

## What Does The NLRB's College Football Players Union Decision Mean For Other Universities?

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Northwestern University scholarship football players are employees of the university for the purposes of the National Labor Relations Act (NLRA), NLRB Chicago Regional Director Peter Sung Ohr held on Wednesday.

The decision is the first finding that college athletes are university employees under federal labor laws.

The College Athletes Players Association (CAPA), an organization backed by the United Steelworkers Union, petitioned the NLRB seeking to be recognized as the bargaining representative for the Northwestern University football players. Northwestern quarterback Kain Colter, a team captain and primary union backer, previously said the National Collegiate Athletic Association (NCAA) is a "dictatorship" and stated "[n]o one represents us in negotiations. The only way we are going to change things is if the players have a union." Colter cited some of the issues faced by players including medical expenses that players incur after their careers are finished and the lack of safer practices to reduce concussions.

Although not a party to the petition, the NCAA responded, arguing "[t]his union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education. Student-athletes are not employees, and their participation in college sports is voluntary. We stand for all student-athletes, not just those the unions want to professionalize."

Northwestern also objected to the petition, asserting that the football players were not employees under the NLRA, but were primarily students.

During a hearing before the NLRB Chicago Regional office last month, current and former Northwestern football players testified, as did Northwestern coach Pat Fitzgerald.

CAPA attorneys used five points to outline their argument for the players:

- Football players at Northwestern are compensated for a service (i.e. playing football) with athletics-based grants-in-aid, or scholarships.
- Players have supervisors (i.e. coaches) who control their schedules and monitor what they say on social media.
- Players must abide by certain rules and regulations, and are held to different standards than other students.
- Players can have their compensation taken away (i.e. have their scholarship revoked) for violating those rules and lose their jobs (i.e. their spots in the lineup) if they skip practices or games.
- Players have a contract (an athletic tender agreement) that stipulates what they must do to maintain their scholarship.

In its defense, Northwestern presented evidence through testimony of Fitzgerald and former students that the football players are primarily students, and their primary relationship with the University is educational, rather than economic. Some former Northwestern football players disputed Colter's assertions, testifying that when they played, Fitzgerald was flexible with the schedule and changed practice times to accommodate the students' class schedules.

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Relying on the “strict and exacting control” that the football program exercised over the players, and the fact that the players are compensated in the amount of as much as \$76,000.00 annually (the maximum value of the scholarship), Ohr ruled the players were employees under the general definition: “an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”

Ohr wrote that the scholarship tender was essentially an employment agreement which detailed the players’ duties and conditions of employment. He noted the difference between scholarship players and walk-ons players who don’t receive scholarships, finding that the latter group doesn’t receive the requisite payment for their participation, thus are merely students. Ohr concluded that only players who are currently receiving scholarships and who have not exhausted their eligibility will be able to vote in the election.

### What’s next in this dispute?

The university can now request a review of the determination by the full NLRB, which it has stated it will do. The request is due by April 9, 2014. From there, the full NLRB will issue a decision, which can then be appealed through federal circuit courts and ultimately to the United States Supreme Court, if it chose to hear the dispute. This process could take years to complete, making it likely that most of the players supporting the petition will have already graduated from Northwestern before a final determination is made. An election will likely be held in the meantime, with the results sealed until the appeal process is completed.

### What does this mean for other universities?

This decision only applies to Northwestern University, but a full NLRB decision would be applicable to other *private* universities, which make up only 17 of the 128 schools that compete in Division I - Football Bowl Subdivision. Public university football programs such as the University of Michigan and Michigan State University, are subject to their individual state labor laws, many of which do not provide bargaining rights to public employees.

Michigan's Public Employment Relations Act (PERA) is modeled after the NLRA, and athletes at a Michigan public university would have to petition the Michigan Employment Relations Commission (MERC) to attempt to achieve similar status. MERC is not bound by the NLRB decision, but it could serve as support for any union’s attempt to unionize Michigan-based players.

But, the decision could have far-reaching consequences if athletes in other collegiate sports who receive grant-in-aid scholarships attempt to unionize. As always, we will keep you informed as the decision winds its way through the appellate process.