BUSINESS IN 2024

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Agenda

Paige Carey – (12:05PM-12:15PM)

- *Johnson v. National Collegiate Athletic Association*: Overview and Impact

Matt Wells – (12:15PM-12:25PM)

- Braving Bonds: Public Finance Basics for Municipal and/or 501(c)(3) entities

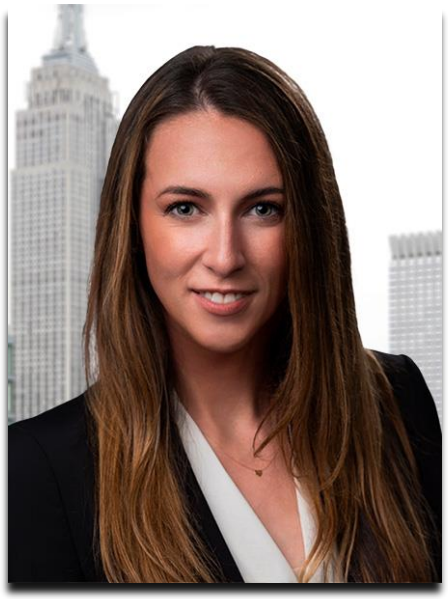
Devin Karas – (12:25PM-12:35PM)

- What's New in Employee Benefits

Lance Willoughby-Hudson – (12:35PM-12:45PM)

- Employee Handbook Do's and Don'ts

Johnson v. National Collegiate Athletic Association: Overview and Impact



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Outline

(I) Procedural History

(II) Outline of Third Circuit's Decision

(III) Collateral Issues and Case Impact

Context

Since 2021, many successful challenges to NCAA rules regarding compensation for student athletes at NCAA Division I colleges and universities.

- *NCAA v. Alston,* 594 U.S. 69 (2021) - ruled that NCAA rule prohibiting payment for name, image and likeness (NIL) of athletes violated the antitrust laws
  - Recognizing that college sports is a profit-making enterprise and rejecting the NCAA's definition of amateurism
  - Kavanaugh Concurrence:
    - The argument "that colleges may decline to pay student athletes because the defining feature of college sports ... is that the student athletes are not paid" is "circular and unpersuasive"

- NLRB Memo 21-08 - students who engage in intercollegiate sports at private colleges are employees under the NLRA
  - Dartmouth College basketball players have unionized

Johnson v. National Collegiate Athletic Association, 556 F.Supp.3d 491 (E.D. Pa. 2021)

- Case brought by collegiate athletes against the NCAA and member schools, alleging violations of the Fair Labor Standards Act ("FLSA") and various state wage laws
- The NCAA and member institutions moved to dismiss
  - Argued that the athletes—as "amateurs"—are not, and historically have never been, considered employees of their respective schools or the NCAA.
- Holding: Denied motion to dismiss
  - Rejected the "amateurism" argument
  - Determined that the athletes had sufficiently pleaded facts that, under the test articulated by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc*., 811 F.3d 528 (2d Cir. 2016), might allow them to be classified as employees under the FLSA
- NCAA and member institutions appealed

Johnson v. National Collegiate Athletic Association, Case No. 22-1223 (3d Cir. July 11, 2024)

Affirmed the District Court's denial of the NCAA and member schools' motion to dismiss

- "College athletes cannot be barred as a matter of law from asserting FLSA claims simply by virtue of a 'revered tradition of amateurism' in D-I athletics."
- "Appellants ask us to elevate amateurism to a quasi-legal status in a way the Supreme Court has already rebuffed" in *Alston*.

Johnson v. National Collegiate Athletic Association, Case No. 22-1223 (3d Cir. July 11, 2024)

Vacated and remanded the District Court's decision for application of a different test to assess the athletes' employment status

- Third Circuit rejected the use of the *Glatt* test, stating that the correct analysis was whether the college athletes were "playing" the sport for recreational or noncommercial reasons or whether their "service" on athletic teams "crosses the legal line into work protected by the FLSA."

- Created a different test, based on National Labor Relations Act precedents:
  - Does the individual perform services for another party?
  - Is the service necessarily and primarily for the other party's benefit?
  - Is the individual under that party's control or right of control? And
  - [Is this done] in return for express or implied compensation or in-kind benefits

Johnson v. National Collegiate Athletic Association, Case No. 22-1223 (3d Cir. July 11, 2024)

- One member of the 3-judge panel joined in the outcome of the case, but not its reasoning. That judge said that the court should not have agreed to hear the appeal until a trial, or at least until full discovery, had taken place.

- The judge said that nearly 200,000 Division 1 student athletes play on nearly 6,700 teams—many facts need to be determined at trial before a court can rule on whether they are eligible for protection under employment laws.

- Neither court distinguished between different circumstances of the range of Division I athletes—this is not just about football and basketball.

- Is serving on an intercollegiate athletic team play or work? Does it differ by sport?

This issue will take time to sort out

- It is likely to be several years before we have an answer to the question of whether collegiate athletes are employees. This case, or another like it, will probably end up at the U.S. Supreme Court because the stakes are so high.

- We will keep you up to date as developments occur. For now, student athletes are not entitled to compensation under the federal wage and hour law. But that could change.

Braving Bonds: Public Finance Basics for Municipal and/or 501(c)(3) entities

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What's New in Employee Benefits

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Employee Handbook Do's and Don't's

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Do Not Copy and Paste a Template

- Take the time to review and customize a handbook template
- Identify processes that may need updates or completely removed

Over Prescriptive Policies

- Consider limiting any sections that tell employees what they can and can’t do.
- Consider limiting anything that is common sense and focus on employer-specific rules.
- Revise sentences that are too legally technical.

Provide Enough Management Discretion

- Establish broad disciplinary policies that allows the flexibility to handle unique situations.
- Include a disclaimer that a disciplinary is not required for an employee's unacceptable behavior.

Failure to Include Legally Required Policies

- State and local specific sexually harassment policies.
- State and local specific paid leave policies.
- State and local specific lactation break policies.

Failure to Revise Employee Handbook on a Regular Basis

- At least once a year.
- Company size increases.
- New federal, state, and local laws are enacted.

Your Questions

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New York Employment Law: The Essential Guide
NYS Bar Association Members can buy the book from the bar here.
Non-NYS Bar Association Members can purchase through Amazon here.

Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.