WHICH COLLEGE ATHLETES PASS THE TEST? ANALYZING THE IMPLICATIONS OF THE *JOHNSON V. NCAA* FLSA EMPLOYMENT TEST FOR COLLEGE ATHLETES

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INTRODUCTION

On New Year's Day 2024, over twenty-seven million people tuned in to watch the college football Rose Bowl in Pasadena, California.[1] This was the most watched college football game of the 2023-2024 season.[2] While the Rose Bowl broadcast surely provides scenic views of the sunset over the San Gabriel Mountains, the overwhelming majority of people tuned into the game for the sole reason of watching college athletes represent their university on the football field. Just a week later, another twenty-five million people tuned into to watch the College Football National Championship game.[3] The only other television broadcasts of the year with more viewership were National Football League (NFL) games, the President's annual State of the Union Address, and the Macy's Thanksgiving Parade.[4] With college football and even men's college basketball viewership numbers frequently outperforming professional sport leagues,[5] athletic conferences have been rewarded with lucrative television contracts. Television contracts have become so lucrative that one athletic conference expects to be able

* J.D. Candidate, The University of Toledo College of Law (May 2026). I would like to thank my faculty advisor, Dean Geoffrey Rapp, for his guidance and feedback throughout this process. I would also like to thank my family and friends for their constant support throughout my law school experience. I would also like to thank college athletes for their commitment to the sports they love and the entertainment they provide to avid sports fans like myself.

1. Nick Schultz, *College Football TV Ratings: Top 10 Most-Watched Games of the 2023 Season*, ON3: NIL (Jan. 11, 2024), https://www.on3.com/nil/news/college-football-tv-ratings-top-10-most-watched-games-2023-season-michigan-alabama-washington-ohio-state/.

2. *Id.*

3. *Id.*

4. Anthony Crupi, *NFL Swallows TV Whole, with 93 of Year's Top 100 Broadcasts*, SPORTICO (Jan. 5, 2024, at 05:55 ET), https://www.sportico.com/business/media/2024/nfl-posts-93-of-top-100-tv-broadcasts-2023-1234761753/.

5. Jon Lewis, *2023 Ratings Wrap: NFL Sweeps Top 50*, SPORTS MEDIA WATCH, https://www.sportsmediawatch.com/2024/01/most-watched-sports-2023-nfl-sweeps-top-50-college-football-nba-mlb/ (last visited Oct. 4, 2025) (excluding NFL games, men's college basketball and football accounts for twenty-six of the forty most watched sporting events in 2023).

to distribute between $80 million and $100 million annually to each of its member schools.[6]

Behind all these lucrative television contracts are the college athletes themselves who toil and sacrifice their talents on the field.[7] College athletes have taken notice of the significant financial benefits their sports often provide to their universities. In a recent trend, college athletes have taken to the courtroom to argue that they should be employees of their university for purposes of the Fair Labor Standards Act (FLSA).[8] The creation of the FLSA dates back to the 1930s when President Franklin D. Roosevelt sought to protect workers from their employers and ensure they receive "a fair day's pay for a fair day's work."[9] The FLSA requires that employers pay their employees minimum wage for all hours worked.[10] The FLSA intentionally defines "employee" broadly to include all workers not specifically exempted from the act; but, up until *Johnson v. NCAA*, college athletes had never met this broad definition to be considered "employees" of their school.[11]

The recent landmark Third Circuit decision in *Johnson v. NCAA* held that college athletes can be employees of their university for purposes of the FLSA.[12] The court held that the "economic reality" of the relationship between college athletes and their schools needs to be analyzed to determine whether an employer-employee relationship exists for purposes of the FLSA.[13] Leaving the door open for certain college athletes to be considered employees of their school, the Third Circuit created a four-part factual test to guide lower courts in their analysis of which college athletes warrant FLSA protections.[14] The college athletes who pass this Third Circuit's FLSA test will be considered employees of their university and guaranteed minimum wage for all hours spent participating in their sport.[15]

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6. *The Big Ten Effect: With 4 New Football Teams Next Year, the NCAA Conference Will Extend Its TV Reach in Key Markets*, NIELSEN (Sep. 2023), https://www.nielsen.com/insights/2023/the-big-ten-effect-with-4-new-football-teams-next-year-the-ncaa-conference-will-extend-its-tv-reach-in-key-markets/ [hereinafter *The Big Ten Effect*] (this number may change with the addition of other schools into the Big Ten).

7. *See generally* Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 597 (1944) (finding that the Fair Labor Standard Act was specifically intended to protect "those who toil [and] and sacrifice a full measure of their freedom and talents to the use and profit of others.").

8. *See* Berger v. NCAA, 843 F.3d 285, 289 (7th Cir. 2016); Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019); Johnson v. NCAA, 108 F.4th 163, 167 (3d Cir. 2024).

9. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/history/flsa1938 (last visited Oct. 4, 2025).

10. 29 U.S.C. § 206(a) (2024); 29 U.S.C. § 207(a) (2024).

11. *See* United States v. Rosenwasser, 323 U.S. 360, 363 (1945) (broad wording of the statute shows Congress's "intention to include all employees within the scope of the Act unless specifically excluded"); 29 U.S.C. § 203(e)(1) (2022) (defining employee as "any individual employed by an employer"); *Berger*, 843 F.3d at 293 (finding that college athletes are not employees of their university or under the terms of the FLSA); *Dawson*, 932 F.3d at 913 (finding under California law, that college athletes are not employees of their university or under the terms of the FLSA).

12. *Johnson*, 108 F.4th at 180.

13. *Id.* at 182.

14. *Id.* at 180.

15. *Id.*

The *Johnson* decision was a major win for college athletes; however, there still remains much factual inquiry in the lower courts to determine which college athletes should be considered employees of their university for purposes of the FLSA. The Third Circuit's four-part test to determine which college athletes are employees of their university is analyzed and applied to the factual circumstances of college athletes.[16] This note argues that *Johnson's* test fails to provide clear guidance on where to draw the FLSA employee and non-employee line for college athletes. Courts should focus their analysis on whether the college athletes' sport is revenue positive for their university because that is the clearest point at which college athletes are playing primarily for the benefit of their university, rather than for their own personal benefit. Applying the Third Circuit's holding, this note concludes that most Power Four men's basketball and football players should receive FLSA employee protection and thus be entitled to minimum wage, while all other college athletes participating in nonrevenue sports should not be protected under the FLSA or considered employees of their university.

I. THIRD CIRCUIT'S RULING IN *JOHNSON V. NCAA*

A. District Court Background

In November 2019, six current and former athletes at NCAA Division I universities filed complaints against their universities and the NCAA.[17] The athletes asserted claims for violation of the FLSA and sought relief in the form of unpaid wages.[18] The plaintiffs argued that students who engage in interscholastic athletic activity for their universities are employees and thus entitled to the FLSA protection of minimum wage.[19] The named plaintiffs were members of the Villanova University football team, Fordham University swimming and diving team, Sacred Heart University tennis team, Cornell University soccer team, and Lafayette College tennis team.[20] The plaintiffs pleaded facts highlighting that the NCAA and its member institutions profit largely off collegiate athletics while NCAA bylaws prohibit universities from offering wages to their student athletes.[21]

In March 2020, the NCAA and its member schools moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[22] They asserted that collegiate athletes cannot be employees for their universities because they are "amateurs."[23] Emphasizing the "revered tradition of amateurism" in college sports,

16. *Id.*

17. *Id.* at 167, 174 n.56; Johnson v. NCAA, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021).

18. *Johnson*, 556 F. Supp. 3d at 495, 498-99.

19. *Id.* at 495.

20. *Id.* at 495-96.

21. *Id.* at 496-97.

22. *Id.* at 495; Fed. R. Civ. P. 12(b)(6) (asserting that the complainant failed "to state a claim upon which relief can be granted").

23. *Johnson*, 556 F. Supp. 3d at 500.

the NCAA and its member schools argued that college athletes cannot be considered employees under any FLSA "economic realities" test.[24]

In August 2021, the District Court concluded that the complaint plausibly alleged that the plaintiffs are employees of their schools for purposes of the FLSA.[25] The NCAA and defendant schools' amateurism argument was rejected.[26] The District Court analyzed the "economic realities" of the relationship between college athletes and their schools by applying the FLSA multifactor test from *Glatt v. Fox Searchlight Pictures*.[27] The *Glatt* primary beneficiary test was created by the Court of Appeals for the Second Circuit to analyze the "economic reality" of the relationship between unpaid interns and their deemed employers.[28] Applying the seven *Glatt* factors to the relationship between college athletes and their respective schools, the District Court concluded that the college athletes had plausibly pleaded that they were employees.[29] The District Court denied the NCAA and its member schools' motion to dismiss.[30]

In December 2021, the District Court granted the NCAA and its member schools' motion to certify an interlocutory appeal from the denial of their motion to dismiss. [31] The sole issue raised on interlocutory appeal to Third Circuit Court of Appeals reads as follows: "Whether NCAA Division I athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics."[32]

B. Third Circuit Articulates a New FLSA Multifactor Test for College Athletes

To determine whether an employer-employee relationship exists under the FLSA, courts look to the "underlying economic realities" of the relationship.[33] In examining the relationship, courts must analyze the "circumstances of the whole activity" rather than looking at isolated factors.[34] In an effort to discern the economic reality between two parties, courts often create multifactor tests.[35] There is no single multifactor test that can be applied to any FLSA case, rather courts "must identify, from the totality of the circumstances, the economic (and other) factors most relevant to the issue in dispute."[36]

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24. *Id.* at 501 (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 102 (1984)).
25. *Id.* at 512.
26. *Id.* at 501.
27. *Id.* at 509-12.
28. Johnson v. NCAA, 108 F.4th 163, 175 (3d Cir. 2024).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. Martin v. Selker Bros., 949 F.2d 1286, 1293 (3rd Cir. 1991) (citing Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947)).
34. *Id.*
35. *Johnson*, 108 F.4th at 189 n.9 (Porter, J., concurring).
36. Brown v. N.Y.C. Dep't of Educ., 755 F.3d 154, 170 (2d Cir. 2014).

The Third Circuit found that all "existing multifactor tests are inadequate when applied to the college athlete."[37] The Third Circuit held that the District Court erred by applying the Second Circuit's primary beneficiary test from *Glatt*.[38] The *Glatt* multifactor test consists of seven non-exhaustive factors to determine whether an unpaid student intern is an employee under the FLSA.[39] The Third Circuit found the *Glatt* test to have little relevance to college athletes because several of the factors focus on educational benefits received during an internship.[40] The Court found that college athletes receive no educational benefits or skills by their participating in their sport.[41] The Court also has issue with the *Glatt* test because it has an underlying assumption that the alleged employee engages in compensable work for their employer, a fact the Court does find to be true for all college athletes.[42]

Although the Third Circuit was not inspired by *Glatt's* unpaid internship FLSA test, the Court did acknowledge that graduate students "may be the closest equivalent" to college athletes.[43] Like college athletes, graduate students' tuition is often fully paid for as a recruitment incentive.[44] Graduate students also must perform work activities for their educational institution that sometimes do not add value or have a connection to their course of study.[45] However, graduate students are often exempt from FLSA coverage because their primary duty is considered teaching.[46] Congress has carved out teachers and other academic administrative personnel from the FLSA protections of minimum wage.[47]

Acknowledging graduate students' statutory exemption from FLSA coverage, the Third Circuit turned to National Labor Relation Act (NLRA) cases that have considered whether graduate students can be considered "employees" of their university.[48] In *Trustees of Columbia University*, the National Labor Relations Board (NLRB) applied a common-law agency test focusing on the alleged employer's control when considering whether graduate students meet the NRLA's definition of "employee."[49] *Trustees of Columbia University* held that graduate students can be considered "employees" of their university.[50] The NRLA has the policy goal of guaranteeing employees the right to organize and bargain

37. *Johnson,* 108 F.4th at 182.
38. *Id.* at 167.
39. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536-37 (2d Cir. 2015).
40. *Johnson,* 108 F.4th at 180.
41. *Id.*
42. *Id.*
43. *Id.* at 179 n.59.
44. *Id.*
45. *Id.*
46. *Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Aug. 2024), https://www.dol.gov/agencies/whd/fact-sheets/17s-overtime-educational-institutions [hereinafter *Fact Sheet #17S*]; 29 U.S.C. § 213(a)(1) (2022).
47. *Fact Sheet #17S*, *supra* note 46; § 213(a)(1).
48. *Johnson*, 108 F.4th at 178.
49. Trs. of Columbia Univ., 364 NLRB 1080, 1081-82 (2016).
50. *Id.* at 1083.

collectively with their employer, a separate and unique policy goal from the FLSA.[51] Despite the distinct NRLA policy goals from the FLSA, the Third Circuit analyzed *Trustees of Columbia University* and other NRLA cases in order to help "answer fundamental questions related to the equitable regulation of the American workplace."[52]

1. The Four-Part Test

The Third Circuit created a four-part factual test to analyze the economic realities of the relationship between college athletes and their school.[53] Analyzing FLSA caselaw, the court determined that the test would have to weed out college athletes who play "solely for [their] personal purpose or pleasure."[54] The court further incorporated common-law agency principles to help evaluate the alleged employer-employee relationship between college athletes and their schools.[55] While acknowledging that the cumulative circumstances of the relationship must be analyzed, the Third Circuit held that for purposes of the FLSA a college athlete may be an employee of their university when they: (1) "perform services for another party," (2) "necessarily and primarily for the other party's benefit," (3) "under that party's control or right of control," and (4) "in return for 'express' or 'implied' compensation or 'in-kind benefits.'"[56]

C. Third Circuit Emphasizes Amateurism Is No Shield to FLSA Claims

During the Third Circuit's interlocutory appeal, a major antitrust case was unfolding against the NCAA.[57] For decades, the NCAA has faced accusations of violating antitrust laws.[58] College athletes have argued that the NCAA's rules violate the Sherman Act because they are "in restraint of trade or commerce."[59] Until recently, the NCAA had been successful in defending antitrust claims largely because of the 1984 Supreme Court opinion *NCAA v. Board of Regents*.[60] In *Board*

51. *Johnson*, 108 F.4th at 178; *Employee Rights Under the National Labor Relations Act*, U.S. DEP'T OF LAB.: NAT'L LAB. RELS. BD. (May 2, 2022), https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/eo_posters/employeerightsposter11x17_2019final.pdf.

52. *Johnson*, 108 F.4th at 178-79.

53. *Id.* at 180.

54. *Id.* at 177 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947)).

55. *Id.* at 179.

56. *Id.* at 180 (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590 (1944)); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985).

57. *See generally* NCAA v. Alston, 594 U.S. 69 (2021) (challenging the NCAA's restrictions on college athlete compensation and education related benefits as a violation of the Sherman Antitrust Act).

58. Claire Haws, Note, *The Death of Amateurism in the NCAA: How the NCAA Can Survive the New Economic Reality of College Sports*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 343, 344 (2022).

59. *Id.*; Sherman Antitrust Act of 1890 § 1, 15 U.S.C. § 1 (amended 1914).

60. Haws, *supra* note 58, at 347-48; *Johnson*, 108 F.4th at 172; *see* McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738, 746 (M.D. Tenn. 1990); Banks

of Regents, the Supreme Court relied on the principle of amateurism to justify restraints the NCAA imposes on college athletes through their rules and bylaws.[61]

In June 2021, the NCAA's amateurism shield was dealt a major blow by the Supreme Court in *NCAA v. Alston*.[62] The *Alston* ruling established that the NCAA cannot use amateurism as a defense to violations of antitrust law.[63] The *Alston* holding weakened the NCAA against future antitrust and employment claims.[64] Just one month after the Supreme Court's *Alston* opinion, the Third Circuit issued their opinion of the *Johnson* interlocutory appeal.[65]

In July 2021, the Third Circuit issued their opinion and found that the history and tradition of amateurism in college sports does not bar college athletes from asserting FLSA claims.[66] The court relied largely on Justice Kavanaugh's concurrence in *NCAA v. Alston* to discredit the Supreme Court's outdated comments in *Board of Regents* about preserving amateurism in college athletics.[67] The Third Circuit emphasized that the Supreme Court's prior comments supporting the NCAA's amateurism argument "have no bearing on whether the NCAA's current compensation rules are lawful."[68] Further undermining the NCAA's argument, the Third Circuit found that the NCAA has "not adopted any consistent definition [of amateurism]."[69] Rather, courts have found that "the NCAA's rules and restrictions on [college athlete] compensation have shifted markedly over time."[70] Carrying on *Alston's* rejection of the NCAA's amateurism argument, the Third Circuit found that college athletes can bring forward FLSA claims alleging an employer-employee relationship with their school.[71]

The Third Circuit's ruling that amateurism itself does not bar athletes from bringing forward FLSA claims opposes other Circuit Court's rulings.[72] In *Berger v. NCAA*, the Seventh Circuit affirmed the District Court's dismissal of collegiate track athletes' FLSA employee claims against their university.[73] The Seventh Circuit declined to apply any FLSA multifactor test to determine whether the collegiate track athletes were employees of their school because they believed such test would "fail to capture the true nature of the relationship."[74] Fixated on the

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v. NCAA, 977 F.2d 1081, 1089-90 (7th Cir. 1992); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004); Agnew v. NCAA, 683 F.3d 328, 342-43 (7th Cir. 2012).

61. NCAA v. Bd. of Regents, 468 U.S. 85, 119-20 (1984).

62. *Johnson*, 108 F.4th at 173.

63. Jennifer A. Schults, Note, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status*, 56 COLUM. J.L. & SOC. PROBS. 451, 474 (2023); Haws, *supra* note 58, at 351-52.

64. Schults, *supra* note 63, at 485.

65. *Johnson*, 108 F.4th at 167, 182.

66. *Id.*

67. *Id.* at 181.

68. *Id.* (quoting NCAA v. Alston, 141 S.Ct. 2141, 2167 (2021)).

69. *Id.* (quoting NCAA v. Alston, 141 S.Ct. 2141, 2163 (2021)).

70. *Alston*, 594 U.S. at 101 (citing D. Ct. Op., at 1071-74).

71. *Johnson*, 108 F.4th at 182.

72. *Id.*

73. Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016).

74. *Id.* at 291 (quoting Vanskike v. Peters, 974 F.2d 806, 809 (7th Cir. 1992)).

tradition of amateurism in college athletics, the Seventh Circuit found that collegiate athletes cannot be employees of their university and thus are not entitled to minimum wage under the FLSA.[75] In *Johnson*, the Third Circuit expressed their disagreement with the ruling in *Berger*.[76] The Third Circuit declined to follow the Seventh Circuit's logic that the tradition of amateurism defines the relationship of college athletes with their schools.[77]

The Third Circuit was the first Court of Appeals to hold that amateurism does not define the economic realities of the relationship between collegiate athletes and their schools for purposes of the FLSA.[78] The holding is a massive hurdle crossed for college athletes in their fight for FLSA employment. NCAA member schools can no longer shut down their athletes' FLSA claims by simply relying on the tradition of amateurism.[79] The Third Circuit acknowledged that although college athletes cannot be barred from asserting FLSA simply because of the tradition of amateurism, there needs to be "an economic realities framework that distinguishes college athletes who 'play' their sports for predominantly recreational or noncommercial reasons from those whose play crosses the legal line into work protected by the FLSA."[80]

II. APPLYING AND ANALYZING EACH PART OF THE *JOHNSON* TEST

The *Johnson* majority acknowledges that their four-part test will require a highly factual inquiry of the lower courts.[81] However, the Third Circuit believes that their articulated test provides the relevant law for the lower courts to apply to each unique case involving college athletes' FLSA claims against their school.[82] This section analyzes each part of the *Jonhson's* four-part test and discusses the likely outcomes for each test.

A. "Perform Services for Another Party"[83]

This test is inspired by the common-law agency definition of an employee.[84] The common-law agency definition is used to define an "employee" in federal

75. *Id.* at 293.
76. *Johnson,* 108 F.4th at 182.
77. *Id.*
78. *Id.*
79. *See id.*
80. *Id.*
81. *Id.* at 182 n.62.
82. *Id.*
83. *Id.* at 180.
84. N.Y. Univ., 332 N.L.R.B. 1205, 1205-06 (2000) (finding that the term "employee" reflects the common law agency doctrine of "when a servant performs for another"); Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1081 (2016) (finding that the common law agency doctrine of the conventional master-servant relationship establishes that an employee exists "when a servant performs services for another").

programs with separate and distinct policy goals from the FLSA.[85] Historically, when determining whether an employee exists under the FLSA, common-law agency definitions of an employee "are not of controlling significance."[86] Rather, FLSA cases examine the "economic realities" of the alleged employee-employer relationship.[87] The FLSA's "economic realities" definition of employee is more lenient and covers more workers as employees.[88] The common law agency inquiry does little to analyze the "economic realities" between college athletes and their school.

The test also does not help distinguish among different types of college athletes because all athletes "perform services for another party."[89] Whether a college athlete participates in a team or individual sport, they represent and perform on behalf of their school. As the *Johnson* concurrence notes, "student-athletes serve the teams for which they play…[t]hat's the whole point of team sports."[90] Teamwork is defined as "work done by a group acting together so that each member does a part that *contributes to the efficiency of the whole*."[91] Every collegiate athlete performs services on behalf of their team and school. This fact alone does not help for FLSA purposes of determining whether an employee-employer relationship exists because it does not analyze the "economic realities" of the parties.

B. "Necessarily and Primarily for the Other Party's Benefit"[92]

This test analyzes who in the alleged employer-employee relationship is the primary beneficiary of the work performed.[93] To be considered an employee under the FLSA, the alleged employee must be performing "work."[94] The Supreme Court has interpreted "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[95] In primary beneficiary analyses like this one, a FLSA employee-employer relationship does not exist when the

85. Lauren Hand, Comment, *You Guys Are Getting Paid? Time for Interns to Cash in on the FLSA*, 127 DICK. L. REV. 813, 818-19 (2023) (finding that common law definition of employee is used for purposes of "ERISA, the NLRA, OSHA, and the federal employment anti-discrimination statutes").

86. Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947) (finding that common law classifications of employer-employee relationships are not of significance in FLSA cases).

87. *Johnson*, 108 F.4th at 187 (Porter, J., concurring).

88. Geoffrey J. Rosenthal, Note, *College Play and the FLSA: Why Student-Athletes Should Be Classified as "Employees" Under the Fair Labor Standards Act*, 35 HOFSTRA LAB. & EMP. L.J. 133, 135 (2017).

89. *Johnson*, 108 F.4th at 180 (majority opinion).

90. *Id.* at 189 (Porter, J., concurring).

91. *Teamwork*, MERRIAM-WEBSTER (July 19, 2025), https://www.merriam-webster.com/dictionary/teamwork (emphasis added).

92. *Johnson*, 108 F.4th at 180 (majority opinion) (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944)).

93. *See* Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944).

94. *Id.*

95. *Id.*

benefits provided to the worker are greater than the worker's contributions to the employer.[96]

The *Johnson* concurrence argues that, in a general sense, all college athletes play primarily for the benefit of their school.[97] Consistent with the nature of organized sports, all college athletes perform services on behalf of their team and school simply by participating in their respective sport. While this may be true, for purposes of the FLSA, the analysis should focus on the economic realities of the relationship between the college athletes and their schools.[98] To answer the question of who primarily benefits from the sport, courts need to focus their analysis on the economic advantages (or disadvantages) a school receives from a particular sport.[99]

An initial question worth considering in this analysis: do sports even contribute to the "business" of a university?[100] If athletic teams are of no benefit to a university or a university's "business," then college athletes could not be employees under the FLSA. Data and trends, however, suggest that athletics often greatly benefit the business of a university. A collegiate athletic team can act as the "front porch" for a university and attract alumni, donors, and spectators from around the country to engage with the university.[101] Collegiate athletic events often bring over 100,000 people onto campus to celebrate the success (or disappointment) of their favorite university.[102] Athletic programs are a university's primary form of "mass media" as millions of people around the country tune in to watch collegiate sporting events.[103] Television contracts for sports, such as football, distribute massive amounts of money to universities.[104] For example, the Big Ten conference expects to be able to distribute between $80 million and $100 million a year to each member school from media television contracts to broadcast highly watched sports like men's basketball and football.[105] Certainly, the sports that bring massive contract dollars and viewership to their universities contribute to the "business" of a university. Although, the data is not conclusive that sports provide benefits to the "business" of their university because some schools find that interscholastic athletics provide no sustained benefit to their school's enrollment and retainment.[106]

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96. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535 (2d Cir. 2015).

97. *Johnson*, 108 F.4th at 189 (Porter, J., concurring).

98. *Id.* at 180 (majority opinion).

99. *Id.*

100. *Id.* at 192 (Porter, J., concurring).

101. William W. Berry III, *Enhancing "Education": Rebalancing the Relationship Between Athletics and the University*, 78 LA. L. REV. 197, 207-08 (2017).

102. *Id.* at 208.

103. *Johnson*, 108 F.4th at 169 (majority opinion); *see* Kendall Baker, *College Sports Viewership Is on Fire*, AXIOS (June 29, 2023), https://www.axios.com/2023/06/29/college-sports-tv-viewership-increase.

104. *The Big Ten Effect*, *supra* note 6.

105. *Id.*

106. *See generally* Merritt Enright et al., *Figures: College Students May Be Paying Thousands in Athletic Fees and Not Know It*, NBC NEWS (Mar. 9, 2020, at 13:01 ET), https://www.nbcnews.com/news/education/hidden-figures-college-students-may-be-paying-thousands-athletic-fees-n1145171

Most college universities are Internal Revenue Code 501(c)(3) non-profit organizations.[107] Despite their non-profit status, courts have recognized that universities often receive significant economic benefit from their athletic programs.[108] The economic benefits received from transactions related to their athletic programs can be used to "aid a university in many positive ways that fall in line with the mission of the university as whole."[109] Similar to the facts at hand, *Tony & Susan Alamo Foundation v. Secretary of Labor* provides a FLSA analysis dealing with alleged employees of a nonprofit.[110] In *Alamo Foundation*, a nonprofit organization that provided religious and humanitarian services to individuals throughout the community funded their operation by a number of commercial businesses.[111] The foundation did not pay wages to the volunteers staffing their commercial business enterprises.[112] Despite being a nonprofit religious organization, the Supreme Court found that the volunteers working for the commercial businesses of the foundation were employees for purposes of the FLSA.[113] The volunteers of these commercial businesses for the foundation were protected under the FLSA because the commercial businesses produced significant economic benefits for the foundation.[114]

Applying the *Alamo Foundation* analysis to college athletics, it is true that very few college athletes participate in sports for their university that create a profit (otherwise known as nonrevenue sports).[115] A study found that only 18 of 229 NCAA Division I public universities' athletic programs were profitable.[116] This means that roughly 92% of NCAA Division I athletic programs lose money for their universities.[117] Nonrevenue sports (or essentially all sports other than Division I men's basketball and football) place financial strains on their universities.[118] Athletes on these nonrevenue sports are not bringing in a profit for their university, rather they are performing an "economic disservice" to their

(university official finding that "athletics had 'no positive impact on our student enrollment, retention, or recruitment,'" and a sports economist finding that "[t]here's just not much evidence that a winning football team or an elite football team affects applicant pool or enrollment very much").

107. Scott Hodge, *The Big Business of Tax-Free College Sports*, TAX FOUND. (Aug. 21, 2023), https://taxfoundation.org/blog/college-sports-tax-free-revenue/.

108. Agnew v. NCAA, 683 F.3d 328, 340 (7th Cir. 2012).

109. *Id.* at 341.

110. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 292-95 (1985).

111. *Id.* at 292.

112. *Id.*

113. *Id.* at 306.

114. *Id.* at 297-98; Johnson v. NCAA, 108 F.4th 163, 190 (3d Cir. 2024) (Porter, J. concurring).

115. Celene Funke, *To Get NIL Right, Congress Must Protect Nonrevenue Sports*, SPORTS ILLUSTRATED (Mar. 11, 2021), https://www.si.com/college/2021/03/11/ncaa-name-image-likeness-athletes-acc (stating nonrevenue sport athletes make up 80% of the college athlete population).

116. Scott Hirko, LINKEDIN, *I Found 18 Profitable & 211 Money-Losing NCAA Division-I Public Athletic Programs in 2020* (Sep. 3, 2022, at 17:24 ET), https://www.linkedin.com/pulse/i-found-18-profitable-211-money-losing-ncaa-public-scott-hirko-ph-d-/.

117. *Id.*

118. Schults, *supra* note 63, at 492.

universities.[119] Therefore, college athletes who participate in nonrevenue sports for their universities do not play "necessarily and primarily" for the benefit of their university.[120]

Athletes participating in revenue positive sports provide significant economic benefits to their university.[121] In most NCAA Division I men's basketball and football programs, the relationship between the university and its athletes is in a sense commercial in nature because of the massive amounts of revenue the sports generate for the university.[122] The revenues generated for the university greatly outweigh the incidental academic benefits to the student athletes.[123] Similar to *Alamo Foundation*, the participants in these revenue positive sports provide significant economic benefits to their universities. It is because of these massive economic benefits that collegiate athletes who participate in revenue positive sports are playing "necessarily and primarily" for the benefit of their university.[124]

C. "Under That Party's Control or Right of Control"[125]

This part of the test created by *Johnson* is, again, an attempt to separate college athletes whose play constitutes "work" as opposed to those who play "solely for [their own] personal purpose or pleasure."[126] FLSA cases have interpreted that an important aspect of "work" is that it must be "controlled or required by the employer."[127] Applied to the facts of the case, the relevant analysis would be determining whether NCAA member school have control or a right of control over their athletes.[128]

Consistent with the idea of team sports, colleges exert substantial control over each of their athletes.[129] As the *Johnson* concurrence suggests, this analysis should not be overcomplicated because inherent in the concept of sports is that teams require direction and collaboration among many people in order to succeed.[130] This means that interscholastic collegiate coaches and administrators have to "evaluate players, assemble rosters, allocate playing time, make personnel changes, determine strategy, call plays, set practice and game schedules, arrange transportation, and so forth."[131] NCAA member schools also have policies that restrict their

119. Nick Tremps, *The Memorandum Heard Around the College Athletics World: Why Student-Athletes in Non-Revenue-Generating Sports Should Not Enjoy the Status of "Employee" Under the NLRA*, 14 WAKE FOREST L. REV. ONLINE 47, 62 (2024).

120. *See* Johnson v. NCAA, 108 F.4th 163, 180 (3d Cir. 2024).

121. *Id.* at 191 (Porter, J., concurring).

122. Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look Into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 191 (2020).

123. *Id.* at 206.

124. *See Johnson*, 108 F.4th at 180.

125. *Id.*

126. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

127. Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944).

128. *See id.*

129. *Johnson,* 108 F.4th at 189-90 (Porter, J. concurring).

130. *Id.*

131. *Id.* at 190.

athletes on a more personal level such as social media restrictions and prohibiting the athlete's use of substances like alcohol and nicotine.[132] A NLRB case examining this issue, found that scholarship football players "are under strict and exacting control by their [school] throughout the entire year."[133]

Colleges also exert control over their student athletes' academic lives.[134] Athletes often are unable to enroll in certain courses or miss classes due to conflicts with their athletics team schedule.[135] Athletes' participation in their collegiate sport may cause them to be "locked…out of hundreds of available classes, including prerequisites for certain academic degrees."[136] Certain college athletes may even be prevented from pursing their preferred major because of the conflicts with their athletic team's schedule.[137] Some of the academic control colleges exert over their athletes may take away from the athlete's education and learning experience; however, colleges also exert academic control that is intended to benefit their learning experience.[138] Colleges often require certain athletes to attend mandatory tutoring and advisory programs.[139] Some athletes are required to participate in professional development programs at their university which prepare them for seeking and obtaining employment after graduation.[140]

Although NCAA schools "exercise significant control" over their athletes, this finding alone does not conclusively determine that college athletes should be employees of their university for purposes of the FLSA.[141] Regardless of a nonrevenue or revenue positive sport, the athletes are required to follow their team rules and are thus subject to control of their university.[142] Nobody would question that members of a nonrevenue sport are not under the control of their university. For example, The Ohio State University men's ice hockey team currently has a head coach, an associate head coach, two assistant coaches, a director of operations, and nine support staff individuals certainly exhibiting some form of control over their athletes.[143] In the Fiscal Year 2023, the Ohio State men's ice hockey team's total expenses outweighed its total revenues by $3,208,939.[144] Although the university certainly exhibits control over its men's ice hockey

132. Tyler Murray, Note, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 802 (2022).

133. Nw. Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. 1350, 1363 (2015).

134. *Id.* at 1358.

135. *Id.* at 1361.

136. *Johnson*, 108 F.4th at 174.

137. *Id.*

138. *See Nw. Univ.*, 362 N.L.R.B. at 1364 (colleges may exert control over their student athletes "[t]o try and ensure that its players succeed academically.").

139. *Id.*

140. *Id.*

141. *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021).

142. Tremps, *supra* note 119 at 64.

143. *2024-2025 Men's Ice Hockey Roster*, OHIO STATE, https://ohiostatebuckeyes.com/sports/mens-ice-hockey/roster (last visited Oct. 4, 2025).

144. *NCAA Membership Financial Reporting System: Reporting Year (FY) 2023*, OHIO STATE NEWS 47, 79 (Jan. 5, 2024), https://news.osu.edu/download/d3729c7e-a2c4-4870-9901-bcf0c475c5ef/fy23ncaamembershipreportfinal.pdf.

athletes, should athletes who participate for a team that loses its institution $3.2 million a year be considered employees for purposes of FLSA?[145] At that point, it seems that the benefits the athletes are receiving by playing the sport they presumably love outweigh the financial benefits the university is receiving from the sport. Analyzing whether the college athlete is "under [their school's] control or right of control" will almost always be answered in the affirmative and does not fully examine the "economic reality" of the relationship between the athlete and their school.[146]

D. "In Return for 'Express' or 'Implied Compensation' or 'In-Kind Benefits'"[147]

This test helps to further distinguish between those college athletes whose play constitutes actual "work."[148] The Supreme Court has made clear that the FLSA does not protect a person who performs "without promise or expectation of compensation, but solely for his personal purpose or pleasure."[149] The compensation agreement can either be expressed or implied and does not need to take the obvious form of wages.[150] In *Alamo Foundation*, the Supreme Court found that benefits provided by the employer to the alleged employees such as food, shelter, transportation, and medical benefits were sufficient compensation to form a FLSA relationship.[151] Despite the absence of any actual wages paid to the alleged employees, the court found the alleged employees had expected to receive these in-kind benefits in exchange for their work.[152]

The NCAA does not allow college athletes to use their athletic skills for direct or indirect pay in any form.[153] But as the *Alamo Foundation* court held, atypical forms of compensation that the alleged employee relies on can be enough to create a FLSA employment relationship.[154] Colleges can provide their athletes with scholarships and financial aid to cover their tuition and fees, certain living expenses, required course materials, and other related expenses to attending the university.[155] The universities themselves, not the NCAA or athletic conference, award and distribute financial aid to their student athletes.[156] Athletic scholarships often allow college athletes to attend an academic institution that otherwise they

145. *Id.*
146. Johnson v. NCAA, 108 F.4th 163, 180 (3d Cir. 2024).
147. *Id.*
148. *Id.* at 190 (Porter, J., concurring).
149. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).
150. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985).
151. *Id.* at 293-295.
152. *Id.* at 301.
153. *Division I 2024-25 Manual*, NCAA PUBL'NS 36 (Aug. 9, 2024), https://www.ncaapublications.com/productdownloads/D125.pdf.
154. *Tony & Susan Alamo Found.*, 471 U.S. at 301; Johnson v. NCAA, 108 F.4th 163, 190 (3d Cir. 2024) (Porter, J., concurring).
155. *Division I 2024-25 Manual*, *supra* note 153, at 177.
156. Dawson v. NCAA, 932 F.3d 905, 909 (9th Cir. 2019).

could not afford.[157] In this sense, college athletes on athletic scholarships are "compensated" through their scholarships for the "work" they perform for their athletics team.

Those athletes considered "walk-ons" or whose schools do not distribute athletic scholarships would not pass this test.[158] Walk-on college athletes do not receive the in-kind benefits from their university that scholarship players receive.[159] Walk-ons have no expectation of any compensation from their university, they are simply playing their sport for the "love of the game."[160] If a walk-on player receives any sort of financial aid from their university it is not provided in exchange for their participation in the sport.[161] In contrast, a scholarship athlete will lose their financial aid related to the scholarship if they discontinue playing their sport.[162]

College athletes who do not receive athletic scholarships attend their university with no expectation of any in-kind compensation for their participation in a sport.[163] This means that walk-on, Ivy Legue, and NCAA Division III college athletes cannot be employees of their university for purposes of FLSA.[164] These athletes can voluntarily quit their sports team at any time with no resulting impact to their financial aid.[165] Athletes in these situations are playing "solely for [their] personal purpose or pleasure" which is not an employer-employee relationship for purposes of the FLSA.[166]

III. SIMPLIFYING AND IMPROVING THE *JOHNSON* TEST FOR COLLEGE ATHLETES

The *Johnson* majority is aware that their test will require an intensive factual analysis of any college athletes who bring forward FLSA claims against their university.[167] After all, the Third Circuit heard this case only on interlocutory appeal to determine whether college athletes *can be* employees of their university under the FLSA.[168] The test attempts to articulate the relevant FLSA law to apply to the unique facts of college athletes, while also emphasizing the need to analyze the cumulative circumstances of the relationship to see if an economic reality of

157. Michael Rovetto, *Impact of a Scholarship: Al Carey*, UNIV. OF MD. ATHLETICS (July 25, 2024, at 05:00 ET), https://umterps.com/news/2024/7/25/terrapin-club-impact-of-a-scholarship-al-carey.aspx.

158. *See* Nw. Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. 1350, 1364 (2015).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Athletic Scholarships: Everything You Need to Know,* NCSA COLL. RECRUITING, https://www.ncsasports.org/recruiting/how-to-get-recruited/scholarship-facts (last visited Oct. 4, 2025).

164. *Id.*

165. *Id.*

166. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

167. Johnson v. NCAA, 108 F.4th 163, 179 n.60 (3d Cir. 2024).

168. *Id.* at 175.

an employee-employer is revealed.[169] After analyzing the four factors of the test, the biggest question that remains is at what point is a college athlete's participation in their sport "necessarily and primarily" for the benefit of their school?[170]

To simplify the analysis, courts should focus on whether the sport the athlete participates in generates a positive revenue for their university. If the college athlete is on scholarship and participates in a revenue positive sport for their university, there likely exists an employer-employee relationship for purposes of the FLSA. After all, the FLSA was created for purposes of protecting "the rights of those who…sacrifice a full measure of their freedom and talents *to the use and profit of others*."[171] A brief analysis of the revenues and expenses of a collegiate athletic program should be the extent of the factual inquiry required by lower courts to determine if a FLSA employer-employee relationship can exist. With an incentive to prevent their college athletes from becoming employees, colleges may be tempted to manipulate their revenues and expenses. To combat this temptation, Division I athletic programs are required to annually submit financial reporting to the NCAA and complete agreed-upon procedures performed by an independent third-party public accountant.[172] These financial reporting procedures provide assurance that colleges are accurately reporting their athletic programs revenues and expenses.[173]

There is no doubt that colleges exert substantial control over all their athletes. However, there needs to be a way to distinguish those athletes who provide actual significant economic benefits to their university. The most crucial part of the analysis to determine whether a college athlete can be an employee of their university should focus on whether the sport they play is revenue positive for the university.

A. The "Economic Reality" of the Relationship Between Athlete and School

While the *Johnson* court provided a four-part factual test to aid in determining whether a college athlete can be considered an employee of their school, the Court emphasized that the "ultimate touchstone" is whether the circumstances between the athlete and university "reveal an economic reality that is that of an employee-employer."[174] Consistent with FLSA caselaw, the "circumstances of the whole activity" must be considered to determine whether a relationship constitutes that of an employee-employer.[175] The difficulty in analyzing the "economic realities" of college athletes is that many participate solely for personal pleasure and without any expectation of compensation.[176] The

169. *Id.* at 180 n.61.

170. Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944).

171. *Id.* at 597 (emphasis added).

172. *NCAA Compliance: Changes to Agreed upon Procedures Impact Finance Reporting*, CLA, https://www.claconnect.com/en/general/ncaa-aup-procedures (last visited Oct. 4, 2025).

173. *Id.*

174. *Johnson*, 108 F.4th at 180.

175. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

176. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

Supreme Court has made clear that these type of individuals are not protected as "employees" for purposes of the FLSA.[177]

College athletes participate in sports for their respective schools for a variety of reasons. Perhaps the most obvious reason is that college athletes derive pleasure and satisfaction from participating in their sport. Playing sports provides an individual with a sense of accomplishment and fosters a team spirit among a group of people.[178] Sports provide a way for individuals to physically exert themselves while participating in an activity they enjoy.[179] Besides the physical benefits of playing sports, many college athletes participate in sports to develop skills such as leadership, resilience, and discipline.[180] The valuable life lessons college athletes learn often make them more enticing to future employers as compared to their peers.[181]

For those college athletes who receive an athletic scholarship, playing their respective sport allows them to attend a university and receive an education that they may not have been able to obtain otherwise.[182] Athletic scholarships are awarded to only 59% of Division I college athletes.[183] Atypical forms of compensation, such as athletic scholarships, can be thought of as compensation for purposes of the FLSA.[184] The other 41% of Division I athletes are participating in their sport without any expectation of scholarship.[185]

Schools retain their college athletes through fostering a sense of social support and community.[186] College athletes are more likely to continue playing their respective sport if the school has a strong sense of community.[187] College athletes may receive athletic scholarship, an education otherwise unavailable to them, or personal character development by participating on their school's athletic team. Some college athletes may also financially benefit from greater marketability of their name, image, and likeness (NIL).[188]

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177. *Id.*

178. Rakesh Ghildiyal, *Role of Sports in the Development of an Individual and Role of Psychology in Sports*, 13 MENS SANA MONOGRAPHS 165, 167 (2015).

179. *Id.* at 166.

180. *Id.* at 166-67.

181. *What Is the Role of College Athletics, and Should Student-Athletes Be Paid?*, VALPARAISO UNIV. https://www.valpo.edu/president/editorials/what-is-the-role-of-college-athletics-and-should-student-athletes-be-paid/ [https://web.archive.org/web/20240802133605/https://www.valpo.edu/president/editorials/what-is-the-role-of-college-athletics-and-should-student-athletes-be-paid/] (last visited Oct. 4, 2025).

182. *Id.*

183. *NCAA Recruiting Facts*, NCAA (Oct. 2024), https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf.

184. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985); Johnson v. NCAA, 108 F.4th 163, 190 (3d Cir. 2024) (Porter, J. concurring).

185. *NCAA Recruiting Facts*, *supra* note 183.

186. Brennan Berg et al., *NCAA Athlete Development and Retention: Administrators' Perspectives*, 14 J. ISSUES INTERCOLLEGIATE ATHLETICS 694, 708 (2021).

187. *Id.* at 695.

188. Cole Claybourn, *Name, Image, Likeness: What College Athletes Should Know About NCAA Rules*, U.S. NEWS (Feb. 8, 2024, at 13:53 ET), https://www.usnews.com/education/best-colleges/articles/name-image-likeness-what-college-athletes-should-know-about-ncaa-rules.

The benefits a college receives from its athletes vary widely depending on the specific sport and athlete. The overwhelming majority of college athletic departments lose money for their universities.[189] Since most college athletic teams and departments have expenses that outweigh their revenues, colleges are forced to externally subsidize their athletic departments.[190] College athletic departments are often subsidized by fees assessed to full-time undergraduate students or directly through state support.[191] Colleges justify charging students an often "deceptive" fee to fund athletic programs because a college's athletic programs can attract more student applications and encourage donations.[192] College sports and athletes can serve as a marketing tool for the university to further brand recognition locally and nationally.[193] While some schools may benefit from the marketing their athletic programs provide, data also suggests that success of college athletic teams does not significantly affect student application pools or enrollment.[194] One university official noted that the impact of athletics programs on their university had "no positive impact on our student enrollment, retention or recruitment."[195]

Considering the "circumstances of the whole activity" between colleges and their student athletes, as previously discussed, there are many college athletes who participate in their sport without the expectation of compensation (or atypical compensation, such as scholarships) and do not provide any significant financial benefits to their university.[196] For these college athletes, it is unlikely that their participation in their sport constitutes the type of "work" that the FLSA was intended to protect.[197] However, the relationship is significantly different for those relatively few scholarship college athletes who participate in sports that "involve billions of dollars of revenue for [their] colleges and universities."[198] In these relationships, college athletes' "freedom and talents" are being deployed for the "use and profit" of their universities.[199] This is exactly the kind of relationship the FLSA was created to protect.[200]

189. Hirko*, supra* note 116*.*

190. Willis A. Jones & Michael J. Rudolph, *Athletic Subsidies and College Costs: Are Students Paying for the Rising Costs in Intercollegiate Athletics Spending?*, KNIGHT COMM'N ON INTER-COLLEGIATE ATHLETICS 4, https://www.knightcommission.org/wp-content/uploads/2015/04/jones.pdf (last visited Oct. 4, 2025).

191. *Id.* at 4-5.

192. Enright et al., *supra* note 106.

193. *Id.*

194. *Id.*

195. *Id.*

196. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

197. Walling v. Portland Terminal Co., 330 U.S. 148, 150-52 (1947).

198. Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J. concurring).

199. Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 597 (1944).

200. *Id.*; Johnson v. NCAA, 108 F.4th 163, 175 (3d Cir. 2024).

B. Power 4 Men's Basketball and Football Athletes Likely Employees Under the FLSA

As courts have noticed, the economic reality for sports such as Division I men's basketball and FBS football will be different from all other collegiate sports.[201] Men's Division I basketball and FBS football are unique because they attract so many spectators and warrant lucrative television deals for the university.[202] Analyzing current television contracts, Power Four conference television deals for the rights to broadcast men's basketball and football will likely be able to distribute on average: $31.7 million to each Big 12 school, $71.88 million to each Big 10 school, $68.75 million to each SEC school, and $17.1 million to each ACC school.[203] ESPN recently finalized a television contract with Power Four member schools where each school will receive between $12 million and $22 million a year for broadcast rights of the college football playoffs.[204] Men's basketball teams that make the NCAA Tournament earn an additional $2 million for their university for each round of the tournament to which they advance.[205]

Despite these lucrative television contracts and media rights for the Power Four conferences, not every member school in these conferences has revenue positive men's basketball and football programs. In the 2022-23 Big Ten season, thirteen of the fourteen member schools had revenue positive men's basketball and football programs.[206] For the 2022-2023 SEC season, while all public institution member schools had revenue positive football programs, only nine of the thirteen schools had revenue positive men's basketball programs.[207] A factual analysis of each school's athletic revenues and expenses is required to determine if a FLSA employer-employee relationship exists. School athletic departments need to ensure they are accurately bifurcating revenues and expenses to each sport so an analysis of the school's financials can easily discern which sports are earning their university a profit.[208]

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201. *Berger*, 843 F.3d at 294.

202. *Johnson*, 108 F.4th at 191.

203. *Current College Sports Television Contracts*, BUS. OF COLL. SPORTS (Mar. 19, 2024), https://businessofcollegesports.com/current-college-sports-television-contracts/.

204. David Cobb & Dennis Dodd, *College Football Playoff Finalizes TV Deal Beginning in 2026 as FBS Leaders Settle on Revenue Distribution*, CBS SPORTS (Mar. 15, 2024, at 14:57 ET), https://www.cbssports.com/college-basketball/news/college-football-playoff-finalizes-tv-deal-beginning-in-2026-as-fbs-leaders-settle-on-revenue-distribution/.

205. Dennis Romboy, *How Much Teams Get for Making the NCAA Tournament*, KSL.COM (Mar. 20, 2024, at 22:34 ET), https://www.ksl.com/article/50954173/how-much-teams-get-for-making-the-ncaa-tournament.

206. *See Sportico's College Sports Finances Database*, SPORTICO: THE BUS. OF SPORTS, https://www.sportico.com/leagues/college-sports/2023/college-sports-finances-database-intercollegiate-1234646029/ (last visited Oct. 4, 2025).

207. *See id.*

208. Katie Davis, *The Misconception of Revenue Generation in College Athletics*, JAMES MOORE (June 25, 2025), https://www.jmco.com/articles/collegiate-athletics-webinars/misconception-of-revenue-generation/.

C. All Other College Athletes Are Not Likely Employees Under the FLSA

The reality is that most college athletes play sports which lose money for their university.[209] Most athletic departments themselves operate at a loss and cost their university millions of dollars.[210] Without the television and media contracts that high level men's basketball and football attract, other college sports do not have the revenues to generate a profit for their university.[211] While a brief factual inquiry is required for each claim, courts should be able to presume that college athletes other than men's basketball or football players in Power Four conferences are not playing primarily for the benefit of their university. Rather, these athletes are participating in their sport solely for their "personal purpose or pleasure."[212]

While the FLSA generally protects employees of businesses that are unprofitable or even unable to meet payroll,[213] the distinction between a profitable sport and a nonrevenue sport is crucial for the unique situation of college athletes.[214] Unlike independent contractors or interns who are undisputedly performing "work" for their employer,[215] college athletes participating in a sport does not always constitute performing "work" for their university.[216] Playing a sport purely for "personal purpose or pleasure" does not constitute the type of work that the FLSA was created to protect.[217] Analyzing whether the college athlete's sport is revenue positive helps to determine whether the athlete is engaged in the type of "work" the FLSA protects.[218]

The unfortunate "economic reality" for the plaintiffs who originally brought suit in *Johnson* is that they each played on nonrevenue teams that do not attract the large television revenues for their schools.[219] Like most college athletes, they will not likely pass the test articulated in *Johnson* and should not be considered employees of their university for purposes of the FLSA.

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209. Michael F. Cavanagh, *Sports Costs Are an Affordability Issue,* INSIDE HIGHER ED (Jan. 12, 2024), https://www.insidehighered.com/opinion/views/2024/01/12/college-athletics-costs-are-affordability-issue-opinion.

210. *Id.*

211. *Id.*

212. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

213. *Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Sep. 2019), https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs; Johnson v. NCAA, 108 F.4th 163, 169 n.14 (3d Cir. 2024).

214. Johnson v. NCAA, 108 F.4th 163, 192 n.14 (3d Cir. 2024) (Porter, J., concurring).

215. Donovan v. Dialamerica Mktg., Inc., 757 F.2d 1376, 1379-83 (3d Cir. 1985); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536-38 (2d Cir. 2015).

216. *Johnson*, 108 F.4th at 177.

217. *Walling*, 330 U.S. at 152.

218. *See Johnson*, 108 F.4th at 192 n.14 (Porter, J., concurring).

219. Johnson v. NCAA, 556 F. Supp. 3d 491, 495-96 (E.D. Pa. 2021).

D. Utilizing a Revenue Test for Other Similar Alleged Employer-Employee Relations

While aspects of the college athlete's relationship with their school are unique, there are several groups of alleged employees who share similarities to college athletes. Graduate students and research assistants are enrolled at their university while also performing work for their institution that may not be directly connected to their course of study.[220] Unpaid student interns perform tasks for their employer that may or may not correspond to their educational coursework or count for academic credit.[221] College band members, musicians, actors, and journalists also share similarities to the college athlete because their extracurricular activities are not necessarily related to their course of study, however, the extra circular activity may provide some benefit to their university. While there is established FLSA caselaw and "economic reality" tests pertaining to graduate students and interns, a similar revenue-based focus as suggested for college athletes can be used to determine whether college band members, musicians, actors, and journalists should be considered "employees" of their university.

Unlike college athletes, most graduate students are statutorily exempt from FLSA protection because the graduate student is employed in a bona fide "professional capacity," which includes teachers and academic administrative personnel.[222] Courts have found that because graduate teaching assistants support university professors by performing certain duties associated with instructing class, they fall under the FLSA exemption for "any employee with a primary duty of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge."[223] A revenue-based analysis of the financial benefits graduate students provide for their university would provide minimal value since courts have found that graduate students are statutorily exempted from being afforded the minimum wage protections of the FLSA.[224]

Courts have developed primary beneficiary "economic realities" tests to determine whether an unpaid intern is an employee for purposes of the FLSA.[225] Although not all circuits have adopted the same primary beneficiary test, the Second Circuit's seven-factor test created in *Glatt* is the most widely adopted test for unpaid internships.[226] The *Glatt* test factors analyze who is ultimately receiving the primary benefit of the internship, the employer or the unpaid intern.[227] The *Glatt* factors largely focus on whether the internship is "similar to that which would be given in an educational environment" and whether the internship "is tied to the

220. *Johnson*, 108 F.4th at 179 n.58, 180.

221. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536-37 (2d Cir. 2015).

222. 29 U.S.C. § 213(a)(1) (2024).

223. Fraser v. Pa. State Univ., 681 F. Supp. 3d 386, 415 (M.D. Pa. 2023) (quoting 29 C.F.R. § 541.303(a) (2017)).

224. *Id.*; *Johnson*, 108 F.4th at 178-79 n.59.

225. *Glatt*, 811 F.3d at 536-37.

226. *See* Nick Martiniano, Comment, *Intern's Lament: Distinguishing an Employee and an Intern Under the Fair Labor Standards Act*, 126 PENN ST. L. REV. 307, 321 (2021).

227. *Glatt*, 811 F.3d at 536-37.

intern's formal education program."[228] Where unpaid internships often have the possibility of providing educational benefits to the student, college athletes' participation in their sport is more likely "detrimental to their academic performance."[229] Analyzing the revenues and profits that an unpaid intern provides for their alleged employer may be a consideration to establish who is the primary beneficiary of the relationship; however, FLSA caselaw has already provided more efficient tests that analyze the potential educational benefits of an internship.[230]

College band members, musicians, actors, and journalists have claims of employment under the FLSA that share similarities to those of college athletes.[231] In *Berger*, Judge Hamilton disagreed with the general logic that non-scholarship participants in extracurricular, such as band and debate team, could be considered employees of their university for purposes of the FLSA.[232] While those who participate in these activities without the expectation of any compensation or scholarship are not likely to be employees under the FLSA,[233] some colleges do award scholarships to members of their band and debate teams.[234] For those college students who receive scholarships to attend their college and participate in extracurricular activities such as marching band, an analysis of the extracurricular's revenue and profits would be important for purposes of establishing an FLSA employer-employee relationship. Determining if a sousaphone player on a college marching band member is performing "work" primarily for the benefit of their school, or rather simply playing for "personal pleasure,"[235] is a difficult task for courts. However, analyzing the profitability of a school's marching band can determine whether school is actually benefiting from the student's activity. College marching bands rely on funding through university administration, student fees, and other university departments which means that marching bands themselves do not generate enough revenue to cover their expenses.[236] It is a difficult factual analysis to determine the true value of a marching band to a school because, while unprofitable themselves, many find that marching bands are a key aspect to the often highly profitable sport of college football.[237] Marching bands play a factor in

228. *Id.* at 537.

229. *Johnson*, 108 F.4th at 180.

230. *Glatt*, 811 F.3d at 536-37.

231. Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J. concurring).

232. *Id.*

233. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

234. Arthur Murray, *Debate, Speak Up for College Scholarships*, U.S. NEWS (Aug. 3, 2017, at 10:00 ET), https://www.usnews.com/education/scholarship-search-insider/articles/2017-08-03/debate-speak-up-for-college-scholarships; Natalie Shelton, *Can I Get a College Scholarship Doing Marching Band? What You Need to Know,* FLOMARCHING (Sep. 6, 2023), https://www.flomarching.com/articles/11223073-can-i-get-a-college-scholarship-doing-marching-band-what-you-need-to-know.

235. *Walling*, 330 U.S. at 152.

236. Brandon S. Alt, *Maximizing the Return on Investment for College Marching Bands*, SCHOLARWORKS@BGSU: HONORS PROJECTS 5 (May 10, 2019), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1535&context=honorsprojects.

237. *Id.* at 1.

the pageantry and tradition of college football.[238] However, simply analyzing the lack of profitability of extracurricular collegiate activities, such as marching bands, will likely result in courts failing to find an FLSA employer-employee relationship for those college students.

IV. FUTURE FLSA IMPLICATIONS FOR COLLEGE ATHLETES

The NCAA has gradually seen its amateurism shield collapse in recent years from landmark cases such as *O'Bannon v. NCAA*, *NCAA v. Alston*, and continued by the Third Circuit's opinion in *Johnson*.[239] Following the 2021 *Alston* ruling, the NCAA permitted student athletes to benefit from their name, image, and likeness (NIL) which has opened up the possibility of lucrative financial opportunities for college athletes.[240] An even more recent landmark settlement, in *House v. NCAA*, will likely result in college athletes receiving a portion of their school's revenue.[241] As early as Fall 2025, colleges may have to share revenue upwards of $22 million a year with their student athletes.[242] With all these significant changes occurring in the college athletics environment, it is a possibility that college athletes' fight for minimum wage under the FLSA may be put on the backburner.

A. How Would FLSA Minimum Wage and NIL Interact?

The college athletes who stand to become employees under the *Johnson* FLSA test are also some of the athletes who financially benefit the most from NIL deals.[243] Nearly 67% of NIL compensation goes to athletes who play men's basketball or football.[244] These are the same college athletes who are most likely to be considered employees of their university for purposes of the FLSA. In 2023, the average Power Four men's basketball player made $200,213 through NIL,

238. Joe Vitale, *Josh Pate Perfectly Explains Why College Football Is Better Than the NFL*, ATHLONSPORTS (Feb. 19, 2024, at 15:07 ET), https://athlonsports.com/college-football/explaining-why-college-football-is-better-than-nfl.

239. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015) (finding many of the NCAA's amateurism rules to be precompetitive); NCAA v. Alston, 594 U.S. 69, 109 (2021) (Kavanaugh, J. concurring) (finding the NCAA's argument of amateurism to be "circular and unpersuasive"); Johnson v. NCAA, 108 F.4th 163, 182 (3d Cir. 2024) ("[W]e will not use a 'frayed tradition' of amateurism with such dubious history.").

240. Pete Nakos, *NIL Timeline: Key Moments That Have Defined the Era*, ON3 (Feb. 26, 2024), https://www.on3.com/nil/news/nil-timeline-key-moments-ncaa-greg-sankey-charlie-baker-livvy-dunne-jaden-rasahda-nico-iamaleava/.

241. Brandon Marcello, *College Athletes Set to Get $2.8 Billion, Revenue-Sharing Model in Landmark House v. NCAA Settlement*, CBS SPORTS (May 23, 2024, at 20:52 ET), https://www.cbssports.com/college-football/news/college-athletes-set-to-get-2-8-billion-revenue-sharing-model-in-landmark-house-v-ncaa-settlement/.

242. *Id.*

243. *On3 NIL Valuations*, ON3, (July 18, 2025, at 20:00 ET), https://www.on3.com/nil/rankings/ (finding that forty-eight of the fifty athletes with the highest NIL valuations play either men's basketball or football).

244. Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO!FIN. (July 1, 2022), https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html.

while the average Power Four football player made $49,894.[245] Recent trends indicate the college football players at the more premium positions command higher NIL deals, such that "you can get a quality starting Power Four quarterback in the $500,000 to $800,000 range."[246]

FLSA caselaw makes clear that protected employees "are not to be deprived of the benefits of the [FLSA] simply because they are well paid."[247] NIL compensation money primarily comes from collectives which are third-party businesses (or more recently 501(c)(3) nonprofits) formed by boosters or fans of a particular school.[248] These NIL collectives are separate from the college athlete's university.[249] In a sense, NIL compensation through these third-party collectives can be thought of as a tip for the student athlete's performance in their sport.[250]

If the college athletes are considered tipped employees for purposes of the FLSA, colleges would be able to take a tip credit toward its minimum wage obligation to those college athletes considered employees.[251] An employee is considered a tipped employee under the FLSA if they regularly receive more than $30 per month in tips.[252] While it may be a stretch to consider college athletes as tipped employees, this presents a way for colleges to perhaps get around paying their students the full minimum wage. It also begs the question that if only those athletes who are already highly compensated through NIL are considered employees for purposes of the FLSA, how much of a benefit will an additional $7.25 (or applicable state minimum wage) an hour provide to those athletes?[253]

B. Congressional Carve Out Looming?

Despite the broad definition of an "employee" under the FLSA, Congress has exempted many employees in various positions and industries from the FLSA.[254] Whether it was in order to pass the FLSA, or later pressure from special interest lobbying groups, Congress has carved out certain employees from the protections

245. *Data Dashboard*, NCAA, https://nilassist.ncaa.org/data-dashboard/ (last visited Oct. 4, 2025).

246. John Talty*, Inside the College Football NIL Market: How Much Players at Each Position Are Actually Getting Paid*, CBS SPORTS (May 20, 2024, at 15:42 ET), https://www.cbssports.com/college-football/news/inside-the-college-football-nil-market-how-much-players-at-each-position-are-actually-getting-paid/.

247. Jewell Ridge Coal Corp. v. United Mine Workers*,* 325 U.S. 161, 167 (1945).

248. Claybourn, *supra* note 188.

249. *Id.*

250. Eli Lederman, *Oklahoma State Barred from Placing NIL-Linked QR Codes on Helmets*, ESPN (Aug. 31, 2024, at 13:58 ET), https://www.espn.com/college-football/story/_/id/41070382/ncaa-bars-oklahoma-state-placing-nil-linked-qr-codes-helmets (the Oklahoma State football program even tried implementing QR codes on their players helmets where fans could scan the code from the TV screen and instantly give money to the programs NIL fund).

251. *Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa (last visited Oct. 4, 2025).

252. *Id.*

253. *Id.*

254. 29 U.S.C. § 213(a)(1) (2024) (listing the exemptions for employees in certain industries).

the FLSA provides.[255] With the lobbying power the NCAA and its member schools possess, ultimately Congress could exempt college athletes from becoming employees for purposes of the FLSA.[256] Even the *Johnson* court took notice that classifying college athletes as employees would be a "sweeping and essentially legislative change[]."[257]

In June 2024, the U.S House of Representatives Committee on Education and Workforce approved a bill that would prevent college athletes from being considered employees of their school, the NCAA, or any athletic conference.[258] The bill was narrowly drawn focusing on the employment issue to protect colleges, the NCAA, and conferences from FLSA and NRLB claims brought by their college athletes.[259] Proponents of the bill argued that there "are ways to provide for greater fairness and equity without making athletes formally employees of their schools."[260] Opponents of the bill, including co-counsel for the plaintiffs in *Johnson*, argued the bill was "unconstitutional."[261] Ultimately, this bill did not reach the House floor for a vote; however, a similar bill was introduced in April 2025 that would prevent college athletes from being employees of their schools, conferences, or athletic associations.[262] While time will tell if any of these bills make it through Congress and ultimately become law, college athletes' win in *Johnson* could ultimately be undone by a Congressional carve out.

CONCLUSION

The Third Circuit's opinion in *Johnson* has paved the way for certain college athletes to be considered employees of their university. The Court emphasized that the NCAA cannot rely on amateurism to defend against FLSA claims, but rather courts must analyze the economic realities and the totality of the circumstances to determine whether an employer-employee relationship exists.[263] The *Johnson* majority articulated a four-part factual test to be used in FLSA determinations for

255. Brennan v. Tex. City Dike & Marina, Inc., 492 F.2d 1115, 1117 (5th Cir. 1974) (discussing how the exemptions appear arbitrary and that they were "created simply to ensure the Act's passage"); Natalie Slavens Abbott, Comment, *To Pay or Not to Pay: Modernizing the Overtime Provisions of the Fair Labor Standards Act*, 1 U. PA. J. LAB. & EMP. L. 253, 257 n.40 (1998) (discussing industry specific lobbying groups' success in getting their employees exempt from the FLSA).

256. Rosenthal, *supra* note 88, at 166 (discussing how ultimately Congress could exempt college athletes from FLSA minimum wage and overtime requirements by agreeing to compensate them a minimum weekly rate or salary).

257. Johnson v. NCAA, 108 F.4th 163, 192 n.15 (3d Cir. 2024) (Hamilton, J. concurring).

258. Steve Berkowitz, *House Committee Approves Bill That Would Prevent College Athletes from Being Employees*, USA TODAY (June 13, 2024, at 16:35 ET), https://www.usatoday.com/story/sports/college/2024/06/13/house-vote-college-athletes-employees-bill/74079658007/; H.R. 8534, 188th Cong. (2024).

259. Berkowitz*, supra* note 258.

260. *Id.*

261. Michael McCann, *House Panel Advances GOP Bill to Ban College Athletes as Employees*, SPORTICO: THE BUS. OF SPORTS (June 13, 2024, at 18:05 ET), https://www.sportico.com/law/analysis/2024/congress-college-athlete-employment-ban-advances-1234784117/.

262. Berkowitz, *supra* note 258.

263. *See* Johnson v. NCAA, 108 F.4th 163,182 (3d Cir. 2024).

college athletes.[264] While the test provides a starting ground for lower courts to analyze the relationship, it does not provide clear guidance as to what point playing a college sport is "primarily for the benefit" of the university.

When analyzing whether a college athlete is an employee of their school for FLSA purposes, courts should focus on the "economic realities" of the relationship between the college athletes and their school.[265] The relationship varies significantly from college athlete to college athlete. Those college athletes who are not on scholarship or who participate in sports that do not generate a positive revenue for their school are likely playing "solely for [their] personal purpose or pleasure."[266] These college athletes do not likely form an employer-employee relationship for purposes of the FLSA and thus are not entitled to minimum wage protection. However, Power Four men's college basketball and football athletes attract such lucrative television deals that their sports often become profitable for their university.[267] These college athletes should be considered employees of their schools for purposes of the FLSA. *Johnson* leaves the door open for certain college athletes to be considered employees of their school and thus entitled to minimum wage. However, with the changing nature of college athletics, time will tell if the courts or Congress ultimately ensure that college athletes are protected under the FLSA.

264. *Id.* at 180.

265. *Id.*

266. *Id.* at 177 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947)).

267. *See id.* at 191 (Porter, J., concurring); *Current College Sports Television Contracts*, BUS. OF COLL. SPORTS (Mar. 19, 2024), https://businessofcollegesports.com/current-college-sports-television-contracts/.