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Legal Issues in COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

IN THIS ISSUE

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Legal Issues in COLLEGIATE ATHLETICS

'Significant Guidance' on Transgender Rights under Title IX Issued

By Thomas Dorer, Monica H. Khetarpal, Michelle E. Phillips, Marla N. Presley and Bethany Swaton Wagner, of Jackson Lewis PC

U.S. Departments of Justice and Education Issue 'Significant Guidance' on Transgender Rights under Title IX The U.S. Departments of Justice (DOJ) and Education (DOE) have issued a joint "Dear Colleague Letter" (DCL) containing "significant guidance" on how these departments will apply sex discrimination protections under Title IX of the Education Act of 1972 to transgender students.

The DCL, dated May 13, 2016, states that DOJ and DOE "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." The guidance covers a range of issues, including participation in educational programs and activities, access to facilities, and recordkeeping and privacy.

The DCL does not set out any new legal requirements. Rather, the Departments' interpretation is consistent with courts' and other agencies' interpretations of federal laws prohibiting sex discrimination. However, in light of recent high-profile state legislation affecting gender identity and expression, the DCL guidance is a strong statement on the enforcement positions that these agencies will take in gender identity discrimination cases.

This also may provide insights for employers on how the DOJ might interpret transgender issues under employment discrimination laws, as that department has stated in the past that it considers Title VII to apply to gender identity and expression.

Courts generally give weight to the interpretation that enforcement agencies apply to laws they enforce, and failure to comply with Title IX can lead to sanctions up to and including loss of access to federal funding. However, the May 13 DCL is guidance, not binding regulation, and the positions of DOJ and DOE may well be challenged in court. Indeed, opposition to individual school district policies on transgender student use of bathrooms or locker rooms already has resulted in litigation. (See our articles, Oxford, Alabama, City Council Repeals Bathroom Ordinance Targeting Transgender Individuals and School District Faces Government Sanctions under Title IX for Denying Transgender Female Student Access to Locker Rooms.)

In addition to defining key terms, such as "gender identity" and "transgender," the letter expresses several key DOJ and DOE positions, including the following:

- Transgender students are entitled to protection under Title IX, regardless of whether they have undergone medical procedures, and regardless of whether official documents, such as birth certificates and government-issued identity cards, reflect the student's individual gender identity or "sex assigned at birth."
- Objections from other students or parents do not serve as a basis for denying a transgender student equal access to academic programs, educational activities, and institutional facilities.
- Educational institutions must provide safe and non-discriminatory environments to all students based on gender, including gender identity. Institutions must react promptly and effectively to harassment or discrimination directed toward transgender students.
- Schools, colleges, and universities

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What Do the New Wage and Hour Regulations Mean for Athletics Departments?

By Mike Grassi, of Sports Law Associates, LLC

On May 17, the United States Department of Labor announced changes to the Fair Labor Standards Act (FLSA) as a result of a 2014 directive from President Obama. The most significant change is the two-fold increase of the twelve-year-old minimum salary floor that employers must pay to qualify for most of the overtime pay exemptions. The changes, which go into effect at the end of the year, already have colleges and universities actively reviewing their workforce classifications and may require difficult decisions regarding the status of many athletic department employees, including coaches, certified athletic trainers, and academic advisors, in the months ahead.

Employers, including colleges and universities, have three compliance options: 1) pay employees at or above the new minimum salary and ensure that their primary work duties meet the additional criteria for one of the applicable exemptions; 2) pay employees below the new target and assign job duties that align with an exemption that does not require the minimum salary or has a reduced salary minimum; or 3) try to limit the compensable hours non-exempt employees work to 40 or less in any given week and pay overtime where the limitations are exceeded. Of course, there is always the option to do nothing and hope for the best but remember FLSA penalties are costly and noncompliance with federal law is dangerous.

The third option is problematic for many schools that are looking to decrease rather than increase athletics operating expenses. To fully understand the potential impact for athletics departments in particular, consider the fact that certain travel time must often be included in an employee's weekly hourly tally when calculating overtime pay for non-exempt employees and lengthy travel schedules for collegiate teams can add up quickly for coaches, trainers, communications workers, paid managers and the myriad of new positions that have been showing up on team travel manifests. As a general rule, time spent commuting to and from the office is not included, whereas travel time that occurs during an employee's normal working hours will count towards the total hours worked in any given week. Determining how to record time spent traveling outside of normal working hours is more complicated. The entire time travelled during a single-day trip to a competition or to visit a recruit, for example, must be included in the employee's working hours total, whereas only the hours travelled during the employee's normal work day will count if the trip is overnight, unless the employee is engaged in compensable work during that time. Such work includes meeting with recruits and their families, watching game film during a flight or on the bus, devising game strategy or analyzing performance on the trip back to campus, driving a van, supervising academic study-halls or working on equipment. It is worth noting that supervision of student-athletes during travel is considered the performance of work and must be included in an employee's total work hours. Therefore, it is advisable to check with your human resource department to determine, for example, whether it is permissible to assign supervisory responsibility to one person only and to fully understand the rules that apply to "on-call" time. Moreover, employees cannot waive their entitlement to overtime and employers have to pay for hours worked. For this reason in particular, finding an exemption that fits is a worthwhile exercise.

Pay employees at or above the new minimum salary (or the limited reduced salary exemption) and ensure that their primary duties meet the additional criteria for the applicable exemption

Previously, a "white collar" employee (i.e., persons employed in an executive, administrative, professional, outside sales, or certain computer occupations) was exempt from overtime pay if she met the following three requirements: (1) she was employed on a salary basis, (2) she earned at least $455 per week ($23,660 per year), and (3) her primary duty fell under one of the "white collar" exemptions. Beginning on December 1, 2016, however, the base salary level for these exemptions will increase to $913 per week and $47,476 annually. This increase effectively converts many formerly exempt employees to non-exempt status.

For those athletics personnel that are paid at or above the new base salary level, it is important to ensure that their primary duty, defined as the "the principal, main, major or most important duty that the employee performs" is FLSA exempt work. Assessing primary duty can be complicated and requires a genuine appraisal of the actual work performed rather than relying on written job descriptions or creative job titles. After identifying the totality of duties each employee performs, the test requires a subjective assessment of the relative importance of the exempt work, how much time the employee spends on exempt versus any additional non-exempt tasks, whether she uses independent judgment or is closely supervised when performing exempt duties, and how the exempt work is compensated when compared to work performed

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by other exempt and non-exempt employees. Finally, primary duty assessments requires a qualitative analysis. The DOL expressly refused to put a quantitative limitation of the performance of non-exempt work but noted that a "disproportionate amount of time spent on non-exempt duties may call into question whether an employee is" exempt. As a general rule, it helps if at least half of an employee's time is devoted to exempt work.

Certain athletics employees who are paid the minimum $47,476 salary may qualify for some "white collar" exemptions provided they use discretion and independent judgment in their work:

- Executive: This might include athletics employees whose primary duty consists of (1) managing a recognized part of the athletic department, or a subdivision such as the sports medicine program, the communications department, or a team, (2) directing the work of the equivalent of two or more full-time employees on a regular basis, and (3) exercising significant influence regarding employment decisions, including the hiring, promotion, and termination of subordinates
- Administrative: Applicable if the employee's office or non-manual work is directly related to the management or business operations of the school. This may include recruiting, budgeting, fundraising, communications and marketing, facilities management, and game scheduling if the employee regularly exercises discretion or independent judgment when performing these significant tasks. For example, assistant coaches with actual authority to devise recruiting strategy, including determining which athletes to recruit and offer scholarships, could meet this exemption if such recruiting is the primary duty of her job. Assistant coaches who recruit under the direct oversight of the head coach and do not have any real discretion in this area, would not fulfill this exemption. Head athletics trainers, directors of communications and marketing, and equipment managers could fit this exemption as well.
- Learned Professionals (Other than teachers, lawyers, and doctors): This exemption is for those employees whose primary duty is predominantly intellectual in character in a field of science or learning and the employee's advanced knowledge is the result of a prolonged course of specialized instruction. Therefore, many certified athletic trainers may be exempt if they have a four-year degree in their field and use such knowledge in the course of their work.

Athletic positions typically include a variety of the work described above. Luckily, the FLSA allows for a combination exemption where the minimum salary threshold is met and the primary duties are an overlapping mix of exempt work. The combined exemption still requires payment of the minimum salary with a notable caveat that is applicable to certain athletic advisor positions. An employee whose primary duty consists of "administrative functions directly related to academic instruction or training," or assisting with academic issues, might fall under the academic administrative exemption, so long as she earns at least $47,476 per year or the minimum salary for teachers at the institution, whichever is lower.

Assign primary duties that align with an exemption that does not require a minimum salary threshold. The notable exemption that many schools currently rely on when classifying athletics employees as exempt even though they earn less than the minimum salary level is one that focuses on teaching. If the employee's primary duty is "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge" and she "is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed," then the employee is exempt from overtime pay regardless of salary level. For example, a full-time coach whose primary duty involves instructing student-athletes on performance of the sport, developing and implementing team concepts, and teaching individual skills, would likely fulfill the teacher exemption, provided the coach uses independent judgment and is not closely supervised while working. A coach who also teaches classes may meet the exemption as well. Determining whether assistant coaches are "teachers" is more difficult. Assistant coaches might not have authority to implement team concepts, and instead work under the direction of the head coach at all times during practices, running conditioning drills, overseeing team dinners, or supervising players on the road. Similarly, if an assistant coach's primary duties involve recruiting or administrative tasks such as filing expense reports, booking travel, ordering and issuing equipment, or operations, she likely will not meet this test. Each case requires its own fact based assessment.

Finally, athletics employees whose primary duties include sales, obtaining orders or contracts for services, or the paid use of facilities may qualify for the outside sales exemption which does not have a minimum salary. However, this exemption is difficult to meet in athletics because the employee must customarily and regularly work off-site.

So what are the options for athletic departments faced with the prospect of numerous employees becoming eligible for overtime

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pay by year's end? It will require a thorough review of each athletic position, regarding both its primary duties and current salary status, and should involve assistance from the Human Resources Department and General Counsel, where available. Employees earning close to the minimum exempt salary level may see raises to avoid overtime pay, assuming their duties are exempt as well. Others may simply receive their overtime pay if doing so would cost less than $47,476. Some schools could take the step of lowering salaries so that total compensation including overtime pay will result in a net change of zero. In addition, public schools have the option to take advantage of certain compensatory time as an alternative to overtime compensation, a topic beyond the scope of this discussion.

Regardless of the methods utilized to handle the new overtime standards, athletic departments should closely manage non-exempt employee work hours in order to limit budgetary dilemmas. All work by these employees, including any in excess of 40 hours, must be recorded and compensated, even where the employee completes the work off-the-clock voluntarily. In an age of advanced technology in which employees can access their work virtually anywhere, athletic departments must be diligent in monitoring employee hours. Head coaches and supervisors should be trained regarding the new rules so that the duties of their subordinates are not altered in a way that could change an employee's exempt status or so non-exempt employees are not directed or allowed to work overtime without obtaining permission in advance. Employees should likewise be trained so as not to put their own employment status in jeopardy.

With the implementation of the new overtime pay standards of the FLSA, the budgetary obligations of athletic departments just became vastly more complicated. The NCAA released a valuable white paper review of the new regulations titled "Payment of Coaches & Athletic Trainers under Federal Law" to aid in the upcoming transition. Schools will also need to determine how to finance the resulting pay increases, while also facing a continued campus arms race and the prospect of expanding compensation for student-athletes. Student fees, while a common source of revenue for athletic departments, have been under increased scrutiny as of late, and therefore may not present a practical solution. Thus, it appears as though human resource directors and general counsels will be working overtime between now and December to figure out how to pay many of their employees under the updated FLSA regulations. ■

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should produce school documents and use names and pronouns that correspond to the preferences of their transgender students, regardless of what legal documents might say.

The DCL also provides guidance on specific situations that arise frequently in the educational setting, such as:

- Transgender students should be permitted to use restrooms, locker rooms, and residence halls that correspond to their gender identity, and they should not be required to use single-sex facilities.
- Schools may use "age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge" to determine student eligibility for sports teams. Colleges and universities should note that the National Collegiate Athletic Association (NCAA) has issued guidance on transgender student-athlete participation in intercollegiate sports. (See The NCAA And Transgender Student-Athlete Participation.)
- If certain courses are restricted to one sex or the other, then transgender students should be allowed to attend based on their gender identity.
- Single-sex schools and single-sex fraternities and sororities are not subject to Title IX in their admissions or selection processes, and, therefore, they may develop their own policies with regard to transgender students.

Finally, the DCL provides guidance on privacy and educational records for transgender students under the Family Educational Rights and Privacy Act (FERPA).

Schools, colleges, and universities should review and, as appropriate, update their harassment and transgender policies in light of the DCL guidance, and implement training for school administrators, human resources, and faculty on how best to comply with transgender student rights. ■

Did They Think Better or Did They Blink — Antitrust Implications and the Now Abandoned Satellite Camp Rule

By Robert A. Boland, J.D.

On Thursday, April 28, 2016 the NCAA's Division I Board of Directors elected to rescind a controversial, recently passed rule that banned satellite football camps. The original ban was one that deeply divided the major football schools and conferences. Coming out of the NCAA's Division I Council just weeks earlier, the ban which prohibited off-campus spring and summer football camp activity by both schools and their coaches, was in some measure what CBS Sports writer Jon Solomon called "a contrived controversy." [1]

But even if contrived, the rule and ensuing controversy had numerous implications. The rule was, and even now with it pulled back for more study, at once: a test of the "Power Five" conferences governance over the collegiate Football Bowl Subdivision (FBS); a divisive turf battle over the fertile recruiting ground of the South, with the very powerful Southeastern (SEC) and Atlantic Coast (ACC) Conferences strongly opposed to the camps as incursions into their geography by competitors; it was a public rebuke of upstart Michigan Coach Jim Harbaugh who has yet to visit a place where he wasn't ready to strip to his khakis and start tossing a ball before flashing cameras; and finally but perhaps most crucially, the ban looked in the "right light" to be an antitrust violation. In rescinding it, the NCAA leadership may have quickly recognized a new normal in its prior latitude with regard to rule making. Although an announced U.S. Department of Justice inquiry into may have hastened this reaction from the NCAA.

Satellite Camp Defined

The Satellite Camp ban, as originally enacted, had two functional prohibitions. First, according to the NCAA's own statement, "[t]he Council approved a proposal applicable to the Football Bowl Subdivision that would require those schools to conduct camps and clinics at their schools' facilities or at facilities regularly used for practice or competition."[2] So essentially it limited schools to having any kind of football camp or clinic on its own campus or practice facilities and not bring their camps to more talent rich areas.

But it also limited where coaches, including part time and graduate assistants and other staff members could work in the summer or off-season, "FBS coaches and non-coaching staff members with responsibilities specific to football may be employed only at their school's camps or clinics."[3] It kept college coaches out of not just other schools' camps but also away from all camps, even those not affiliated with an institution. The NCAA also sought immediate implementation of the rule, sending schools and coaches scrambling.

Proponents of the ban favored it because it curbed another broad expansion of the already onerous recruiting cycle and less directly keep current college players on campus and in class, after Harbaugh had brought his Michigan team to the IMG Academy in Florida during spring practice. But claims of protecting territory were never too far below the surface particularly in statements from SEC and ACC athletic directors. Solomon even quoted LSU Athletic Director Joe Alleva, from a radio interview, as saying, "[m]ainly what I'm concerned about is other schools coming into our state and stealing our kids."

Despite a divide body, the NCAA Division I Council voted in the ban, which was proposed by the SEC, largely under the view that a single solution was needed, that either satellite camps would be allowed or not and a level playing field would be maintained. Yet, it is precisely this all or nothing rule making, a norm in college sports thinking, when it involves an agreement to protect or divide markets or limits competition that likely triggers antitrust scrutiny.

The NCAA: An Inviting Target

Any new NCAA rule, even one clothed in the fabric of maintaining competitive equality might be subject to antitrust challenge if it touches on a market. This is likely true even of a popular and well-intentioned rule, but a polarizing one like this rule must pass through the eye of the needle of antitrust scrutiny. That is simply a post O'Bannon and pre-Jenkins reality, referring to the O'Bannon v. NCAA case currently on appeal and the Jenkins v. NCAA suit currently docketed in the Ninth Circuit. Antitrust lawyers have found the NCAA, a trade organization that also enforces discipline and competitive balance on its members an inviting target. The majority of other sports contexts leagues and disciplinary authorities receive significant antitrust immunity from one of two primary sources: 1) the statutory and non-statutory labor exceptions that immunize the outcome of arms' length collective bargaining between management and union; and

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1 Jon Solomon, SEC 1, Harbaugh 0, Satellite Camps are Done and We Are All Worse Off, CBSSports.com, April 8, 2016. http://www.cbssports.com/collegefootball/writer/jon-solomon/25547256/ncaa-puts-an-end-to-silly-satellite-camp-debate-but-hurts-players-most

2 NCAA Statement on Ban

3 Id.

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2) the Sports Broadcasting Act of 1961 (Title 15 USC Section 32) which allows individual pro sports entities (teams) to collectively act (as a league) in selling broadcast rights. But the NCAA gains no immunity from these and must justify all its market impinging activities under a Rule of Reason analysis.

The NCAA has been challenged in antitrust before and found itself on the losing end most famously NCAA v. Board of Regents (1984) and Law v. NCAA (1998). The Tenth Circuit in the Law decision questioned any rule that had a substantially adverse effect on competition. Under nearly every Federal guideline for interpreting antitrust violations, horizontal agreements to restrict competition, divide territory or fix prices are construed as contrary to Section 1 of the Sherman Antitrust Act and the NCAA is without any of the immunity the professional leagues have by virtue of the labor exceptions and Sports Broadcasting Act to such challenges.

After the Law decision proved to be a devastating financial defeat, the NCAA and its attorneys have demonstrated much greater caution in many activities that might be market or competitive restrictions. The settlement of Metropolitan Intercollegiate Basketball Association v. NCAA (2004), where the NCAA purchased the National Invitation Tournament (NIT) from the plaintiffs to avoid a trial, on whether a ban on teams declining an NCAA tournament bid accepting a bid to another post-season tournament, is one such example of this greater caution. But governance of a public, popular and lucrative business, which is precisely what collegiate athletics are, remains a challenge and the Satellite Camps ban is one where the NCAA's own legislative structure in trying to maintain an even playing field for all schools may have once again triggered Sherman Act liability. The problem is that all too often coaches and athletic directors don't see their activity in rule making even related to the antitrust laws but in today's climate when a competition rule impinges on any relevant market antitrust scrutiny will be triggered.

The Markets Involved

One mid-major conference football staffer interviewed for this article laughed off the aspect of the Satellite Camp ban keeping his school from holding a camp in recruit-rich Florida or Georgia, the activity most associate with the term, as "something they'd never do." But he turned serious when he said the ban might very well prevent his institution from identifying potential players at camps and clinics held in larger cities in his own state by high schools and was grave when he described the ban affecting his own career by keeping him from working other school's camps and "getting to know and be seen" by head coaches and coordinators at larger institutions who might recommend him for jobs in his career path.

If the ban on off-campus activity has career implications for coaches, what might it hold for prospective student-athletes? That highly debated phrase is still relevant in this context because, as opponents of the ban describe it as potentially preventing a student from even learning about institutions remote from his hometown and the range of opportunities that they might hold, not just athletic opportunities.

No one is naïve enough to say that this isn't fundamentally about football recruiting. But on nearly every college campus today is at least one former athlete, who today is simply a student, who learned about that school, applied and ultimately attended because of a meeting with a coach. USA Today decried the rule and its implication for what it described as "under recruited prospects," who angle for the opportunity to receive not a scholarship but a paid official visit to an institution far from home that they could not afford to visit on their own unofficially.[4]

The Search for Antitrust Immunity

In teaching and following the major trends in sports law over the last many decades it is easy enough to describe much of it as a search for an antitrust remedy by plaintiffs and antitrust immunity by defendants across all sports. This can be seen in a range of long running cases from Flood, Robertson, Powell and McNeil, Brown, Clarett, American Needle to Brady- the last of these being the locked out Tom Brady not the football deflating Tom Brady (Brady v. NFL, 2010). But the Board of Regents decision demonstrated and O'Bannon decision has reiterated that collegiate sports and the NCAA are really without significant armor or defensive weapons in an antitrust suit.

This means that even in a core function, such as rule making, the NCAA, as a trade association must be able to meet a Rule of Reason analysis to support any action it takes that might impinge on a market place or consumers in terms of price, supply or cost. The NCAA has not always been fully cognizant of this reality, expected deference from the Courts that

4 Paul Myerberg, Real Losers in NCAA Ban on Satellite Camps Are Under Recruited Players, USA Today April 8, 2016. http://www.usatoday.com/story/sports/ncaaf/2016/04/08/ncaa-hurts-players-by-ending-satellite-camps/82796952/

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Think Twice Before Backing Idea of College Athlete 'Employees'

By Donna A. Lopiano, Ph.D and President of Sports Management Resources

"We should pay NCAA college football and basketball players because it is totally unfair that their coaches get millions in compensation while athlete compensation is capped at the value of a full athletic scholarship!"

This statement summarizes media and public sentiments currently in vogue. If Division I men's basketball and football programs move in that direction, they will also have to leave their "motherships" (their non-profit educational institutions) because they can't afford the Title IX obligation of having to equally compensate female athletes. Currently, only 20 institutions bring in more revenues than they spend. Before sport managers support any effort to professionalize college athletes by making them paid employees, they might want to consider what would happen if Division I college football and men's basketball created professional leagues.

1. Because the professional sport league would have to be constructed as a for-profit business operated outside the institution, the resources of the non-profit higher education institution legally could not be used to subsidize the for-profit business.
2. No longer under the not-for-profit umbrella of the educational institution, the new professional basketball and football programs would no longer benefit from tax preferences (i.e., the 80percent tax deductible donations driving season ticket and seating preference sales, use of tax-free bonds to construct athletic facilities, etc.). Thus, it is not clear whether the financial viability of a new league would be assured.
3. The new professional football and men's basketball team and league revenues would be fully taxable at the federal and state levels and in some cities, salaries and wages may be subject to employee payroll taxes, unlike the college programs.
4. Athlete employee salaries would be fully taxable at the federal and state level and athlete employees would have to pay unemployment taxes and social security. Rather than accepting less than their current non-taxed athletic scholarship compensation, players would form a players' association/union and demand $100,000 annual minimum salaries — the equivalent of the non-taxable athletic scholarship they would be giving up. While these athletes would not have to attend classes in season, removing the current pressure and conflict with academic demands, athlete employees wishing to attend college in the off-season would have to pay for their own housing and food and the cost of tuition, required fees and books. Tuition and fees would not be tax deductible if the athlete earned more than $80,000 per year.
5. Instead of carrying squads of 85 players, all receiving full scholarships, squad sizes would be close to NFL limits (53) and include a smaller, lower cost taxi squad. Fewer players would benefit as employees than being a student under the college scholarship system.
6. Gate receipt income and attendance would suffer a decline if watching paid professional players, a product of lesser quality than the NFL, is not as attractive a sport product to viewers as amateur students playing for their alma maters.
7. The institution would have to charge the new professional football and basketball teams fees to lease their stadia, weight rooms, locker rooms and meeting spaces and obtain the rights to use the institutions' names and marks. These fees would have to be substantial since the professional teams would be taking all earned revenues in those sports (gate receipts, media rights, advertising and sponsorship fees, concessions, parking, etc.) for their own support The institution would need to set these fees at a substantial level to include paying off existing capital debt that would be retained and to offset the anticipated decline of donated funds to the institution's athletic program if the institution wants to continue supporting the retained non-revenue extracurricular athletic program. These substantial costs may reduce the attractiveness of the new professional college league to investors.
8. The new football and basketball professional sport businesses would have to incur the considerable costs of providing full athletic injury and disability benefits for all players, benefits institutions do not currently provide to college athletes.
9. Given the fact that only 50percent of Division I FBS football and basketball programs pay for themselves with no institutional or student fee subsidies and the fact that this statistic does not include capital costs, it is doubtful that all 128 NCAA FBS members would risk operation of an independent professional football

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and basketball business on financial feasibility grounds. Depending on how many and the quality of the institutions willing to give up their extracurricular amateur teams, the programs that remain in the NCAA intercollegiate athletics system may represent competition with the new professional league.

10. Scholarships and operating budgets for Division I women's sports and other men's non-revenue sports remaining at institutions moving their football and basketball programs to the professional model, would need to be eliminated or substantially reduced to the extent that former football and basketball revenues would now flow to the new taxable professional leagues. These scholarships represent college degree opportunities. Moving these remaining intercollegiate programs to lower competitive divisions may have to be considered.

11. The college or university would have to pay off multimillion dollar collegiate long-term coaching agreements while the new professional league would have to negotiate new coaching agreements. The professional league coaching salaries would most likely be less lucrative once athlete labor and other costs mentioned above are factored into the financial equation.

12. The value of the NCAA's Final Four Division I basketball championship, which currently generates $770 million that annually supports all 488,000 NCAA athletes in all three competitive divisions would most likely decline considerably, probably to the level of the NIT, if the great majority of top FBS basketball programs choose the professional model.

13. The $440 million College Football Playoff, currently owned by the ten FBS conferences (with the top five conferences taking home 75 percent of revenues and the remaining 25 percent to the bottom five) would probably revert to the new professional league. Instead of these funds funding athletic programs serving athletes attending the 128 FBS schools, these revenues would most likely be diverted to providing salaries and benefits to the new league's professional athletes, further diminishing the resources currently available for the remaining intercollegiate sports.

In short, sports managers should think twice before succumbing to the prospect of athlete employees. These new professional basketball and football leagues would primarily benefit those basketball and football players going on to play in the NBA, NFL or international professional basketball and football leagues each year — an estimated 582 football and 471 basketball players each year (NCAA data based on the 2014 NBA and NFL drafts) while diminishing significant resources currently used to support college educations of the remaining 488,000 NCAA athletes. Is this a justifiable step for collegiate athletics? ■

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hasn't always been forthcoming.

NCAA and the New Normal with Regard to Antitrust Liability

But in this case, NCAA Board of Directors are deserving of credit then for walking back from an overreaching rule that might become the subject of intense litigation. Even NCAA Vice President Oliver Luck, an attorney himself, was reported to have said in a speech would likely be reviewed.[5]

The right thing happened. This time it happened before anyone was negatively affected or a lawsuit was filed. What makes this situation remarkable is not the attention this rule received. Arguably, it was a rule that was enacted to level the playing field among schools in recruiting, something always considered within the purview of the NCAA to regulate. What is remarkable is the NCAA's own recognition that its activities, even in the rule making sphere are not only subject to, but likely to trigger negative antitrust review. It is a position removed from the NCAA's prior stance in cases like Board of Regents, Law and O'Bannon. If this is a 'new normal' for the NCAA, to even override the sentiments of its own membership, this may establish a more pragmatic and sustainable legal footing for the NCAA and its members. ■

Boland is Director of MBA/MSA Programs & Executive in Residence/ Sports Law, Department of Sports Administration, College of Business, at Ohio University.

5 Zac Jackson, Pro Football Talk on Twitter, April 18, 2016. https://twitter.com/AkronJackson/status/722058815944945664

Panelists at Sports Lawyers Association Meeting Look at Issues Impacting the Future of the NCAA

By Nathan Martin

At this year's Sports Lawyers Association (SLA) Conference, a panel of invited speakers discussed the future of the National Collegiate Athletic Association (NCAA).

Moderated by Glenn Wong, Distinguished Professor of Practice at Arizona State University's Sandra Day O-Connor College of Law, the panel comprised Len Elmore, former NCAA basketball star and current basketball analyst for ESPN and CBS Sports; Lynn Holzman, Commissioner of the West Coast Conference; Oliver Luck, Executive Vice President of Regulatory Affairs for the NCAA; and Larry Scott, Commissioner of the Pac-12 Conference.

Professor Wong first provided introductions, a brief history of the NCAA, a summary of the current literature on and litigation landscape for the NCAA, and the recent changes to the NCAA in response to the litigation (e.g. scholarships for full cost of attendance such as travel and childcare, more autonomy to Power 5 conferences, allowing students to borrow against future earnings to pay for loss-of-value insurance, etc.). He then laid the foundation for the panel's discussion. Focusing specifically on regulation and the NCAA's reaction to it, he asked the panel how they view the litigation facing the NCAA.

Luck's perspective was through that of a regulatory lens, whereby he and his staff were focusing on enforcement and planning/preparing for the mechanical implications of the new regulations instituted by the NCAA in response to the litigation. He described the example of how to enforce the *cost of attendance* regulation. Because of the complexity of determining cost of attendance at diverse and unique institutions across the country, an NCAA-level analysis would be overly burdensome, so alternative options must be considered.

Scott's comments focused on the effects of autonomy granted to the Power 5 conferences like the Pac-12. He stated that this new regulation would add to the NCAA's stability as well as significantly improve the lives and conditions for student athletes. This relieved the tension and friction that existed before between the Power 5 conferences and the other conferences, and implemented robust changes around flexibility and transparency specific to concerns like time demands on student-athletes. Furthermore, he mentioned that the increased role of student-athletes in the process was a long time coming.

Holzman's thoughts summarized the challenges of making changes in a large, diverse, and thus complex organization like the NCAA. Because of this diversity of perspective, determining the organization's highest priorities is difficult, and gets more so due to the exposure and debate of issues in the public forum. She also mentioned the shifting from equity-based to fairness-based competitive regulations (i.e. natural advantages exist between campuses that cannot, and should not, be regulated) will have a positive effect on the athletes' experience.

Elmore Sees Problems with Pay for Play

Professor Wong then referenced an article written by Henry Bienen and Elmore entitled *Save College Sports Before It's Too Late*, and asked Elmore what the article might look like today, approximately 18 months later. Elmore stated that it wouldn't be much different, other than the recent regulation changes including scholarships for full cost of attendance, the ability for student-athletes to return to finish their degree, elements that better address the health, safety, and well-being of the student-athletes, and the continued focus on academics. Elmore then highlighted his article when he reiterated the problems of a potential pay-for-play outcome that the NCAA might be forced to enact. He stated that since only 25 percent of Power 5 conference institutions operated in the black, a free market recruiting system would have a negative impact on the viability college athletics. He suggested that much of the present challenges have been self-inflicted, and if stripped of further controls, it would not be progressive because the result would be chaos among ungoverned institutions. Elmore believes that governance can save the NCAA from the lack of trust between individual institutions so that it does not die a death of 1000 cuts (of litigation). In fact, he supports an NCAA anti-trust exemption so that it can more effectively govern college athletics.

Luck further elaborated on the recent regulation changes specific to the health, safety, and well-being of student athletes by listing six area of concern that the NCAA had prioritized. They were concussions, mental health, cardiac arrest, sleep and nutrition, sexual violence, and substance abuse.

Scott responded with his opinion that the NCAA is being much more progressive and proactive with student-athlete welfare, and provided examples to support this opinion such as the appointment of a Chief Medical Officer (CMO). The CMO leads the newly created Sport Science Institute, which focuses on research, education, collaboration, policy development and best practice guidelines benefit the safety, excellence and wellness of the student-athlete. He also noted the development of a Student-athlete Health Initiative that provides grants for research

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on student-athlete welfare concerns.

Professor Wong then posed his final question for the panel before turning it over to SLA members in the audience. He asked the panel to respond to EPSN College Basketball Analyst Jay Bilas's late-2015 claim that college athletes should be paid because, among other things, college athletics is a multi-billion commercial enterprise.

Elmore was the first to respond, and stated that the critical difference was that of advancing the educational mission of an institution. More specifically, he posited that we ought to view the relationship between the student-athlete and the institution as benefactor-beneficiary rather than employer-employee, and as such paying student-athletes *per se* doesn't make sense. He suggested that it is a values argument about the privilege of participating in college athletics.

Professor Wong interjected with an additional question that although 95 percent of student-athletes say that the arrangement is a good deal, should there something different for the other 5 percent?

Scott clarified that it's closer to 98 percent, and that the other 2 percent have alternatives. These individuals can become an employee through other opportunities in Major League Baseball and the National Basketball Association. Although playing football in the National Football League (NFL) is different (one must wait three years before eligible based on NFL and NFL Players Association collective bargaining agreements), these outliers do have choices.

Examining the Real Beneficiary in the Athlete/Institution Relationship

The first question from the audience was posed by Robert Wallace of Thompson Coburn, LLP. He asked: Who the benefactor and beneficiary was in the current student-athlete/institution relationship? How are student-athletes who are often away from campus for a significant period of time actually getting the full education from such an experience? Shouldn't the current time demand of 20 hours/week also include travel, compliance meetings, etc.?

Luck responded that academic advising advising/support is unprecedented, and with technology student-athletes can do homework, get tutoring, and take courses online. He suggested, though, that technology might be working too well as in some cases it's leading to academic fraud.

Holzman added that the pendulum has swung too far in the wrong direction, as the pressures on student-athletes today are much higher (e.g. expectations for training year round). She agreed that changes have to be made and are coming regarding in-season, out-of-season, and summer time-demands; student-athletes are often overscheduling to the point of bad decisions. However, she noted that this might be an opportunity to learn about decision making for these student-athletes.

Elmore noted that the benefactor/beneficiary relationship begins with the agreement between the parties. If student-athletes maintain their side, the benefactor ought to maintain the benefits.

A second audience member, Len Simon of Robbins, Geller, Rudman & Dowd LLP and the University of San Diego School of Law, posited that many of the wounds suffered by the NCAA have been self-inflicted because the NCAA is slow to act/react. He asked: why can't the NCAA act more quickly? Is there a change of governance structure and reactions/Public Relations planned? Is improvement coming? He concluded that "whatever the opposite of lean and mean is, that's where you're (the NCAA) at."

Luck stated that the governance reform of the autonomous group of five power conferences will create a nimbler component of the organization.

Scott noted that the complex, multi-division elements of the NCAA make it a different animal than the professional ranks and it really is an unfair comparison to make regarding the agility of the organization.

Another question was posed, which sought feedback on a scenario, which could be described simply as unleashing the NCAA's members from themselves, whereby there were no rules or governance to constrain members.

Holzman cautioned that Federal Department of Education regulations on students (including student-athletes) regarding grant-in-aid do apply, and if/when a student's aid passes the threshold "above" assistance, a host of new issues/concerns is triggered.

Elmore prefaced that his response was an emotional one, and that such an unleashing would place the burden of failure disproportionally on student-athletes of color. He characterized these student-athletes' perspective as most often not on education, but on money and how they often ask how "can I get mine." He was worried that the majority of those student-athletes who think they're prodigies, but actually are not prodigies, will suffer the consequences of failure more acutely if a system of rules and regulations like the NCAA's and member institutions' does not exist.

A final question was posed from the audience about the NCAA modifying existing rules to allow high school baseball players,

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Blue Named UC Davis Director of Athletics

Kevin Blue, senior associate athletics director for external relations at Stanford, has been named director of athletics at the University of California, Davis. Blue, who will assume his new role on June 21, comes to UC Davis after a seven-year tenure at Stanford where he provided executive oversight of the external business units in athletics, including sales, sponsorships, marketing, communications, business strategy, ticket operations, fan experience and video. He oversaw the university's relationships with Learfield Sports, Spectra Ticketing, key sponsors and the Pac-12 Network — which he led the launch of at Stanford in 2012. He also served as sports administrator for several varsity programs while at Stanford.

Cohen Appointed Athletic Director at the UW

The University of Washington (UW) has announced that Jennifer Cohen, senior associate athletic director at UW, who has been serving as the interim athletic director since January, has been named UW's new athletic director. Cohen has been with UW for 18 years and for much of that time has overseen the athletic department's fundraising efforts. Most recently, Cohen and her team led the "Drive for Husky Stadium" campaign, in which the department raised over $50 million in gifts for the renovation of Husky Stadium, which was completed in August 2013.

Pac-12 Announces Court-Storming Initiative

The Pac-12 CEO Group – made up of the presidents and chancellors of Pac-12 universities – has approved a recommendation from the Pac-12 Council to add an institutional fine schedule to the Conference court and field storming policy. Starting in the 2016-17 academic year, fines will be applied to institutions as follows: $25,000 for first offense, $50,000 for a second offense, and $100,000 for a third offense. "The Pac-12 Council carefully considered this policy and its impact on our fans who loyally support our teams," said Mike Williams, Director of Athletics at the University of California, Berkeley. "This enhanced policy underscores the importance our universities place on the safety and welfare of our student-athletes, officials and fans, and will allow us to educate staffs and fans on procedures going forward."

Illinois Settles with Ousted Coach, Athletes

The University of Illinois has announced settlements with former football coach Tim Beckman and seven former women's basketball players. Beckman threatened a lawsuit after he was fired for cause on Aug. 28, 2015. More specifically, he was accused of forcing players to play through injuries and demeaning them for being hurt. The players, meanwhile, claimed the coaching staff discriminated against them on the basis of their race and violated their civil rights. The university said the settlement should not be viewed as an admission of guilt. "While the university sincerely apologizes for the events that resulted in the filing of this lawsuit, the settlement of this matter in no way constitutes an admission of wrongdoing on the part of the university," a statement read. "The university maintains that independent investigations concluded the evidence did not support the student-athletes' grievances." Meanwhile, the plaintiffs said in a statement that "actions have been put in place so that no other student-athlete may have to experience what we have."

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who are drafted to the MLB but have not yet signed a professional contract, to now hire agents to negotiate contracts. She asked how the NCAA is going to reconcile this with other sport athletes, particularly in the context of the recent lawsuit filed by high-profile sports labor attorney Jeffrey Kessler.

Luck identified that the reason why rules and the approach enforcing them has softened is simply because the student-athletes need better advice. The baseball example along with the NBA rule on attending the combine and trying-out for an NBA team allow for the student-athletes to get a more realistic perspective. He added that a similar rule is possible for football and the NFL.

Scott commented that they were wrestling how to get student-athletes more educated. Since so many student-athletes have unrealistic expectations of playing professionally, education is critical before making significant, life-altering decision. He mentioned that he would love to see the baseball model applied to other sports, and that they were considering an NBA pre-draft to show basketball student-athletes their potential draft positions as an educational outcome. ■

Martin is the Executive Director at Aquatic Center at California State University, Northridge. He has also taught sports law at the University of Memphis.