

Practice Update

Dartmouth Basketball Players Have Voted to Unionize

March 7, 2024

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Introduction

What it means to be a student-athlete in college is evolving, and Dartmouth basketball players find themselves at the forefront of this new era. For the first time in history, on Tuesday, March 5, 2024, the Dartmouth men's basketball team voted in a National Labor Relations Board (NLRB) conducted election, 13 to 2, in favor of unionizing and selecting Service Employees International Union Local 560 (SEIU 560 Local) to service as the team's representative for the purpose of collective bargaining. This unprecedented vote comes as no surprise to some, given remarks and guidance issued by the general counsel of the NLRB in 2021, which set out her view that student-athletes are employees (see GC Memo 21-08). What remains to be seen, however, is whether the general counsel's theory will withstand muster under review by the Board and courts. The Dartmouth vote remains marred by legal challenges claiming, among other things, that the NLRB lacks the authority to exercise jurisdiction over student-athletes (remember the *Northwestern* decision), and that the decision affording Dartmouth players the right to participate in the vote clearly departs from existing Board law and misapplies the law to reach the erroneous conclusion that Dartmouth basketball players are employees under the National Labor Relations Act.

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The Decision That Attempts to Redefine Student-Athletes

Momentum toward the student-athletes' unionization efforts arose last month following a landmark NLRB decision and direction of election issued on February 5, 2024 (February 5th Decision), which classified Dartmouth basketball players as employees of the school. According to the decision, the players are considered Dartmouth employees rather than students engaged in an extracurricular activity because "Dartmouth has the right to control the work performed by the men's varsity basketball team, and because the players perform that work in exchange for compensation." Interestingly, the decision cited reimbursement for expenses incurred while performing the sport, and "fringe benefits" such as "academic support, career development, sports and counseling psychology, sports nutrition, leadership and mental performance training, strength and conditioning training, sports medicine, and integrative health and wellness" as the basketball players' "compensation," inasmuch as the players do not receive any athletic scholarship aid from the university in exchange for players' participation on the men's basketball team. Dartmouth filed separate motions to reopen the record to introduce additional evidence, stay the election, and appeal the February 5th Decision. The motions to reopen and stay the election were both denied, but the NLRB has agreed to review the February 5th Decision, per Dartmouth's request. The question of whether student-athletes are school employees may ultimately escalate to the Supreme Court as litigation continues.

Looking Forward

Unionization affords private sector "employees," as defined under the Act, with the right to come together to select one representative to bargain collectively on employees' behalf, and negotiate with their employer concerning wages, hours, safety regulations, and other terms and conditions of

employment. Several practical questions have arisen in light of this recent news, including:

- Whether student-athletes will be considered “at-will” employees thus subject to termination by their schools;
- Whether student-athletes are entitled to compensation for their athletic participation;
- What, if any, formal pay structure may look like for student-athletes; and
- Whether the legal framework applied in the *Dartmouth* decision may be applied to students participating in other extracurricular activities at private colleges and universities.

Although the future implications for collegiate sports and higher education are unclear, private colleges and universities should be preparing now in the event that this potentially precedent-setting decision permanently changes the landscape of collegiate athletics, or they experience their own organizing efforts while the law in this area remains in flux.

As always, Akerman Higher Education and Labor attorneys stand ready to provide counsel and assist institutions with adapting to college sports’ rapidly evolving model.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.