

Calif. College Athlete Pay Bill May Lead To Employment Issues

By **David McManus, Elizabeth Polido and Samantha Ojo**

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In the latest to challenge to the NCAA's long-standing amateurism model, the California state Senate Education and Judiciary Committees recently voted on S.B. 1401, the College Athlete Race and Gender Equity Act.[1] The bill, which received a vote of do pass in both committees, could continue to chip away at the status quo and significantly influence the landscape of college sports.

As currently drafted, S.B. 1401 requires California colleges and universities to establish a degree-completion fund for each of its players. The amount to be deposited into the fund is determined by subtracting the amount of athletic grant-in-aid scholarships from 50% of the athletic program's revenue for each individual sport, with the resulting amount allocated among athletes in that sport.

The bill requires that college players have immediate access to up to \$25,000 per academic year and the balance of their fund if they complete an undergraduate degree within six years from enrollment at an institute of higher education. College athletes who transfer to a different California four-year institution and continue participating in an athletic program would remain eligible for the fund.

The fight for compensation and employment-related rights for college athletes is not new, and it has spurred legislation across the country as well as recent lawsuits and policy discussions. We saw California lead the charge in enacting the Fair Pay to Play Act in 2019, the nation's first law allowing college players to be paid for their name, image and likeness, or NIL.

In response to the Fair Pay to Play Act and similar proposed legislation in other states, the NCAA implemented an interim policy that allows players at institutions of higher education to receive compensation for their NIL. In June 2021, the U.S. Supreme Court sided with college athletes in *National Collegiate Athletic Association v. Alston* by affirming in a 9-0 decision that college athletes can receive unlimited education-related compensation.

Justice Brett Kavanaugh provided the harshest critique of the NCAA's current overall model in his concurrence, writing:



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The NCAA's business model would be flatly illegal in almost any other industry in America. ... Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate.

Several months later, referencing Justice Kavanaugh's concurring opinion, the National Labor Relations Board issued a memorandum[2] finding that college athletes meet the definition of employee under both the National Labor Relations Act and the common-law agency test, and extended labor rights and protections to college athletes, including the right to organize.

On the heels of these significant developments, the National College Players Association — the athlete advocacy group involved in California's NIL legislation and S.B. 1401 — filed an unfair labor practice charge in February against the NCAA, the Pac-12 Conference, the University of Southern California and the University of California, Los Angeles, alleging that the schools and organizations violated the NLRA by misclassifying the college players as nonemployees and interfering with their rights as employees.

S.B. 1401 goes one step further by requiring universities to compensate college players based on the revenue they bring into their school.

While the bill has an educational focus and prohibits the transfer of funds from the school to the college athlete from "constituting a payment for purposes of establishing an employment relationship," if passed S.B. 1401 would nonetheless seem to further pry open the door for an argument that players at academic institutions should be deemed employees. This will result in a host of issues for colleges and universities to grapple with going forward.

If college athletes are deemed employees, schools will need to address questions related to workers' compensation, discipline and termination, income and employment tax, paid time off, fringe benefits, and wage and hour laws, including whether to classify players as exempt or nonexempt. There will also inevitably be gender equity concerns related to the treatment of men and women playing the same sports.

With respect to discipline, schools should think about how performance management could work in this context. To the extent schools discipline players for misconduct or poor performance in their sport — with such discipline potentially ranging from a written warning, to decreased playing time, to removal from the team and revocation of scholarship — they may face employment discrimination claims from players who claim they were disciplined due to protected characteristics.

To mitigate against this risk, colleges and universities may consider corrective action policies and objective performance management processes for college athletes, including written performance reviews.

Workplace culture will also be a major issue to consider. For college players, their workplace could be a college campus in which they live with other athlete-employees, as well as other nonemployee students, and interact with them on the field of play, in the locker room and myriad places that are not part of a typical work environment and will be much more difficult to manage.

This raises unique issues and a potentially heightened risk for sexual harassment and other employment discrimination claims. Schools may need to have specific policies regarding interactions in the locker room and outside of athletics, including at parties and in dorm rooms, and they should consider providing harassment prevention training to all of their athletes.

As many employers now do in the traditional workplace, schools should consider ways to ensure a safe and respectful work environment and address any potential issues, including conducting workplace culture assessments and confirming that athletes have access to and are aware of conduct policies and reporting mechanisms.

As the potential for college athletes to be deemed employees increases, universities should ensure that their human resources, legal and athletic compliance departments have the staffing and resources to navigate these unique issues in a way that minimizes potential legal risk.

S.B. 1401 is now heading to the Appropriations Committee before arriving on the state Senate floor. Based on the discussion set forth in the Judiciary Committee, which included concerns about whether S.B. 1401 will negatively affect women's sports and uncertainties regarding revenue calculations, the bill may have a difficult time passing. But regardless of whether S.B. 1401 is enacted, the issue of college athlete compensation is not going away.

Colleges and universities must thoughtfully examine and prepare for the potential challenges that could be triggered by compensating college athletes so they can tackle them head-on as we enter a new era for college sports.

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[1] Available at https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202120220SB1401&showamends=false.

[2] Available at <https://www.morganlewis.com/pubs/2021/10/nlrb-general-counsel-says-college-athletes-are-statutory-employees-in-memo-with-broad-implications>.