Student-Athletes: Why Employee Status is Not the Answer
Introduction:

Athletics have been part of life for as long as history provides. Athletic ability has been a praiseworthy skill dating as far back as historians can go, with the most famous example being the Olympic Games of Ancient Greece.\(^1\) The Mongolians’ “Three Manly Skills” includes wrestling, citing cave paintings dating back to 7000 B.C. to show the depth the sport has attained in their culture.\(^2\) Native Americans once battled on the fields of the Midwest utilizing sticks and balls as training and recreation for warriors, which, over time, evolved into the sport of lacrosse.\(^3\)

While professional athletes are revered in society for their abilities, often times the most loyal following stems from collegiate sports. There is a hard-to-describe feeling that is experienced while cheering on one’s alma mater. Even without alumni or current student status, or another meaningful connection to an institution, fan bases for collegiate athletics are widespread. Saturdays in the fall are hallmarked by tailgates and football. Winter and early spring evenings are spent emphatically cheering on men’s and women’s basketball teams, culminating in a month long March Madness where seemingly every pulse is on the outcome of the collegiate tournament. Professional sports teams invoke similar loyalty from their fan base; nevertheless the deeply personal connection many feel to their alma mater has sparked an intense love for both collegiate sports and its amateur athletes.

Given the high praise athletes receive in society, it is no wonder why so many aim to play their chosen sport at the highest level of competition by first becoming collegiate athletes, some with the hopes to become professional athletes. Student-athletes are expected to balance the

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participation in college level education with the commitment of participating in collegiate level athletics.

Due to the nature of each demanding activity, student-athletes are faced with a myriad of problems they must overcome in order to obtain a college degree successfully while participating in athletics. Unfortunately, the current NCAA and its Conference system is flawed and does not adequately protect student-athletes from the both monetary and academic cost of participation in collegiate athletics. Absent full reform of the system and an overhaul of long standing rules and regulations, many student-athletes will not be able to balance the demands of college with athletics.

These problems have not gone unnoticed by the student-athlete and collegiate sports community. Northwestern University football players recently sought to obtain employee status from the university in order to be able to form a union to participate in negotiations regarding concerns such as participation requirements and schedules. The Regional Director for Chicago of the National Labor Relations Board (the “Board”) found in favor of the student-athletes in the Northwestern University case, holding that student-athletes receiving scholarships, due to the nature and extent of the universities’ control over the individuals, can be classified as Common Law Employees, whom are persons doing work for another person or entity under a contract of hire whom is under that entity’s control, in return for payment or compensation. This decision allows the student-athletes to vote to form a union.

Although student-athletes receiving scholarships for their participation in collegiate athletics can be legally considered employees of the university, the classification of student-athletes...
athletes as employees does not adequately protect the student-athletes from the problems they face, and is therefore not the most workable solution.

In order to give student athletes the control they desire, without the need for lengthy reform, collegiate athletes should be able to profit off of their likenesses. This allows student-athletes to benefit monetarily from the commitments they make to their school and team, which inevitably limit the student-athletes in multiple aspects of life for their time in college. Below is a critique of the classification of student-athletes as employees as well as an analysis of the workable solution of allowing student-athletes the ability to profit of their likenesses.

Background:

The NCAA, founded in 1906, is the governing body of the collegiate athletic leagues, setting rules by which student-athletes, coaches, and other participants must abide both on and off the playing field. The NCAA is just one governing body over student-athletes today, albeit the largest and most powerful. Student-athletes must abide by the NCAA rules, Conference rules (if their respective university or college is a member of a conference), and their respective university or college’s rules surrounding participation in athletics. Each of these authorities outlines minimum standards that each student-athlete must meet in order to remain eligible, such as GPA requirements, and sets restrictions on certain behaviors and activities of the student-

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7 Conferences split up each division of the NCAA, for the most part based on geographic location. Conferences act as governing bodies over these smaller “leagues,” scheduling games as well as organizing conference championship tournaments. Conferences often contract with television networks for the broadcast of games, and can impose rules and regulations on conference members. Not all universities elect to be members of these conferences; Notre Dame is an “Independent” school and contracts with NBC directly for the broadcast of football games. See Associated Press, NBC’s Notre Dame deal extended, ESPN.com, http://espn.go.com/college-football/story/_/id/9186897/nbc-extends-notre-dame-fighting-irish-football-deal-2025 (last updated Apr. 18, 2013, 2:50 PM).
The NCAA rules pertaining to Division I student-athletes are often the topic of heated debate, and are thus the set of rules used as the basis for this analysis.

There is great value of participating in collegiate athletics, such as scholarships that provide student-athletes with the ability to earn a college degree they may otherwise not be able to afford. As with any activity, the value of participating in athletics has a strong opportunity cost, and often detracts from the student-athletes’ ability to participate in other aspects of the collegiate experience, including academics. Student-athletes are constantly being pulled in multiple directions; it is extremely difficult to maintain a balance between academics and athletics. The following are accounts from four former student-athletes, each involved in a different Division I sport; names have been omitted as a means to preserve the candid nature of the responses received.

A volleyball player was under the belief that her scholarship could be revoked for either poor academic or athletic performance. Her time was severely restricted; she was only allowed Saturdays off, was not allowed to travel during the season, and was forced to return to school a month early in the fall. Additionally, she believed that her participation in athletics detracted from her schoolwork.

A basketball player with a full scholarship required additional loans in order to afford his expensive private-school education. The participation in a major sport at a prestigious school cost this student-athlete more than just the additional loans – missed tests, classes, events, and no

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9 Questionnaire answers of Division I Athletes. Author developed a series of questions and distributed among former and current Division I athletes; in order to provide more candid responses, author removed any identifying information from the answers; four athletes responded, all former Division I student-athletes, three of which were members of Patriot League schools, one of which was a member of an Ivy League school; respondents were given unlimited time to answer each question; analysis of answers provided author with better understanding of the problems student-athletes face, as well the student-athletes position and opinions on the problems they face.
breaks from September to March. About 90% of professors would grant extensions on schoolwork order to fit both school and athletics into his collegiate experience. With such a tight schedule, it was impossible for this particular student-athlete to work during the season. Even though restrictions on actually holding a job were not explicit, this student-athlete was restricted from advertising himself as a Division I student-athlete in order to prevent him from profiting off of his likeness.

A field hockey player in the Patriot League was told that there were no athletic scholarships offered for her sport. Field hockey restricted travel on the weekends, caused this student-athlete to miss class, and even required attendance at certain athletic programs. This particular student-athlete was not aware of any restrictions on profiting off of her likeness.

Ivy League schools notoriously do not offer athletic or academic scholarships, instead using their extensive endowments to increase the availability for financial aid. An Ivy League lacrosse player stated that his “scholarship” was admission, and that his attendance required additional loans. Lacrosse players at this particular school were not allowed to profit off of their likeness and were bound to practice times and other athletic events. This student-athlete was additionally restricted academically, and was not able to attend certain seminars and classes that he may otherwise have wanted to participate in.

Participation in a given sport not only restricts the student-athletes’ ability to participate in academics; often coaches will pressure the student-athletes in order to prevent participation in outside activities, such as Greek life or even obtaining employment during the course of the

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season. Student-Athletes are additionally restricted on their ability to profit from their likeness under the NCAA rules. 11

Each year, the NCAA publishes a rulebook for each athletic division, as well as individual rules for playing each sport. 12 This rulebook outlines restrictions for student-athletes, coaches, and schools ranging from employment of student-athletes to acceptable recruiting methods for prospective student-athletes. 13 The rules refrain from explicitly prohibiting employment of student-athletes, but instead severely limit the types of employment opportunities that are available for student-athletes. Considering the time crunch many student-athletes are under, traditional employment is often not an option.

The NCAA limits the employment of student-athletes in a multitude of ways; section 12.4 of the 2014-15 NCAA Division I Manual outlines these restrictions. 14 Regardless of the type of employment, student-athletes are restricted on the compensation they may receive. Compensation must be “(o)nly for work actually performed; and (a)t a rate commensurate with the going rate in that locality for similar services.” 15 The goal of this rule is to prevent employers from overcompensating student-athletes.

The rules go many steps further when outlining the employment restrictions in athletically related fields. As student-athletes’ summers are often cut short, a viable alternative to the traditional internship or job is the participation as a coach or counselor for a summer camp. Since camps often last only a few days to a few weeks, they allow student-athletes the ability to make some money over the summer to help offset the cost of attendance that their scholarship

12 Id.
13 Id. at iii-vi.
14 Id. at 66-67.
15 Id.
does not cover, without the same time commitment as a typical internship or job. Unfortunately for student-athletes, the NCAA has placed many restrictions on this type of employment, causing the ability to receive compensation for this type of employment activity to be almost impossible while following the rules. Interestingly enough, in the conducted interviews of student-athletes, the author found that not all student-athletes were made aware of this rule. The student-athletes that were most aware of this rule were those in the higher revenue sports; namely, the student-athletes this rule would have restricted the most.

One of the most controversial of the rules restricting student-athlete employment is the rule preventing students from utilizing their own “name, photograph, appearance or athletics reputation” in order to advertise or promote the employment activity.16 This rule restricts student-athletes’ ability to profit off of their own likeness, essentially stripping the student-athlete of the goodwill of his or her own name and athletic ability they spend the majority of their time cultivating.

Not only does this restrict the celebrity student-athlete from receiving compensation for a commercial or advertisement, it restricts any student-athlete from using his or her likeness in order to promote any activity for compensation, such as athletic training or camps. In an interview with The Atlantic, three-time All-American wrestler Hudson Taylor discussed the extreme time commitment he gave to his sport while attending the University of Maryland.17 Taylor additionally said that the ability to profit off of his own likeness, in the form of running a wrestling camp, was a significant opportunity that was taken away from him.18

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16 Id.
18 Id.
Student-athletes have been grappling with how to balance the responsibilities they have to their team, their academics, and especially to themselves. Recently, a group of Northwestern University football players sought to form a union in order to gain a seat at the discussion table with respect to the problems student-athletes face, such as better scholarships, medical treatment for injuries, and other benefits. The Regional Director for Chicago of the National Labor Relations Board reviewed their claims and issued a decision finding that the scholarship student-athletes were employees of the university, and thus allowed to vote to form a union in order to have a greater hand in reformation of the current rules and regulations.

The Regional Director’s Decision:

In an effort to regain control over their lives, student-athletes have been advocating for better treatment in the form of better compensation and autonomy in the use of their likeness. One of the opportunities presented by student-athletes, most notoriously by the Northwestern University football team, is the classification of student-athletes receiving scholarship as employees of the university they attend. Recently, the Regional Director for Chicago of the National Labor Relations Board reviewed the Northwestern University football team’s petition to form a union.

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20 Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, Regional Director’s Decision and Direction of Election, N.L.R.B. (2014) (review pending before full Board).
21 The National Labor Relations Board is “an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions,” Who We Are, National Labor Relations Board, http://www.nlrb.gov/who-we-are (last visited Sept. 30, 2014). It is important to note that this finding is a Decision and Direction of Election, which concludes that the prerequisites to an election have been satisfied and directs that an election be conducted. Cases & Decisions, National Labor Relations Board, http://www.nlrb.gov/cases-decisions (last visited Dec. 12, 2014). The process by which a unit may elect to form a union varies in every case; in most cases the process begins with a petition to form a unit that is then reviewed by the appropriate Regional Director. The NLRB Process, National Labor Relations Board, http://www.nlrb.gov/resources/nlrb-process (last visited Dec. 12, 2014). The Regional Director then investigates
In order to determine whether a group of individuals can collectively join into a union for the purposes of collective bargaining, they must first be classified as employees. In the decision, the Regional Director discusses the need to apply the common law definition of “employee” to the case at hand due to the broad nature of Section 2(3) of the Act’s definition of an employee.\footnote{Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, Regional Director’s Decision and Direction of Election, N.L.R.B. (2014) (review pending before full Board) at Sec. 4(B). \textit{See also} \textit{NLRB v. Town & Country Elec.}, 516 U.S. 85, 93, 116 S.Ct. 450, 455 (1995). (stating that when the term “employee” is used in a statute that does not define the term, courts interpreting the statute must infer that Congress means to incorporate the established meaning by common-law agency doctrine)}

The common law definition of an employee is a person doing work for another person or entity under a contract of hire who is under that entity’s control, in return for payment or compensation.\footnote{Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, Regional Director’s Decision and Direction of Election, N.L.R.B. (2014) (review pending before full Board) at Sec. 4(B). \textit{See also Restatement (Second) of Agency Sec. 2(2) (1958).}} The Regional Director found that Student-athletes receiving scholarship, due to the nature and extent of the universities’ control over the individuals, fit squarely into the definition of a common law employee.

The first element of the common law employee definition pertains to the nature of the relationship between the student-athlete and the university. Student-athletes must sign a contract with the university they will attend and where they will participate in athletics. The Regional Director cites the recruitment process as indicating that the student-athletes’ acceptance, and subsequent scholarship, is because of their athletic ability.\footnote{Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, Regional Director’s Decision and Direction of Election, N.L.R.B. (2014) (review pending before full Board) at Sec. 4(B)(1).} Additionally, student-athletes are...
subject to contracts that control the duration and conditions under which the scholarships will be provided.\textsuperscript{25} The Regional Director states that the scholarships are provided in exchange for the athletic service performed, and thus are a compensation for a work for hire.\textsuperscript{26}

The second element of the common law employee definition concerns the amount of control the employer retains over the employee. Student-athletes’ schedules are almost entirely controlled by their sport. From the interviews conducted, and from the testimony of the Northwestern University football players in the Regional Director’ decision, it is clear that their coaches, and their contract to participate in athletics, regulate the majority of the student-athletes’ time.\textsuperscript{27} Although the NCAA limits this to 20 hours per week once the academic year begins, Northwestern football players on average devote 40-50 hours per week to athletic activities during the regular season.\textsuperscript{28} The decision highlights many of the specific controls over the student-athletes’ time, including practice schedules, travel schedules, meal times, and study hall participation amongst other things.\textsuperscript{29}

Essentially, because the university is controlling what will be done and how it will be done the student-athletes receiving scholarships can be classified as employees under the Regional Director’s analysis.

**Issues with the Regional Director’s Decision:**

While the Northwestern University decision classified student-athletes as employees of the university, it has not provided a realistic solution to any of the problems plaguing student-athletes. The presence of a legal remedy to a problem does not necessarily mean that it is the best

\begin{footnotes}
\item[25] Id. at Sec. 4(B)(2).
\item[26] Id. at Sec. 4(B)(1).
\item[27] Id. Sec. 4(B)(2).
\item[28] Id.
\item[29] Id.
\end{footnotes}
method for resolution. There are many legal issues that would ultimately arise with the classification of student-athletes as employees of the universities; thus schools are adverse to this classification because of an innate desire to minimize both legal and monetary responsibilities. Regardless of what the institutions are seeking to avoid or protect, it is the student-athletes’ best interest that is at issue, and thus is the main focus of this analysis.

It is often hard to keep best interests in mind where money is involved, whether it is one’s own interest or that of an institution. It is expensive to reform the NCAA, conference, and university rules due to the lengthy amount of time required to do so. There is additionally the monetary cost to comply with state and federal employment law, and to provide fair compensation to the student-athletes. The NCAA, conferences, and universities, not the student-athletes, would absorb these costs. Nonetheless, this expense would be for naught as it does not afford the student-athletes the ability to address the existing issues with the NCAA rules, and thus is unlikely to effect significant change to the problems the student-athletes currently face.

I. Fractured Team

The Northwestern solution of classifying the student-athletes as employees fails to take into consideration those student-athletes that cannot be classified as employees because they are not on scholarship. This divide in employment status creates multiple problems, both on and off of the field. Classifying only part of a given team as employees is likely to divide teammates, employees vs. non-employees.

Student-athletes that receive compensation are likely to perceive themselves as more important than their non-employee counterparts, causing a cleavage in the team. Athletic teams are notorious for acting as a surrogate family for collegiate athletes. In order to communicate
effectively and play well together, teammates need to trust and respect each other on and off of the field. Dividing the team into classified groups risks destruction of this camaraderie, and could cost teams games and even championships.

A petitioned-for-unit is not appropriate if it fractures a unit. The Regional Director’s decision addresses this by suggesting that since the walk-on and non-scholarship student-athletes cannot be classified as employees under the common law definition, there is no fractured unit (of employees) present. A fractured unit exists when there is representation of only an arbitrary segment of a unit, and the excluded and included groups share an “overwhelming community of interest”. The Regional Director states that the difference in compensation is a substantial difference in the community of interest shared between the two groups; since the walk-on and non-scholarship student-athletes cannot be classified as employees, the Regional Director does not view them as part of the employee unit.

Walk-on and non-scholarship student-athletes attend the same practices, run the same drills, and play the same games as the scholarship-receiving student-athletes. They’re participation in athletics is no different than that of the scholarship-receiving players. Traditionally the Board balances a multitude of factors when deciding whether two groups share a community of interest, such as the similarity of skills, benefits, wages, duties, working conditions, and supervision of the employer. The Regional Director ignored the “overwhelming community of interest,” created by the similarity of skills, benefits, duties, working conditions,

30 Id. at Sec. 4(E).
31 Id.
32 Id.
33 NLRB v. Catherine McAuley Health Ctr., 885 F.2d 341, 349 (6th Cir. 1989) (in order to determine whether the bargaining unit was appropriate, Court discussed the Board’s adherence to a community of interest standard in making unit determinations as well as outlining relevant factors the Board has traditionally used in analysis). See also Speedrack Prods. Grp. v. NLRB, 114 F.3d 1276, 1283 (D.C. Cir. 1997) (Court discussed factors used in Board’s determination of community of interest in order to determine whether an employee is eligible to vote in a representation election).
and supervision of the employer between the two groups of student-athletes, and instead focused too intently on the difference in compensation.

In a previous Board decision, the Board held that unpaid interns were properly not included in a unit of employees even though they were subject to similar terms and conditions of employment. The Regional Director uses this decision as his basis for finding that the walk-on and non-scholarship student-athletes are appropriately excluded from the petitioned-for-unit. Conversely, walk-on and non-scholarship student-athletes are not analogous to unpaid interns.

Unpaid interns are most often hired for finite periods of time, with the understanding that the knowledge and experience obtained will substitute for payment of the services rendered. Unpaid interns additionally may experience the similar terms and conditions of employment, but are not given the same work as a full-time employee. Using the “community of interest” factors, it was appropriate to exclude interns from the union due to the vast differences between interns and employees. Unlike unpaid interns, walk-on and non-scholarship student-athletes are given the same “work” as the scholarship student-athletes.

Employees and union members do not all receive the same compensation, yet this does not preclude them from participating in a collective unit when the other factors are strongly present, thus, this difference in compensation should not preclude the walk-ons and non-scholarship student-athletes from being considered as part of the petitioned-for-unit.

Since the only difference between the two groups is the receipt of scholarship, walk-ons and non-scholarship student-athletes are inappropriately excluded from the petitioned-for-unit. Therefore the petitioned-for-unit fractures a unit and is not proper. The Board must follow prior

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34 *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999).
35 Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, Regional Director’s Decision and Direction of Election, N.L.R.B. (2014) (review pending before full Board) at Sec. 4(E).
decisions in order to remain consistent with findings and holdings, unless the Board explains the deviation persuasively. The facts of each individual case are considered in tandem with prior holdings in order to further ensure that while consistency is maintained, each case is treated on its individual merits. The Regional Director here relies too heavily on precedent that is not analogous to the particular facts of the case.

II. Cuts Funding to Other Sports:

Another concern the Northwestern University footballs players did not consider was the cost of classifying student-athletes as employees for their student-athlete peers in other sports and to the athletic program itself. Universities may discontinue funding losing teams that cost more money to run than bring in revenue, in order to shift focus and funds to high revenue teams. While this may mean great things for a top Division I football program generating millions for a university, this could also mean other sports are removed entirely from a schools athletic program in order to offset the cost of paying compensation to student-athletes. At Northwestern University the high revenues brought in through football are used to fund other non-revenue sports, provide for scholarships, and pay for facility maintenance, amongst other things.\textsuperscript{36}

From the Regional Director’s findings, the Northwestern University football program generated $30.1 million in revenue for the 2012-2013 season, yet also generated $21.7 million in expenses.\textsuperscript{37} The remaining $8.4 million is then used to maintain the stadium facility, as well as subsidize Northwestern University’s non-revenue raising sports.\textsuperscript{38} It is noted in the decision that the revenue used to subsidize the other sports ensures that there is a proportionate number of

\textsuperscript{36} Id. at Sec. 3(F).
\textsuperscript{37} Id.
\textsuperscript{38} Id.
men’s and women’s varsity sports in compliance with Title IX of the Education Amendments of 1972.\textsuperscript{39}

Utilizing these funds as compensation for the student-athletes would not only reduce the funds available for the other programs, but could also cause universities to violate Title IX inadvertently. Men’s sports, specifically football and basketball, are the main sources of revenue for the majority of universities. Women’s basketball, although popular, most likely will not provide enough revenue in order to level the playing field among the breadwinners of collegiate sports. Re-allocation of revenue funds in order to compensate the employee student-athletes is thus an unworkable, and possibly unconstitutional, solution to this problem.

\textbf{III. Reduces Academic Participation}

A main argument for allowing student-athletes to be classified as employees, and thus allowed to form a union in order to collectively bargain with the universities, was to give the student-athletes a voice in order to prevent or mitigate the damage done to academic involvement that occurs with participation in collegiate athletics. Classifying a student-athlete as an employee only puts more focus on athletics.

Classifying the student-athletes as employees puts further emphasis on their athletic commitment by stating up front that their employment is for athletic, not scholastic, performance. Further, this classification, as previously mentioned, only applies to student-athletes receiving scholarship. While there will still be those who will participate for “the love of the game,” further alienating these walk-on or non-scholarship student-athletes runs the risk of deterring non-employee student-athletes from participating at all.

\textsuperscript{39} Id.
This employee classification additionally deters prospective student-athletes, regardless of scholarship status, who want to find a balance between academics and athletics by placing an emphasis, through monetary compensation, on the athletic portion of their commitment. The current rules additionally subject the student-athletes to academic performance standards.\textsuperscript{40} Failure to meet these academic obligations results in ineligibility to participate in athletics, and is a legitimate reason for the cancelling of scholarships.\textsuperscript{41} There has been no discussion how the current NCAA rules would apply to student-athlete employees, though it can be assumed that their employee status would not be revoked for poor academic performance, thus furthering the disconnect between student-athletes and their academic pursuits.

**IV. Scholastic Activities**

The Regional Director’s decision also puts a high emphasis on the athletic activities of the student-athletes, assuming that the only reason the student-athletes are at a given school is for the athletic component. The decision overlooks the GPA and credit hour requirements placed on student-athletes, as well as glazes over the often mandatory study hall hours and tutoring programs offered for student-athletes. The analysis depends on the fact that the athletic participation is in exchange for the scholarship in order to classify as a work for hire; scholarships can be revoked for a number of reasons, including academic.

The Regional Director highlights the ability of the athletic department, specifically the head coach of the football team, to revoke a scholarship for a variety of reasons, before continuing the analysis that this is an obvious connection to the scholarship and the student-

\textsuperscript{40} NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2014-15 NCAA DIVISION I MANUAL, 147-185 (August 2014).

\textsuperscript{41} Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, Regional Director’s Decision and Direction of Election, N.L.R.B. (2014) (review pending before full Board).
athletes’ athletic services. There is no mention that scholarships are subject to academic restrictions, nor that a scholarship could be revoked for poor academic performance. Such a tie to academic performance would limit the ability for the scholarship to be classified as compensation for athletic services since it is conditional upon the student-athlete performing academically as well.

The Regional Director’s decision is a potentially flawed analysis that additionally overlooks harms to the student-athletes that would be further exacerbated by classifying the student-athletes as employees of the university. Thus, this classification is not a workable solution for any of the problems that student-athletes must overcome today.

Solution:

The two largest problems faced by student-athletes are the distraction from schoolwork and the cost of attendance, as scholarships do not typically cover the full cost of attendance at a university. Classifying scholarship-receiving student-athletes as employees of the university does not adequately mitigate these problems. In order to combat these problems there needs to be a greater reform of the system. The NCAA, conferences, and individual schools need to change the treatment of student-athletes in order to ensure the educational value of a scholarship is not lost to the athletic participation. The most workable solution to the problems student-athletes face is to allow the student-athletes the ability to profit off of their likeness; giving the student-athletes more control over their own lives.

This proposed solution requires the least amount of change to the current NCAA rules, as well as minimizes the cost both to the NCAA and the individual schools. The rules limiting the ability of the student-athletes’ ability to profit off of their likeness are not a large portion of the
NCAA Manual. Thus, changing this small portion to reflect the ability for student-athletes to profit off of their likeness would not require much effort outside of deleting the relevant portion of the rules in the handbook that currently prohibit the practice. This is a much easier change than rewriting and rewording the entire 434-page document to reflect employee status for the student-athletes on scholarship. This change is thus easier to pass through the NCAA and would take effect much faster than rewriting the entire book and having each new rule subsequently approved by the NCAA, and then implemented by the Conferences and the individual schools.

There are still issues that need to be addressed with the removal of the ban against profiting off of likeness. While the celebrity student-athlete is a rare phenomenon, and few will ever encounter the ability to make substantial and lucrative sums as a result of their image or abilities, it is still a possibility. Current rules do not allow an employer to compensate a student-athlete more than a rate “commensurate with the going rate in that locality for similar services.”

It would be wise to keep this language as to prevent those few celebrity student-athletes from receiving skewed compensation for otherwise simple services. Additionally, it would be prudent to update the rules, upon removal of the profiting off of likeness ban, to include salary caps for particular services in order to further prevent the student-athletes from abusing their celebrity status. An example of this would be to include amounts that are reasonable for services such as endorsements or participation in commercials.

For the non-celebrity student-athlete, the removal of this ban would allow greater freedom in employment opportunities. One such example, as discussed earlier, is the ability for student-athletes to participate or organize a camp or training experience using their position as Division I student-athletes, and their success in the given sport, as advertisement for this

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opportunity. Often times camps (1-2 weeks in the summer or winter break) are the only feasible employment option for student-athletes because of the time constraints placed over the entire year, allowing student-athletes to profit off of their likeness would thus allow them to advertise themselves in order to profit from these camps. There is an additional benefit to allowing this type of activity to occur, that is the benefit to the community.

Realistically, the geographic areas that student-athletes are likely to hold a camp or training activity in are going to be around the campus of the school the student-athletes attend, or around the hometown or area where the student-athletes grew up. This fosters a greater sense of community both for the sport and the student-athletes, as well as promotes the goodwill of the universities the student-athletes attend. Additionally, these camps or training sessions are likely to be targeted at the younger generation of athletes, the future collegiate athletes. Attendance at one of these camps may further promote participation and interest in the sport, as well as may allow a young athlete to obtain a level of training they may not have otherwise received. This training could provide skill and expertise that leads to the securing of a future scholarship. While this is all conjecture, it is easy to imagine the impact that this experience may have on the future of a young child.

Allowing student-athletes to profit off of their likeness also positively rewards those in sports that require more time commitment. The compensation student-athletes would receive would most likely be commensurate with the level of commitment and restriction they would have over their day-to-day activity. Where a famous quarterback may be able to star in a commercial, a tennis player may only be able to advertise his “fame” for a camp or training program. The profit received will more than likely be equal to the required participation.
Therefore, higher profits would inevitably go to the student-athletes that are already sacrificing more. Basketball players often miss a month of academic activity for the preparation and participation in the March Madness tournament; football players are in full bowl-game preparation mode during the last month of classes and during final exam time, as well as over the holiday season when they are often scheduled to practice or play on days that they would otherwise spend celebrating religious or social holidays with family and friends.

This solution is far from a new concept. The NCAA recently passed a new set of rules allowing for more autonomy in the top five conferences, in what can be seen as a means to make up for the restrictions on student-athletes. The NCAA is essentially allowing these top five conferences to make their own rules and guidelines. Those five conferences are: the Southeastern Conference, the Atlantic Coast Conference, the Pacific-12, the Big Ten, and the Big 12.

The change allows for the conferences to set scholarship guidelines for the universities to abide by. As discussed in *The New York Times*, this does not necessarily mean that salaries will replace scholarships, but that they will be more likely to cover the full cost of attendance. It is additionally too soon to see how this new autonomy will affect the student-athletes, and whether or not it will in fact be a beneficial change. While there is no way to prevent the distraction from academics, there is a way to compensate all student-athletes for their commitment without great reform of the overall system.

Granting conferences more autonomy in creating rules is a small step in the right direction; still, it does not adequately give the individual student-athletes a voice in how their lives are governed. The allowance for more autonomy can be seen as the NCAA recognizing that

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44 Id.
45 Id.
students need more money and are too restricted from making it on their own, but deferring the controversial decision making to the conferences. Outside of the effect on scholarships, more autonomy allows the five conferences to provide better for the student-athletes in the form of medical care, assistance, and even food. Nevertheless, only allowing the top five revenue making conferences to benefit from this change in the rules does not equally benefit all student-athletes, only those in universities within those five conferences.

Allowing student-athletes to profit off of their likeness would mitigate the cost of attendance as well as give the student-athletes greater control over their own schedule and lives. Additionally, there are those that are under the belief that prohibiting student-athletes from profiting off of their own likeness is a violation of antitrust laws and a restriction on trade. Edward O’Bannon, a retired basketball player, recently brought a suit on behalf of the NCAA Division I men’s football and basketball players alleging the NCAA rules prohibiting student-athletes from profiting off of their likeness were in violation of antitrust law. In August of 2014, the Court held for O’Bannon.

The Court’s decision only applies to NCAA Division I football and basketball players, and additionally allows for the NCAA to set a cap on the amount of earnings allowed, so long as it allows a minimum of $5,000 per student-athlete per year. Still, the NCAA has appealed the ruling in this case, thus delaying the effect of the permanent injunction issued in the monumental

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Pending appeal aside, the O’Bannon decision is a large leap forward in addressing the need for change in the NCAA rules and the treatment of student-athletes.

The O’Bannon decision is based off of marketplace concerns, where Plaintiffs are challenging the set of rule that restrict student-athletes from receiving a share of the revenue raised by the NCAA and its member schools by the sale of licenses to use the student-athletes’ likenesses, including name and image. The Court found that these rules unreasonably restrained trade in the relevant market, namely educational and athletic opportunities offered by NCAA Division I schools, and issued a permanent injunction prohibiting these “overly restrictive restraints.”

This decision forces the NCAA to review its rules in order to account for the growing marketplace due to technological advancements. Namely, it requires the NCAA to evolve along with the marketplace and change the rules in order to support the current needs of its student-athletes. While the ruling has not yet taken effect, and may not ever take effect depending on the outcome of the appeal, it has brought the many issues and problems created by the NCAA rules to light in a large public forum. Allowing the public a glance into the inequality and plight of the student-athlete, while simultaneously forcing the NCAA to review its rules in accordance to the current state of technology and sports culture, is a great step forward in starting the process of inflicting change to the NCAA rules.

Conclusion:

Although the Regional Director of the Board found that student-athletes receiving a scholarship for their participation in collegiate athletics are employees of the university, the

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50 O’Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).
51 Id.
classification of student-athletes as employees does not adequately protect the student-athletes from the problems they encounter, and is therefore not the most workable solution.

The NCAA, conferences, and individual schools need to change the treatment of student-athletes in order to ensure the educational value of a scholarship is not lost to the athletic participation. In order to mitigate this harm it is important to give student-athletes more control over their lives, thus, collegiate athletes should be able to profit off of their likeness. This gives each student-athlete the ability to benefit from the commitments they make to their school and team, as well as give back to the communities that support them in their athletic endeavors. Allowing student-athletes to profit off of their likeness enables student-athletes to take control of a portion of their life during what is otherwise a heavily regulated collegiate experience.