p.m. “lights out”—meals, lodging, medical treatment, classroom time, and practices are all laid out for players, who work for about fifty to sixty hours per week throughout the month.¹³⁷ The hourly commitment is minimized slightly as the season and school year both begin. However, whatever time is not spent on the field, is spent performing some other mandatory task such as traveling to an away game

¹²⁹ *Id.* at *10.

¹³⁰ *See id.* at *10–11 (explaining that freshman and sophomores must remain in on-campus dormitories, and upperclassmen may move off campus, only if they receive permission from their head coach).

¹³¹ *See id.* at *11 (describing the social media policy they must abide by, including random checks on their account, and mandatory “friend” request acceptances from coaches).

¹³² *Id.* at *10–11.

¹³³ *Id.*

¹³⁴ *Id.* at *12–13.

¹³⁵ *Id.* at *13.

¹³⁶ The football team posted a historic 10–3 record, ranking in the Top 25 schools in the nation, but lost their final game of the season to the University of Tennessee, 45–46. 2015 FOOTBALL SCHEDULE, www.nusports.com/schedule.aspx?path=football [https://perma.cc/3BNP-N3LA] (last visited Feb. 19, 2016).

¹³⁷ *See Northwestern I*, 2014 NLRB LEXIS 221, at *13–15 (providing the daily schedule for the team while on their annual trip to Kenosha, Wisconsin).

or sitting in study hall for tutoring.¹³⁸ Even when mandatory events are not allowed by NCAA rules, players are still strongly encouraged to attend practices orchestrated by the quarterback and/or a team trainer, due to a ban on coaches' attendance.¹³⁹ Football season continues beyond the bowl game with weight room workouts and spring football programs beginning almost immediately after the supposed culmination.¹⁴⁰ Even throughout spring workouts, and into the summer, there is little time off for these players, who work year-round for their university's football program.¹⁴¹

Lastly, and in today's college football landscape, perhaps most importantly, the student-athletes in the program generated \$235 million in revenue for Northwestern University over the decade prior to the NLRB decision—\$30.1 million of this revenue came in the 2012–2013 season alone.¹⁴² These numbers pale in comparison to institutions where the football program is more nationally prominent. The University of Texas football team generated over \$128 million in revenue for the school during the 2014–2015 season, and fellow rivals of Northwestern in the Big Ten Conference, 2015 national champion Ohio State University and the University of Michigan, generated over \$93 million and \$112 million in revenue, respectively.¹⁴³ These numbers, which climb higher and higher each calendar year, have reached a point at which these programs' revenue streams are an integral part of the university's operations. And these revenue streams are created primarily because of the talent of student-athletes, despite opinions like *Coleman*, which stated that these student-athletes do not carry out an "integral" task for their employers/universities, and therefore could not receive workers' compensation benefits.¹⁴⁴

A university's right to control and exercise of control seems to be satisfied in a potential benefit dispute at Northwestern University. The ability to dictate the daily, and almost hourly movements of each and every player on the team, while they work towards a goal of providing athletic

¹³⁸ See *id.* at *18–21 (explaining the players' schedule during a trip to the University of Michigan in 2012 for an away football game).

¹³⁹ See, e.g., *id.* at *17 (“[T]he coaches are not permitted to compel the players to practice again later in the day. The players, however, regularly hold 7-on-7 drills . . . outside the presence of their coaches.”).

¹⁴⁰ See *id.* at *22 (“Following the Bowl game, there is a two-week discretionary period where the players have the option to go into the weight room to work out.”). Head coaches may not attend these work outs, by NCAA rule, but may rejoin their team to begin working again in mid-January. *Id.*

¹⁴¹ See *id.* at *26 (stating that there are a couple weeks spent at home following the academic year, before players must return back to campus for begin training).

¹⁴² *Id.* at *37–38.

¹⁴³ See Jared Diamond, *What's Your College Team Worth?*, WALL ST. J. (Jan. 12, 2015), <http://www.wsj.com/articles/whats-your-college-team-worth-1421081367> [<http://web.archive.org/web/20160416055257/http://www.wsj.com/articles/whats-your-college-team-worth-1421081367>] (valuing the Ohio State University football program with an intrinsic value of \$1.12 billion).

¹⁴⁴ *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 227 (Mich. Ct. App. 1986).

and financial success, could lead a fact-finder to find, much like the NLRB found, that there is control in this relationship that is indicative of an employer-employee relationship. Further, “[c]ontrol is necessarily implied in every contract that gives the employer the right to insist that services be performed according to specifications.”¹⁴⁵ The scholarship that is offered to the student-athlete would imply that control exists. Scholarship athletes also hold onto their financial aid throughout their college career; however, there are cases in which universities may revoke the scholarship for good cause.¹⁴⁶ The ability to terminate is still present. The one factor within the control test still under serious contention is the method of payment, which is why one of the reasons why the employment status of a student-athlete is still unsettled.

B. *Reviewing the Status of Northwestern University Football Players Under the Economic Reality Test*

Under the economic reality test,¹⁴⁷ a football player at Northwestern University may have more success today than in 1963, when *Coleman* was decided. Not only are revenues ever-rising,¹⁴⁸ but television deals are now more lucrative than ever. Not only did Division I FBS settle on an approximately \$470 million television deal annually¹⁴⁹ but also in 2010, when CBS renewed its deal with the NCAA to air the entirety of the Men’s Basketball Championship Tournament, it brought in a second television conglomerate, Turner Broadcasting, to help broadcast all sixty-seven games, and that deal settled at \$10.8 billion for fourteen years.¹⁵⁰ Collegiate athletics, with football being the leading sport, have become a “profit making enterprise.”¹⁵¹ Perhaps the new age of profiteering could sway a court towards recognizing an athlete as an employee in a workers’ compensation claim, if it chooses to utilize the economic reality test.

¹⁴⁵ See, e.g., *Larry’s Post Co. v. Unemployment Ins. Div.*, 777 P.2d 325, 328 (Mont. 2003) (citing *St. Regis Paper Co. v. Unemployment Comp. Comm’n*, 487 P.2d 524, 527 (Mont. 1971)) (allowing for unemployment benefits to be provided to a claimant that the employer knew he had control of, before making the employee sign an exemption).

¹⁴⁶ See 2015–16 NCAA DIVISION I MANUAL § 15.3.4.2, 196–97 (2015), <http://www.ncaapublications.com/productdownloads/D116.pdf> [https://perma.cc/V6XJ-TWKS] [hereinafter NCAA MANUAL] (allowing revocation for academic eligibility, fraudulent activities, and serious misconduct).

¹⁴⁷ See *supra* note 87.

¹⁴⁸ See *Diamond*, *supra* note 143 (noting that values of programs have shot up recently, due in part both to revenue and the ever-increasing value of professional leagues, which trickle down to value of college programs).

¹⁴⁹ *Bachman*, *supra* note 5.

¹⁵⁰ Press Release, Nat’l Collegiate Athletic Ass’n, CBS Sports, Turner Broad., NCAA Reach 14-Year Agreement (Apr. 22, 2010), <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement> [https://perma.cc/2FYL-WAK3].

¹⁵¹ *Tiscione*, *supra* note 19, at 138 (citing *Whitmore*, *supra* note 70, at 763 n.1).

V. CALCULATING WORKERS' COMPENSATION CLAIMS FOR COLLEGE FOOTBALL PLAYERS WITH FULL COST OF ATTENDANCE SCHOLARSHIPS UNDER CONNECTICUT STATUTE

Calculating workers' compensation payments for a college athlete would be difficult, given that an athlete's compensation is not a traditional hourly wage or salary. Pending future litigation, such as the case that recently had its classes certified,¹⁵² as the law currently stands, the "compensation" that a college athlete receives is now set at a cap up to full cost of attendance at his respective university.¹⁵³ This cost of attendance total provides an athlete with a quantifiable amount that can be utilized into a workers' compensation claim. As unorthodox as this may seem, when attempting to determine one's average weekly wage (which is used to calculate benefit payments), the method is not unheard of. In the past, some courts have taken into account room, board, food, and other non-monetary factors when attempting to calculate average weekly wages.¹⁵⁴ Indeed, workers' compensation has historically been seen as generally intended to compensate for lost earnings or earning capacity, but broad readings of the word "income" allow for non-monetary aspects of a job to be calculated.¹⁵⁵ Therefore, even though the actual outcome will differ by state, like all other aspects of workers' compensation law,¹⁵⁶ there is a potential for a dependable, numeric value to be used when calculating benefits for college athletes.

Workers' compensation is calculated in very similar ways across all states, with slight variations in the rates of payment to employees.¹⁵⁷ Payments will begin with an "average weekly wage," which operates the

¹⁵² See *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 2015 U.S. Dist. LEXIS 163878, at *15–16 (9th Cir. 2015) (certifying two classes of collegiate athletes from three separate sports to sue the NCAA).

¹⁵³ *O'Bannon II*, 802 F.3d at 1075–76 (holding that grant-in-aid caps on compensation violate antitrust law and that full cost of attendance is more appropriate and less restrictive).

¹⁵⁴ See *Smith v. St. Mary's Hosp.*, 259 N.Y.S.2d 373, 374 (N.Y. App. Div. 1965) (holding that lower court erred when calculating the wage rate of a graduate-level nurse, rather than using the non-monetary compensation received as a student nurse); George L. Blum, Annotation, *Workers' Compensation: Value of Employer-Provided Room, Board, or Clothing as Factor in Determining Basis for or Calculation of Amount of Compensation Under State Workers' Compensation Statute*, 48 A.L.R. 6th 387, § 4, 411–18 (2009) (surveying jurisdictions and situations in which room and board are/are not seen as compensation). *But see* *MacSuga v. Moreno*, 66 P.3d 409 (Okla. 2003) (holding that when the evidentiary record is without any projected value of non-monetary room and board, it cannot properly be calculated in to wage earnings).

¹⁵⁵ See Blum, *supra* note 154, at § 3, 408–09 (using market value to calculate what the "reasonable value" of room and board may be).

¹⁵⁶ See *id.* at § 4, 411–18 (annotating a discussion on room and board in workers' compensation payments based on state statutes).

¹⁵⁷ See LARSON, *supra* note 68, at § 1.01 ("The typical workers' compensation act has these features . . . benefits to the employee include cash-wage benefits, usually around one-half to two-thirds of the employee's average weekly wage, and hospital, medical, and rehabilitation expenses.").

same across the country, but is defined under Connecticut law as:

[D]ividing the total wages received by the injured employee from the employer in whose service the employee is injured during the fifty-two calendar weeks immediately preceding the week during which the employee was injured, by the number of calendar weeks during which, or any portion of which, the employee was actually employed by the employer¹⁵⁸

The State of Connecticut then takes this wage total, and multiplies it by a total of seventy-five percent of the “difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury[.]”¹⁵⁹ If an employee is not working at a new position, then the current wage will be zero dollars, leaving the full seventy-five percent of the previous wage total to be calculated into payments. That total is multiplied by a total amount of weeks of compensation, set by a schedule under statute, depending on the partial incapacity of one’s body part.¹⁶⁰ The product of this equation becomes the payment amount for an injured employee.

Here is where the full cost of attendance price tag can be a viable option to represent an athlete’s “wage” within a claim. Using the University of Connecticut as an example, the full cost of attendance for the 2015–2016 school year was \$47,344.¹⁶¹ Debating whether or not a football player works fifty-two weeks out of the year is, much like the debate over whether they are even employees in the first place, much larger than this discussion and still unsettled. Given the description of what a football player endures at Northwestern University,¹⁶² however, it is fairly safe to argue that a Division I FBS athlete works on his craft year-round. Thus, it would be fair to calculate an athlete’s compensation by dividing UConn’s full cost of attendance by fifty-two weeks, equating to an average weekly wage of \$910.46.

During the 2015 season, a sophomore offensive lineman injured his lower leg after only playing in one game—an unfortunate loss for the Huskies.¹⁶³ According to Connecticut’s schedule of payment for partial or

¹⁵⁸ CONN. GEN. STAT. ANN. § 31-310(a) (2015).

¹⁵⁹ CONN. GEN. STAT. ANN. § 31-308 (2015).

¹⁶⁰ *Id.*

¹⁶¹ *Tuition & Costs*, UCONN, <http://uconn.edu/admissions/tuition-and-costs/> [<https://perma.cc/K7QZ-3FCU>] (last visited Jan. 8, 2016) (including tuition, university and student fees, residence hall fees, university meals, and other yearly expenses for an out-of-state student).

¹⁶² *See supra* Part IV(a).

¹⁶³ Desmond Conner, *UConn Football Insider: Best and Worst of 2015*, HARTFORD COURANT (Jan. 5, 2016), <http://www.courant.com/sports/uconn-football/he-uconn-footbal-best-worst-of-season-0106-20160105-story.html> [<https://perma.cc/4QJ9-SPSX>] (“[L]osing sophomore offensive lineman, Ryan Crozier (lower leg) for the season may have been the most critical [injury] of them all.”).

total incapacity of a body part, the athlete could have received 125 weeks of compensation for an injury to one foot, with loss coming at or above the ankle.¹⁶⁴ If this lineman is a full scholarship athlete, his average weekly wage of \$910.46 would be multiplied by seventy-five percent, and paid out over the next two years or so, to match the schedule of payment under statute.¹⁶⁵ A workers' compensation claim could provide the athlete, who was is sidelined, incapacitated with injury, with approximately \$85,355.77 over the next two years. Furthermore, if he were to have a permanent partial disability to his leg, payments under Connecticut law could continue after the 125 weeks of partial incapacity payments ceased.¹⁶⁶

This lower leg injury will most likely not render the athlete totally disabled, nor will it end his life, which means that his family has no claim to the NCAA's \$25,000 death benefit under its Catastrophic Coverage Plan.¹⁶⁷ If his treatment does not surpass \$90,000¹⁶⁸ then where will the coverage come from? More importantly, if this lineman were a junior or senior, the treatment to his leg would continue after he left UConn and his scholarship expired. The NCAA claims that the goal of its Catastrophic Plan is to avoid having an athlete pay out-of-pocket expenses for major injuries,¹⁶⁹ but with a health plan with such a high deductible and no coverage guarantees beyond the time an athlete spends in college, there is risk that one moves on from a university after performing a service for them, and is left without coverage, whereas workers' compensation could at least provide a modest payment for the injury that an athlete suffers. For the nearly 99% of college athletes who do not go on to play professional sports, this payment can certainly help.

VI. EXAMINING THE REALISTIC NECESSITY AND FEASIBILITY OF WORKERS' COMPENSATION FOR STUDENT-ATHLETES

If we recognize the legal right that student-athletes have to workers' compensation payments, the next question is whether it truly is feasible or necessary to provide it. Student-athletes are injured quite often, yet they always manage to get the medical care they need.¹⁷⁰ The NCAA also

¹⁶⁴ CONN. GEN. STAT. ANN. § 31-308 (West 2015).

¹⁶⁵ *Id.*

¹⁶⁶ See CONN. GEN. STAT. ANN. § 31-308a (West 2015) (allowing for the State to make payments of seventy-five percent of average weekly wage for partial permanent disability after the temporary payments expire).

¹⁶⁷ See *NCAA Catastrophic Injury Insurance Program Frequently Asked Questions*, *supra* note 18 (applying to Aug. 1, 2012 to Jul. 31, 2013 policy period).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See Juanita Sheely, *Insurance Coverage for Student Athletes*, Nat'l Collegiate Athletic Ass'n, (May 20, 2015, 5:05 PM), http://www.ncaa.org/health-and-safety/sport-science-institute/insurance-coverage-student-athletes#_ftnref1 [<https://perma.cc/V5EH-BSUD>] ("Member[] [universities] are

allows them to sit out for a season without losing eligibility, which provides the athlete with the four seasons he intends to play when he walks onto campus.¹⁷¹ But still, workers' compensation is not just about medical care, although it also plays a major role in the coverage.¹⁷² Rather, "[t]he main purpose of workers' compensation laws is to provide employees a guaranteed remedy for injuries arising in the course of serving their employers."¹⁷³ The historical thinking behind workers' compensation statutes is that if one is an employee, there is a relationship in which the employee is guaranteed benefits at the expense of not suing employers.¹⁷⁴ It is a guarantee that an employee holds simply because he risks the chance of injury for the sake of his employer. It is not a bonus added on to a paycheck. If student-athletes are eventually going to be considered employees of their universities, then this is a natural development that must also accompany the new status.

A. *Avoiding the Worries of Open Market Competition and Preserving "Amateurism" with Workers' Compensation Payments*

Much of the *O'Bannon* litigation, based on antitrust law, discussed the disruption of the competitive collegiate market if athletes were paid, with the aim being to not disrupt its procompetitive practices.¹⁷⁵ Indeed, as the NCAA argued, the court understood that the opportunity to earn a higher education is what attracts athletes to college, and being paid some form of compensation would still make this option available to them.¹⁷⁶ The court then supported the payment of full cost of attendance scholarships as a substantially less restrictive alternative under antitrust law's Rule of Reason,¹⁷⁷ but stopped short of allowing the athletes to receive cash compensation for the use of their names and likenesses (specifically in

permitted to provide that coverage, but they are not required to do so. Coverage can be provided through the school, a parent/guardian policy or a policy student-athletes have on their own. If coverage by some source is not in place, the student-athlete cannot practice or play.").

¹⁷¹ See, e.g., NCAA MANUAL, *supra* note 146, at § 12.8.4 (allowing an athlete to retain a year of eligibility if they suffer a season-ending injury/illness within the first 30% of the season).

¹⁷² See LARSON, *supra* note 68, at § 1.01 ("The typical workers' compensation act has these features . . . Benefits to the employee include cash-wage benefits, usually around one-half to two-thirds of the employee's average weekly wage, and hospital, medical, and rehabilitation expenses.").

¹⁷³ Whitmore, *supra* note 70, at 767–68.

¹⁷⁴ See *id.* (ensuring this guarantee by construing the definition of "employee" liberally).

¹⁷⁵ See *O'Bannon II*, 802 F.3d at 1056 ("First, the [district] court found there is a 'college education market' in which FBS football and Division I basketball schools compete to recruit the best high school players by offering them 'unique bundles of goods and services' that include not only scholarship but also coaching, athletic facilities, and the opportunity to face high-quality athletic competition.").

¹⁷⁶ See *id.* at 1073 (stating that a pro-competitive market for college athletes still exists).

¹⁷⁷ See *id.* at 1075 (limiting courts by saying that they should not continue to use antitrust law to micromanage universities).

video games) because it does not promote amateurism.¹⁷⁸

But workers' compensation is not compensation for the use of names and likeness. Rather, it is a protection against potential injuries that players are risking by playing sports at a university. Injuries occur, with or without amateurism and competitive college markets being affected, and making benefits available to athletes does nothing more than compensate them for providing a service to their university. No one *wants* workers' compensation benefits to kick in. Much like basic health insurance, it is a system that is in place to protect loss that, ideally, no one wants to occur. It seems outlandish to think that student-athletes will seek injury and sacrifice playing time to receive benefits. Therefore, having universities provide these benefits does not change the competitive market between schools vying for talented athletes; especially if all schools have them. The *O'Bannon* Court found that paying students cash compensation would not promote amateurism.¹⁷⁹ However, the cash compensation question was answered in response to the question of marketability of individual athletes, which is much different than providing workers' compensation benefits.

B. *Handling the Cost of Providing Workers' Compensation to Student-Athletes*

Paying for workers' compensation coverage is based on a market of various plans offered by insurers, and as seen in states like California, the state itself does not regulate the prices of plans.¹⁸⁰ In a 2013 report, the National Academy of Social Insurance placed the average cost of providing benefits to workers at approximately \$1 for every \$100 of covered wages.¹⁸¹ While the market for providing coverage to student athletes is not fully formed, if it came at a cost of one-one hundredth of the scholarships provided, universities would likely be able to cover it. The revenue that television networks and universities are receiving through athletics has been discussed ad nauseam, but there is no argument that everyone is profiting more from the performance of college athletes nowadays. A Duke University economist concluded several years ago that

¹⁷⁸ *Id.* at 1076 (footnote omitted).

¹⁷⁹ *See id.* at 1076 (“[T]he district court ignored that not paying student-athletes is *precisely what makes them amateurs.*”) (internal footnote omitted).

¹⁸⁰ *See, e.g., Answers to Frequently Asked Questions About Workers' Compensation for Employers*, STATE OF CAL. DEP'T OF INDUS. RELATIONS (June 2016), <http://www.dir.ca.gov/dwc/faqs.html> [<https://perma.cc/8BTB-CZDK>] (an independent regulatory board dictates pricing for employers).

¹⁸¹ *See* Ishita Sengupta et al., *Workers' Compensation: Benefits, Coverage, and Costs, 2011*, NAT. ACAD. OF SOCIAL INS., at 1, 2, <https://www.nasi.org/research/2013/report-workers-compensation-benefits-coverage-costs-2011> [<https://perma.cc/43RW-8MQF>] (comparing to employers' cost of providing coverage in 2011 at \$1.27 for every \$100).

since 1984, the salaries of head football coaches at public universities increased by 750%, adjusted for inflation.¹⁸² In 2009, for the first time, even an *assistant* college football coach surpassed \$1 million in yearly salary.¹⁸³ Quite simply, with all of the new revenue that universities are receiving, there is potential for coverage to be provided to college football players for such a nominal amount, especially given the fact that not all of them would become injured to the point of receiving payments. The cost of workers' compensation benefits is both reasonable and feasible for universities within the NCAA.

VII. CONCLUSION

There are admittedly many variables to consider when offering workers' compensation benefits to student-athletes. The state-operated workers' compensation system in general has created unpredictability that may only be fixed by creating a uniform system run by the federal government.¹⁸⁴ Some states, such as California and Hawaii, have specifically exempted scholarship athletes from obtaining workers' compensation, for example.¹⁸⁵ Conversely, Nevada has embraced scholarship athletes, and passed laws specifically protecting those within its state university system, subject to court review of their scope of employment.¹⁸⁶

Other discrepancies between the sports that generate revenue and those that do not, or private and public universities, or perhaps maybe gender concerns based on Title IX could enter the debate on whether workers' compensation benefits could be feasible. But what should not be debated is that the benefits are available and they should be granted to student-athletes. The tenets of "amateurism" and the "student-athlete" are already fragile,¹⁸⁷ and as dollar amounts rise, the NCAA's efforts to shield athletes

¹⁸² See Branch, *supra* note 1 (setting the national average at about \$2 million per coach).

¹⁸³ See *id.* (discussing the hiring of Monte Kiffin at the University of Tennessee).

¹⁸⁴ See, e.g., Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1083 ("[W]orkers' compensation has moved away from its original goals of uniformity, efficiency, predictability, and fairness to a current state of disarray amidst inconsistent state case law and federal regulation.").

¹⁸⁵ See, e.g., CAL. LAB. CODE § 3352(k) (West 2015); HAW. REV. STAT. § 386-1 (2015); see also Whitmore, *supra* note 70, at 782–83 (showing that state legislatures are just as split on the issue as courts have been).

¹⁸⁶ See NEV. REV. STAT. § 396.591 (2015); see also Whitmore, *supra* note 70, at 783 (explaining Nevada's provision, titled "System to Provide Separate Program of Medical Coverage for Members of Athletic Teams of the University of Nevada System"). The statute Whitmore discusses used to have mandatory language for providing coverage, which has since been amended to state that schools "may" provide coverage.

¹⁸⁷ See, Branch, *supra* note 1 ("[T]he real scandal . . . [is] that two of the noble principles on which the NCAA justifies its existence—'amateurism' and the 'student-athlete'—are cynical hoaxes,

from compensation become weaker. The workers' compensation system is not perfect, but it is modest. It allows for some security that student-athletes are more than deserving of in a cartel-like system in which former president of the NCAA, Walter Byers, argues "[t]he college player cannot sell his own feet (the coach does that) nor can he sell his own name (the college will do that)."¹⁸⁸ College athletics has become a massive industry that has caused the very architects of the system to turn on it as far too exploitative. Byers, the very creator of the word "student-athlete,"¹⁸⁹ is now disgusted with the organization, arguing that "[t]his is the plantation mentality resurrected and blessed by today's campus executives."¹⁹⁰ While providing workers' compensation benefits is not a full fix to the issues that commercialization of college athletics and the "student-athlete" have raised, it is a safe place to start.

legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes.").

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*