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## December 2017 Public Forum Topic Analysis and Research Guide

### **Resolved: NCAA student athletes ought to be recognized as employees under the Fair Labor Standards Act.**

Produced by Simpson College Speech and Debate

#### **Historical Overview**

##### NCAA History

In the last decade or so, many commentators have begun to call on the NCAA to allow student athletes to be paid. This has happened for many reasons. The first reason is a recent lawsuit by Ed O'Bannon. The lawsuit began in 2009<sup>1</sup>. Former UCLA basketball player Ed O'Bannon realized that his likeness was being used in a video game, but he wasn't being compensated<sup>2</sup>. O'Bannon filed a lawsuit against EA Sports and the NCAA<sup>3</sup>. The judge ruled in O'Bannon's favor citing anti-trust laws and established that colleges could pay their athletes at most \$5,000 for the use of their image<sup>4</sup>. However, this only applies to football and basketball athletes<sup>5</sup>. In 2015, the NCAA allowed the power five conferences: Big Ten, Big Twelve, ACC, SEC, and PAC 12, to pay their athletes a stipend to cover costs not addressed in their scholarships<sup>6</sup>. This new policy was put into place last season<sup>7</sup>. There have been other lawsuits, but this one really began the push for paying college athletes<sup>8</sup>.

The next reason that there has been growing calls to pay student athletes is a recent bid for unionization by the Northwestern football team. The movement to unionize began in 2013 with the "All Players United" motto among players<sup>9</sup>. The Northwestern players began the process to create a union that would ultimately be open to all college athletes<sup>10</sup>. At the beginning of August 2015, the National Labor Regulations Board (NLRB) ruled that the Northwestern

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<sup>1</sup> Frontline, "The NCAA Lawsuit," PBS, n.d., <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/>

<sup>2</sup> Sara Ganim, "The College-Athlete Pay Case that Nearly Didn't Happen," CNN, August 30, 2014, <http://www.cnn.com/2014/08/30/us/ncaa-pay/index.html>

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> John Paul Stevens, "A History of Challenges to NCAA's Ban on Paying Athletes," *Associated Press*, August 22, 2015, <http://collegefootball.ap.org/article/history-challenges-ncaas-ban-paying-athletes>

<sup>7</sup> Blair Kerkhoff and Tod Palmer, "They're not Paychecks, but Major College Athletes got Extra Scholarship Stipends for the First Time this School Year," *Kansas City Star*, June 26, 2016, <http://www.kansascity.com/sports/college/article86062792.html>

<sup>8</sup> Michelle Piasecki, "Law Review: Are College Athletes Employees?" *American Bar Association*, n.d., [https://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/16/spring-2016/law-review--are-college-athletes-employees-.html](https://www.americanbar.org/publications/insights_on_law_and_society/16/spring-2016/law-review--are-college-athletes-employees-.html)

<sup>9</sup> Chip Patterson, "Northwestern Players Start Union Movement in College Athletics," *CBS Sports*, January 28, 2014, <https://www.cbssports.com/college-football/news/northwestern-players-start-union-movement-in-college-athletics/>

<sup>10</sup> Ibid.

players could not unionize<sup>11</sup>. However, the NLBR did stress in their ruling that they ruled based on the special circumstances of the case<sup>12</sup>. The implication of this ruling is that the board would be amicable to an effort of unionization for all players.

The third reason is the burgeoning revenue of collegiate athletic departments. In recent years, it has come to the attention of sports commentators that college athletic departments are making millions of dollars off their players<sup>13</sup>. Colleges are profiting, but athletes are not receiving any of this money. Athletes and commentators argue that college athletic departments are making money because of these athletes. Colleges would not be making money without the success of their players. It is only fair then athletes receive some sort of payment from this profit.

### Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) was ratified in 1938. This law established many of the workplace regulations that we have today. Those regulations include: establishment of minimum wage, overtime pay, recordkeeping, and youth employment standards<sup>14</sup>. These provisions apply to the private sector, federal, state, and local government employees<sup>15</sup>. However, there are some major exemptions. One such exemption is employees of seasonal amusement or recreational activity<sup>16</sup>. The Department of Labor clarifies this exemption with two tests. The first test is that the establishment is in operation seven months or less in a calendar year<sup>17</sup>. The second test from the Department of Labor is the 33-1/3% test<sup>18</sup>. This test is for establishments that operate more than seven months in a calendar year. If the revenue made in that time is less than 33-1/3% of the total revenue, the establishment is exempt<sup>19</sup>.

The Department of Labor has further and explicitly excluded student-athletes as employees. This is explained by the American Bar Association, “Pursuant to the Department’s *Field Operations Handbook*, ‘[a]ctivities of students in [interscholastic athletics] programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution, are not ‘work’ [under the FLSA] and do not result in an employee-employer relationship between the student and the

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<sup>11</sup> N.a., “Northwestern University and College Athletes Player Association, Case No. 13-RC-121359,” *American Association of University Professors*, August 17, 2015, <https://www.aaup.org/brief/northwestern-university-and-college-athletes-players-association-capa-case-no-13-rc-121359-0>

<sup>12</sup> Ibid.

<sup>13</sup> Michelle Piasecki, “Law Review: Are College Athletes Employees?” *American Bar Association*, n.d., [https://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/16/spring-2016/law-review--are-college-athletes-employees-.html](https://www.americanbar.org/publications/insights_on_law_and_society/16/spring-2016/law-review--are-college-athletes-employees-.html)

<sup>14</sup> “Compliance Assistance- Wages and the Fair Labor Standards Act,” *United States Department of Labor*, n.d., <https://www.dol.gov/whd/flsa/>

<sup>15</sup> Ibid.

<sup>16</sup> “Handy Reference Guide to the Fair Labor Standards Act,” *United States Department of Labor*, September 2016, <https://www.dol.gov/whd/regs/compliance/hrg.htm#8>

<sup>17</sup> “Fact Sheet #18: Section 13(a)(3) Exemption for Seasonal Amusement or Recreational Establishments Under the Fair Labor Standards Act (FLSA),” *U.S. Department of Labor Wage and Hour Division*, July 2008, <https://www.dol.gov/whd/regs/compliance/whdfs18.pdf>

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

school or institution.”<sup>20</sup> This provides the justification for athletic departments to not pay their athletes.

A recent lawsuit has further enforced the exemption of student-athletes as employees. Samantha Sackos, a soccer player for the University of Houston, sued the NCAA and all Division I schools for a violation of the Fair Labor Standards Act<sup>21</sup>. The lawsuit alleged that athletes qualify as temporary employees of the NCAA and therefore ought to receive minimum wage<sup>22</sup>. The lawsuit then changed the plaintiffs to be three track and field athletes from the University of Pennsylvania<sup>23</sup>. However, the judge dismissed the lawsuit claiming that Congress did not intend for the act to apply to student athletes<sup>24</sup>.

### Definitions/Framing

Terms that potentially need to be defined in round: student athlete, ought, and FLSA (Fair Labor Standards Act).

The NCAA coined the term student athlete in response to a series of lawsuits filed in the 1950s and 1960s that threatened to define collegiate athletes as employees of their respective school<sup>25</sup>. The former President of the NCAA, Walter Byers, said, “We crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations.”<sup>26</sup> The US Code provides a definition of the term student athlete: “the term “student athlete” means “an individual who engages in, is eligible to engage in, or may be eligible in the future to engage in, any intercollegiate sport. An individual who is permanently ineligible to participate in a particular intercollegiate sport is not a student athlete for purposes of that sport.”<sup>27</sup>

There are multiple ways to define ought from the resolution. One possibility is to define it as a moral obligation. Meaning it is the NCAA’s duty to employee their athletes under the FLSA because it is ethical. Using this definition, arguments regarding the payment of players’ health insurance are possible, and impacts on the multiple scandals of concussions and loss of scholarships can be linked in. A legal version of ought can also be presented, and would focus

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<sup>20</sup> Michelle Piasecki, “Law Review: Are College Athletes Employees?” *American Bar Association*, n.d., [https://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/16/spring-2016/law-review--are-college-athletes-employees-.html](https://www.americanbar.org/publications/insights_on_law_and_society/16/spring-2016/law-review--are-college-athletes-employees-.html)

<sup>21</sup> Scooby Axon, “New Lawsuit Claims NCAA Violated Fair Labor Standards Act,” *Sports Illustrated*, October 24, 2014, <https://www.si.com/more-sports/2014/10/24/ncaa-sued-fair-labor-standards-act>

<sup>22</sup> Ibid.

<sup>23</sup> Steve Berkowitz, “Judge Dismisses NCAA Wage Lawsuit Involving Penn Track Athletes,” *USA Today*, February, 14, 2014, <https://www.usatoday.com/story/sports/college/2016/02/16/ncaa-wage-hours-lawsuit-samantha-sackos-penn-track-fair-labor-standards-act/80482630/>

<sup>24</sup> Ibid.

<sup>25</sup> Taylor Branch, “The Shame of College Sports,” *The Atlantic*, October 2011 <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/>

<sup>26</sup> “Student-Athlete’ Is An NCAA-Created Legal Dodge,” *Inside NU*, January 28, 2014, <https://www.insidenu.com/2014/1/28/5355988/ncaa-student-athlete-kain-colter-union-workers-comp>

<sup>27</sup> “Chapter 104-Sports Agent Responsibility and Trust,” *United States Government Printing Office*, 2010, <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title15/html/USCODE-2010-title15-chap104.htm>

the round on whether student athletes fall under the legal definition of the FLSA. This would benefit a case that focuses on the court cases that players have filed against the NCAA. The problem with using the court cases as arguments is that they have predominantly sided in favor of the NCAA. Regardless of why this is the case, impacts could become moot for the affirmative.

The FLSA should be easily definable, and it most likely will not come up in round. The exception is if it is mentioned at the top of a case. It will be important that everyone is clear about the law. When defining the Fair Labor Standards Act, a US government definition is a required. All other definitions should be thrown out due to the potential for skewing the round.

### Potential Frameworks

It is important to remember that in PF, teams don't have to defend implementation, but they do need to defend feasibility. The affirmative team doesn't have to defend the implications of college-athletes receiving a salary starting tomorrow, but they do have to defend compensation for players in principle.

Also, be aware that due to the vagueness of the resolution, it is wise to avoid cherry-picking individual school impacts, unless they sparked court cases or further discourse. Impacts should focus on a holistic view in order to win a cost-benefit framework. This argument can be started in the framework debate.

#### *All NCAA Athletes Framework*

Because the resolution makes no exception, the scope of the debate includes all NCAA athletes (roughly 460,000). This framework favors con and is effective because it forces the affirmative team to defend division two and division three schools which are less likely to be able to afford paying their athletes. One can defend this framework by arguing that it is the interpretation which requires the fewest assumptions. If the debate were intended to revolve around certain types of players, it would be specified in the resolution. Under this framework, if a school can't afford their athletes, they don't get to keep them.

Affirmative Response: The affirmative team should agree that all NCAA players are included in the resolution. Trying to argue a different interpretation will most likely make one look disingenuous to a judge. Instead, the affirmative should proudly argue that schools, just like businesses, ought to pay their athletes fair compensation for their labor. Currently, students are generating revenue for their schools without being paid, which would be illegal in a business setting. End the double standard, vote pro.

#### *Division 1 Only Framework*

This framework favors the affirmative. In the status quo, calls to pay student-athletes occur exclusively in division one. Additionally, new rules regarding player compensation only apply to division one schools. Thus, the everyday person would assume that is what the resolution is asking. Division one schools have the biggest programs and the best ability to pay their athletes. Impacts to division two and three are still possible under this framework using an argument about the wider implications of this policy.

Negative Response: The negative team can agree to this framework. Division one status is determined by how many sports a school offers. This means that there are small division one schools that cannot compete with the large schools in division one. Additionally, the ability for division two and three schools to recruit athletes will be diminished. In essence, all of the arguments from the previous framework are valid under this framework.



## Affirmative Arguments

### THEY FALL UNDER THE COURT DEFINITION OF EMPLOYEES

Based on the hours put into the activities, the amount of revenue they generate, and the benefits they bring to their schools, student athletes are true employees. This argument needs to be backed up with argumentation on how the court cases were incorrect in their decisions. Impacted out, the argument would state that the schools are exploiting their student athletes which is morally wrong.

### COLLEGIATE SPORTS ARE A FORM OF MODERN SLAVERY

The NCAA and colleges specifically go after minority athletes in low-income communities because it is easier to take advantage of these athletes; the minority athletes they pull from low-income communities are usually not qualified to be in college and are being used for the colleges' gain. The amount of time student athletes spend on athletics is quadruple the amount of time they spend on getting their education. They are not receiving a good education while making the NCAA and colleges millions of dollars for their hard work. They are getting scholarships, but they aren't getting a full education because they are focusing on athletics instead. After four years of doing nothing but playing sports; they are left with nothing.

### NCAA AND COLLEGES MAKE MILLIONS OFF OF THE WORK OF ATHLETES

Each year the NCAA and colleges make millions of dollars off of athletes and the athletes are not paid a dime. The athletes are entitled to portions of the earnings that they bring into the schools, especially when the money is coming from the names and success of the players.

### SMALL SCHOOLS COULD ATTRACT MORE TALENTED PLAYERS.

In a world where schools pay their athletes, talent can be bought. According to Jay Bilas, quoted in an article by Maurice Peebles in 2015, "So if you're a smaller school, say you're Wichita State [a smaller school]. Wichita State does good no matter what, but Wichita State could not get the players that Kansas are recruiting. And they can't afford to attract the top players Kansas are recruiting, but they could marshal their resources and pay more for Kansas' third-best player than Kansas could pay. So, they would be able to afford more talent that way, and then they could make decisions such as 'You know, we don't need to build these gigantic facilities, we can throw the money into the procurement of talent.'" In an affirmative world, NCAA sports programs of all sizes would be more competitive because they would have to compete for desirable players.

## STUDENT-ATHLETES WOULD COMPLETE MORE YEARS OF EDUCATION.

According to Jay Bilas, quoted in an article by Maurice Peebles in 2015, “They might stay longer. Now, you’re not going to get the top pick. Like Kentucky’s not gonna get Karl-Anthony Towns to stay longer, but they may get some of the other guys to stay longer. They may decide, ‘You know what, I’m making money here.’ When you start making money, then you can go when you’re ready. I think part of the culture has become: ‘If you don’t want to be here, go.’ Instead of: ‘No, it’s good for you to be here.’ If we really think it’s good for kids to stay in school, why [we] shouldn’t we provide incentives for them to stay? It’s a good thing.” This evidence indicates that incentivizing athletes with compensation increases the likelihood they will stay in college. One could use this logic to argue that athletes would also take their studies more seriously if they were paid, though this could go both ways.

### Negative Arguments

#### HARMS TO DIVISION 2 AND DIVISION 3 SCHOOLS

Division 2 & 3 schools still operate under the NCAA, but have different rules for scholarships and financial compensation. The programs, as well as budgets, tend to be smaller. Due to the financial burden, programs would have to end. The opportunity for students to play sports at these schools then disappears, and the impact can be loss of the benefits that come from the sports, or harms to the colleges because of a loss of enrollment.

#### STUDENT ATHLETES ARE COMPENSATED ALREADY

Students who attend universities and colleges to play sports are often granted scholarships to pay for their tuition, room and board, and more. In return, the students play sports under the college’s name. Adding employment pay to that would increase the divide between student athletes and other students because the same opportunity isn’t granted to the average student.

#### TRANSFER OF FUNDS

The burden of the athlete’s pay would be placed on the university, forcing them to reevaluate the use of funds. This creates the potential for the school to take money away from educational programs, or even more important student needs. Schools don’t only



use the funds from their sports team to pay for sports, but they use it in other areas as well.

## LOSS OF EDUCATION

When you pay your athletes, their priorities shift from being a student who plays sports to an athlete who is attending college. The athletes become employees which distracts from the true reason for attending college: an education. By missing classes, and working extended hours due to legal employment, they are no longer students.

## ACCESS TO EDUCATION LOSS

If student athletes were paid salaries, instead of scholarships (which you would have to argue would happen), the salaries would be subject to taxes; local, state and federal. Currently tuition scholarships are deductible from taxes. If a college athlete is paid a salary they would have to pay taxes on that income. As a result these students can be put in a worse situation and lower-income students would lose their access to a truly free education.