

Blog Post

The Ramifications of College Athletes Being “Employees”

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By [Ryan Krone](#)

Consider this: the General Counsel of the National Labor Relations Board (NLRB) has opined that some student-athletes at the collegiate level are “employees” for purposes of the right to engage in protected concerted activity, and the U.S. Supreme Court has found that student athletes are entitled to certain compensation. So, if student athletes have new rights under federal law, might others as well?

These trends in college athletics may have far-reaching implications. Jennifer Abruzzo, the General Counsel of the NLRB has opined that some student athletes are employees and are entitled to “Section 7” rights under the National Labor Relations Act. Abruzzo’s recent [Memorandum](#), which announced that certain student-athletes are “employees” under the NLRA, touched on trends that could have an impact on all employers in every industry. Specifically, the Memorandum hinted at expansion of Section 7’s scope, and also reiterated the GC’s position that misclassifying employees is an independent violation of the NLRA.

GC 21-08 comes on the heels of GC 21-04, released August 12, 2021, which provided a detailed agenda of the legal precedents and case-handling processes that Abruzzo will advocate changing during her term as General Counsel of the NLRB. Specifically, GC 21-04 directed all Regional Directors, Officers-in-

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Charge, and Resident Officers to send certain cases to the Regional Advice Branch for “centralized consideration” to determine whether change is necessary to fulfill the Act’s mission. In GC 21-04, Abruzzo made clear that her ultimate objective is to revert back to Obama-era precedent, and she continues moving that way in GC 21-08.

While on its face GC 21-08 only appears to impact student-athletes, there are clear hints of implications for employers across the board. These implications appear to be bringing back the Obama Board’s focus on protected concerted activities in workplaces, both non-union and union.

Expansion of Section 7’s Scope

First, GC 21-08 suggests expansion of Section 7’s scope. Section 7 of the National Labor Relations Act guarantees employees numerous rights including the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. Common examples of protected concerted activity include, but are not limited to, discussing terms and conditions of employment (particularly on social media), distributing materials, participating in a concerted refusal to work in unsafe conditions, and employees joining together to talk directly to the employer about issues in the workplace.

Many employers and employees do not understand that the protections afforded by Section 7 apply to issues beyond union activity, and to non-unionized workplaces. An employee does not have to be conversing about a topic that relates directly to working conditions in the traditional sense to be protected concerted activity.

A March 2021 General Counsel Memorandum, GC 21-03, outlined the NLRB’s more expansive view of protected concerted activity, particularly as it relates to employee activity surrounding health and safety protests, and racial discrimination concerns raised

within the workplace. GC 21-08 took it a step further by affirmatively asserting that activism concerning such racial justice issues, including openly supporting the Black Lives Matter movement, directly concerns terms and conditions of employment, and therefore is protected concerted activity. Abruzzo appears to conclude that employees in *any workplace* who engage in these types of concerted activities to improve their working conditions have the right to be protected from retaliation.

With employer vaccine mandates becoming the new normal, and OSHA's newly issued Emergency Temporary Standard on COVID-19 vaccination, employers are already seeing more protests over mandatory vaccination policies. Protests could come in many forms, including employees demonstrating outside an employers building, employees confronting management, and even employees striking. In other words, employees could engage in protected concerted activity over vaccine mandates.

The bottom line is that *all* employers should be aware of employee actions related to safety and social justice issues, and the possibility that these actions will be considered protected concerted activity. Abruzzo seems intent on not only vigorously enforcing the right to engage in protected concerted activity, but also intent on continuing to expand those rights. Employers should stay tuned for developments in this area.

Misclassifying Employees as Independent Contractors

Second, Abruzzo reiterated her position that simply misclassifying employees, without any other coercive action, is an independent violation of the NLRA and said that any cases involving such violations should be submitted to the Division of Advice. Abruzzo's stance is that an employer's mere act of misclassifying workers as independent contractors itself is a violation of Section (8)(a)(1) of

the NLRA. Essentially, Abruzzo believes that misclassifying employees may lead them to believe they are not entitled to protection under the NLRA, which would have a chilling effect on their rights to engage in protected concerted Section 7 activity.

In *Velox Express, Inc.*, 368 N.L.R.B. No 61 (2019), the NLRB addressed this issue head on and held that an employer does not violate Section 8(a)(1) of the National Labor Relations Act by misclassifying its workers as independent contractors. However, in GC 21-04, Abruzzo requested that all cases involving the applicability of *Velox Express, Inc.*, be submitted to the Division of Advice, and she seems to be doubling down on this request in GC 21-08.

One thing is clear, Abruzzo is pushing forward with her efforts to overturn several of the NLRB pro-business's decisions from the Trump era, and overturning the *Velox Express, Inc.* decision seems to be at the top of her list.

Employers are already well aware that classification of workers has been a hot button issue, but now they must be cognizant of the additional risk and uncertainty related to misclassification of workers.

The Takeaway

Abruzzo has already revealed her intent to explore doctrinal shifts in key areas of labor law, and GC 21-08 makes her intentions even more clear. Employers with concerns about the impact of the GC's policy shifts should contact their Akerman attorney.

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