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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2018; B.S., Utica College, 2014. The author would like to thank Professor Roger Hartley for his invaluable guidance and expertise throughout the writing process of this Comment. The author also would like to thank the staff of the Catholic University Law Review for their hard work and assistance in editing and publishing this Comment. Finally, the author extends his sincerest gratitude to his family and friends for all of their love and support.

THE PERFECT PLAY: WHY THE FAIR LABOR STANDARDS ACT APPLIES TO DIVISION I MEN'S BASKETBALL AND FOOTBALL PLAYERS

Richard Smith⁺

We do have hungry nights that we don't have enough money to get food in. . . . Sometimes, there's hungry nights where I'm not able to eat, but I still gotta play up to my capabilities.¹

—Shabazz Napier, University of Connecticut point guard²

On April 7, 2014, the University of Connecticut defeated the University of Kentucky 60-54 to win the Division I Men's Basketball National Championship.³ The star of the game was Shabazz Napier, who scored 22 points

⁺ J.D., The Catholic University of America, Columbus School of Law, 2018; B.S., Utica College, 2014. The author would like to thank Professor Roger Hartley for his invaluable guidance and expertise throughout the writing process of this Comment. The author also would like to thank the staff of the Catholic University Law Review for their hard work and assistance in editing and publishing this Comment. Finally, the author extends his sincerest gratitude to his family and friends for all of their love and support.

1. Rodger Sherman, *Shabazz Napier: 'There's hungry nights where I'm not able to eat'*, SB NATION (Apr. 7, 2014, 7:23 PM), <http://www.sbnation.com/college-basketball/2014/4/7/5591774/shabazz-napier-uconn-basketball-hungry-nights>. Wisconsin Basketball player Nigel Hayes also highlighted the issue of compensation for college athletes. See also Charles Curtis, *Wisconsin's Nigel Hayes uses 'GameDay' sign to make powerful statement on NCAA paying athletes*, USA TODAY (Oct. 15, 2016, 10:59 AM), <http://ftw.usatoday.com/2016/10/ncaa-wisconsin-nigel-hayes-college-gameday-sign-pay-players-photo>. Hayes, a member of the University of Wisconsin's Men's Basketball Team, brought a sign to "College Gameday," an ESPN program that runs on Saturday mornings during college football season, that read "Broke College Athlete[.] Anything Helps[.]" *Id.* One paper reported:

Hayes held up a sign on *College GameDay* last weekend with the words, 'broke college athlete,' to illustrate the financial struggles student-athletes experience. He also solicited donations to a Venmo account that went to a friend's bank account; the funds raised will go to the Boys & Girls Clubs of Dane County.

Scott Gleeson, *Marquette's Duane Wilson backs NCAA, calls Nigel Hayes' money protest 'corny'*, USA TODAY (Oct. 19, 2016, 1:34 PM), <http://www.usatoday.com/story/sports/ncaab/bigeast/2016/10/19/marquette-duane-wilson-ncaa-protest-nigel-hayes-money/92411676/>.

2. Shabazz Napier was the star player on UConn's 2014 National Championship team. See Roger Rubin, *Shabazz Napier leads UConn to NCAA title with win over Kentucky, tells world 'This is what happens when you ban us'*, DAILY NEWS (Apr. 8, 2014, 8:52 AM), <http://www.nydailynews.com/sports/college/nap-time-uconn-rides-defiant-shabazz-national-title-win-kentucky-article-1.1749046>.

3. Jon Benne, *Kentucky vs. UConn, 2014 NCAA basketball championship final score: Huskies cut down nets with 60-54 win*, SB NATION (Apr. 7, 2014, 11:24 PM), <http://www.sbnation.com/2014/4/7/5592454/kentucky-uconn-2014-ncaa-basketball-championship-results>.

in the win.⁴ Napier was a unanimous American Athletic Conference (AAC) first-team selection,⁵ winner of the Bob Cousy Award,⁶ and was named the AAC Player of the Year.⁷ After the title game, Napier was named the Final Four's Most Outstanding Player.⁸ People were shocked by Napier's statement quoted above: how could a college basketball star go to bed hungry?

Over the past decade, college campuses have become a hotbed for labor issues regarding college athletes.⁹ Although National Collegiate Athletic Association (NCAA) sanctioned competitions began in the early 1900s,¹⁰ the Department of Labor (DOL) has only recently started addressing these issues.¹¹ Whether college athletes are employees of the school they attend is an important emerging issue which remains unresolved.

In 2014, the Northwestern football team attempted to form a labor organization to collectively bargain with the school.¹² The National Labor Relations Board ("NLRB" or "Board") ruled that the team could *not* unionize, as it would not further the purposes of the National Labor Relations Act (NLRA).¹³ Interestingly, the Board did not rule on whether the football players were employees of Northwestern under the NLRA, leaving for future litigation this most important issue for college athletes.¹⁴

4. *See id.* ("Napier had one of his best games on the biggest stage, leading the Huskies with 22 points and pulling down six rebounds.").

5. *American Announces All-Conference and All-Rookie Teams*, THE AMERICAN ATHLETIC CONFERENCE (Mar. 11, 2014) http://theamerican.org/news/2014/3/11/MBB_0311140245.aspx.

6. *Napier Wins 2014 Bob Cousy Award*, UCONN HUSKIES (Apr. 6, 2014), <http://www.uconnhuskies.com/sports/m-baskbl/spec-rel/040614aab.html>. The Bob Cousy Award is given annually to the nation's top point guard. *Id.*

7. *UConn's Shabazz Napier Named American Athletic Conference Player of the Year*, THE AMERICAN ATHLETIC CONFERENCE (Mar. 12, 2014), http://theamerican.org/news/2014/3/12/MBB_0312145520.aspx.

8. *See* Rubin, *supra* note 2.

9. *See e.g.*, Allie Grasgreen, *Labor board: College athletes can't unionize—yet*, POLITICO (Aug. 17, 2015, 12:21 PM), <http://www.politico.com/story/2015/08/northwestern-university-nlrb-college-board-121430>; *see also* Joe Nocera, *O'Bannon Ruling Stands, but N.C.A.A.'s Status Quo May Yet Collapse*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/sports/ncaa-obannon-case-ruling-supreme-court.html?_r=0.

10. *History*, NCAA (last updated Nov. 8, 2010), <https://web.archive.org/web/20110807060521/http://www.ncaa.org/wps/wcm/connect/public/ncaa/about%2Bthe%2Bncaa/who%2Bwe%2Bare/about%2Bthe%2Bncaa%2Bhistory>.

11. Michelle Piasecki, *Are College Athletes Employees?*, ABA, https://www.americanbar.org/publications/insights_on_law_and_society/16/spring-2016/law-review—are-college-athletes-employees-.html (last visited Apr. 14, 2018).

12. *Nw. Univ. & Coll. Athletes Players Ass'n (CAPA)*, Case 13-RC-121359, 2015 WL 4882656 at *1 (N.L.R.B. Aug. 17, 2015).

13. *Id.* at *1 (holding "it would not effectuate the policies of the Act to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of [the NLRA]").

14. *Id.* at *3 (stating "[a]fter careful consideration of the record and arguments of the parties and amici, we have determined that, even if the scholarship players were statutory employees

With respect to the Fair Labor Standards Act (“FLSA” or “Act”), there has not been much discussion as to whether college athletes should be included. In the 2016 case *Berger v. National Collegiate Athletic Ass’n*, a federal district court in Indiana, deciding an issue of first impression, ruled that the Act did not apply to college athletes.¹⁵ This Comment contends that the court in *Berger* misapplied the FLSA and that, when properly framed and argued, there is a compelling argument that the FLSA should protect college athletes.

The FLSA was a monumental piece of legislation when enacted in 1938.¹⁶ The Act’s main purpose is to protect workers through three main provisions: the minimum wage mandate, the overtime requirement, and a prohibition on child labor.¹⁷ It is an expansive statute that reaches many workers, but it is not all encompassing. Some workers are either not covered due to their relationship with the employer, or because they fall into one of the many statutory exemptions built into the Act.¹⁸ Therefore, the first hurdle workers must overcome is to prove that an employment relationship exists with their employer.¹⁹ This is critical, and many claims fail at this step.²⁰ Once this prerequisite is met, the rest of the analysis for the court is relatively straightforward: if the worker is a covered employee, then the worker is entitled to minimum wage and overtime pay.

The courts have not extensively addressed whether college athletes are employees for purposes of the FLSA. The United States District Court for the Southern District of Indiana is the only court to directly decide whether the FLSA covers college athletes. Most of the jurisprudence on college athletes revolves around the NLRA, which governs unionization and collective bargaining, or antitrust laws.²¹

(which, again, is an issue we do not decide) it would not effectuate the policies of the Act to assert jurisdiction”).

15. *Berger v. NCAA*, 162 F. Supp. 3d 845, 857 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285, 293 (7th Cir. 2016).

16. Jonathan Grossman, *Fair Labor Standards Act of 1938: maximum struggle for minimum wage*, 101 MONTHLY LABOR REV. 22, 22 (1978).

17. *See* 29 U.S.C. §§ 206–207, 212.

18. *See* ABA, COVERAGE UNDER THE FAIR LABOR STANDARDS ACT 31–35, http://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/flsa/kearns.authcheckdam.pdf (last visited Apr. 15, 2018). The main exemptions in the Act are the so-called White Collar exemptions, which are classes of executive, administrative, and professional employees that are exempt from the Act’s minimum wage and overtime protections. 29 U.S.C. § 213(a)(1) (2012).

19. *See* ABA, *supra* note 18, at 1.

20. *See, e.g., Baker v. Dataphase, Inc.*, 781 F. Supp. 724, 734 (D. Utah 1992); *Dole v. Amerilink Corp.*, 729 F. Supp. 73, 77 (E.D. Mo. 1990); *Shultz v. Jim Walter Corp.*, 314 F. Supp. 454, 458 (M.D. Ala. 1970).

21. *See generally* Nw. Univ. & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2015 WL 4882656 (N.L.R.B. Aug. 17, 2015) (deciding whether Northwestern’s football players were employees of the university that could unionize within the meaning of the NLRA); *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (considering whether the NCAA’s restraints on athlete compensation violated antitrust laws).

This Comment discusses why courts should hold that Division I Men's Basketball and Football players should be covered under the FLSA.²² It begins by discussing the background and coverage of the FLSA, provides a brief history of the NCAA, and examines the FLSA intern doctrine as well as previous judicial determinations on the employment status of college athletes. Next, it explains why the *Berger* court's decision was a mischaracterization of the relationship between college athletes and their schools. This Comment concludes by applying the most exhaustive FLSA intern test, articulated by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*,²³ to demonstrate that Division I Men's Basketball and Football players should be covered by the FLSA.

I. THE SCOUTING REPORT: THE FLSA, NCAA, INTERNS, AND THE COURTS

A. *The FLSA*

President Franklin Delano Roosevelt signed the FLSA into law on June 25, 1938.²⁴ The Roosevelt administration had sought to achieve this victory for almost half a decade.²⁵ The bill outlawed the shipment of goods in interstate commerce that were manufactured under employment conditions that did not meet those set forth in the Act.²⁶ It was unclear upon passage whether the law would withstand judicial scrutiny because it was a major expansion of government control into the private market, which the Supreme Court had been hesitant to hold constitutional in the past.²⁷ As many expected, the Supreme Court soon had an opportunity to address the constitutionality of the FLSA.²⁸

22. This Comment only discusses Division I Men's Basketball and Football players because they are the only sports that consistently generate revenue for schools.

23. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015).

24. Grossman, *supra* note 16, at 22.

25. *See generally id.* (describing how the Roosevelt administration met and overcame severe judicial and congressional opposition to pass the FLSA).

26. *See* 29 U.S.C. § 202; *id.* § 212(a).

27. *See* HERMAN A. WECHT, WAGE – HOUR LAW: COVERAGE 24 (Joseph M. Mitchell 1951) (“Prior to 1941 there was a conflict of opinion as to the power of Congress to prohibit the interstate shipment of goods produced under forbidden substandard labor conditions.”). The Supreme Court had notoriously struck down many of the New Deal era economic policies of the Roosevelt administration, including the National Recovery Administration and a New York State minimum wage for women workers. *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935); *Morehead v. New York*, 298 U.S. 587, 618 (1936).

28. *United States v. Darby*, 312 U.S. 100, 108 (1941).

Continuing its post-court-packing²⁹ strategy, the Court ruled that the FLSA was a constitutional exercise of Congress's commerce power.³⁰

The purpose of the FLSA is set forth in section 202(a) of the Act:

The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.³¹

To effectuate this purpose, the Act has three major provisions. The first is a minimum wage requirement that all employers must pay if they employ workers that meet the definition of "employee[s]" under the Act.³² The second is an overtime requirement that must be paid if an employee works more than forty hours per week.³³ The third is a ban on child labor.³⁴

I. Coverage: Finding an Employment Relationship

To be eligible for FLSA coverage, a worker must first show that an employment relationship exists.³⁵ The definition of "employ" under the Act is "to suffer or permit to work."³⁶ Courts have held that this definition is broad, explaining that it was the most encompassing definition of employment ever

29. See Grossman, *supra* note 16, at 23. In light of the Court striking down key New Deal economic programs as unconstitutional, upon reelection in 1936, Roosevelt attempted to "pack" the Court, appointing a new justice for every justice on the Court that did not retire at age 70. *Id.* Realizing the gravity of this threat, the Supreme Court reluctantly ruled in favor of a minimum wage statute enacted by the State of Washington, and Roosevelt dropped his Court packing plan. *Id.* at 23–24; see also *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 389, 400 (1937).

30. *Darby*, 312 U.S. at 115. The Court held: "We conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress." *Id.*

31. 29 U.S.C. § 202(a).

32. See *id.* § 206(a).

33. *Id.* § 207(a).

34. See *id.* § 212. Child labor was prevalent prior to the passage of the FLSA. However, as child labor has no bearing on this comment, it will not be discussed further.

35. See R. BRIAN DIXON, *THE FEDERAL WAGE & HOUR LAWS* 11 (2d ed. 2003).

36. 29 U.S.C. § 203(g).

created.³⁷ Thus, establishing “employee” status is often an easy hurdle for workers to clear.³⁸

While the test is typically easy to meet, not all workers are “employees” under the FLSA. Specifically, the Act does not cover independent contractors.³⁹ The DOL has issued guidance for courts to apply when distinguishing between independent contractors and employees.⁴⁰ The guidance provides a non-exhaustive list of six factors that can be determinative of an employment relationship.⁴¹ The factors are: (1) whether “the work performed is an integral part of the employer’s business”; (2) whether “the worker’s managerial skill affect[s] the worker’s opportunity for profit or loss”; (3) “how . . . the worker’s relative investment compare[s] to the employer’s investment”; (4) whether “the work performed require[s] special skill and initiative; (5) whether “the relationship between the worker and the employer [is] permanent or indefinite”; and (6) “the nature and degree of the employer’s control” over the worker.⁴²

Courts have been fairly consistent in applying some variation of the economic realities test.⁴³ An important aspect to note, which is vital to the remainder of this Comment, is that how the employer or employee characterizes the relationship has no bearing on the legal determination of FLSA coverage.⁴⁴ The intention of the parties does not influence a court’s characterization of the relationship.⁴⁵

2. *The Minimum Wage Requirement*

Section 206 sets forth the minimum wage requirement.⁴⁶ This provision states:

37. *See* United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (quoting 81 CONG. REC. 7657) (“Senator Black said on the floor of the Senate that the term ‘employee’ had been given ‘the broadest definition that has ever been included in any one act.’”).

38. DIXON, *supra* note 35, at 11.

39. *Id.* at 14.

40. *See* U.S. DEP’T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2015-1 (Jul. 15, 2015).

41. *See id.*

42. *Id.*

43. The courts have coined the “economic realities test” as the test used to determine the status of a worker as an employee or an independent contractor. *See* Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974) (stating “a determination of whether a worker is an ‘employee’ within the Act depends on the underlying economic realities”); *see also* Dubois v. Sec’y of Def., No. 97-2074, 1998 WL 610863, at *1 (4th Cir. Sept. 3, 1998) (stating “we consider the degree of control exercised by the employer[;] . . . the workers’ opportunity for profit or loss[;] . . . the degree of skill and . . . initiative required[;] . . . the permanence or duration of the working relationship; and the extent to which the work is an integral part of the employer’s business”).

44. *See* DIXON, *supra* note 35, at 14 (stating “[a]n individual will *not* be found to be an independent contractor merely because the individual has agreed to be an independent contractor”).

45. *Brennan*, 492 F.2d at 709 (“Nor does it matter that the parties had no intention of creating an employment relationship, for application of the FLSA does not turn on subjective intent.”)

46. *See* 29 U.S.C. § 206.

Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees[.] Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rate[. . .] . . . \$7.25 an hour.⁴⁷

The minimum wage requirement is simple to apply: if a worker meets the definition of “employee,” then the employer must pay the worker the statutorily defined minimum wage.⁴⁸ The statute exempts three classes of employees who would otherwise be covered by the Act, known as the “white-collar exemptions.”⁴⁹ These exemptions include administrative workers, executive workers, and professional workers.⁵⁰ A worker falls within a white-collar exemption if he or she meets the following three requirements: (1) the worker must perform certain duties, (2) the worker must be paid a fixed salary which is not subject to reductions based on performance, and (3) this salary must exceed a fixed amount set by the DOL.⁵¹ If these requirements are met, then the worker is excluded.

3. The Overtime Requirement

Section 207 sets forth the overtime requirement, mandating:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.⁵²

This provision is more difficult to apply due to the complexities courts encounter when determining what activities count towards working time.⁵³ Any activities completed before an employee starts his or her principal duties or any activities done after the employee finishes his or her last principal duty are not counted toward work time; however, other activities, such as donning or doffing

47. *Id.* § 206(a).

48. *See generally* DIXON, *supra* note 35, at 14 (“Wage and hour laws apply only where an employer-employee relationship exists.”).

49. 29 U.S.C. § 213.

50. *Id.*

51. DIXON, *supra* note 35, 41–53.

52. 29 U.S.C. § 207(a)(1).

53. As a full discussion of what constitutes work time is unnecessary to this Comment, only an introductory explanation is provided. For a full discussion on the intricacies of activities that constitute work time, see DIXON, *supra* note 35, at 17–24.

equipment, may or may not count as working time depending on the circumstances.⁵⁴ An employer must set a standard workweek, or seven consecutive days, to calculate when an employee is owed overtime pay.⁵⁵ An employee who works more than forty hours in that seven-day span is entitled to overtime pay of at least an additional one-half of the employee's regular rate of pay.⁵⁶

B. The NCAA: The 900 Million Dollar Enterprise

The NCAA was first formed in 1905 as a rules committee for reforming college football.⁵⁷ It was originally formed to “reduc[e] the unsavory violence and mayhem” that was pervasive in college football at the time, and for the “preservation of amateurism.”⁵⁸ Since 1905, the NCAA has grown to encompass 1,123 colleges and universities, nearly half a million athletes, 19,500 teams, and 90 championship events.⁵⁹ These athletes compete in twenty-four sports across three divisions.⁶⁰

In short, it is important to understand how popular and profitable the NCAA has become over the years. The 2015 NCAA Men's Basketball National Championship Tournament, for example, averaged 11.3 million viewers at any one time.⁶¹ This was an eight percent increase from the viewership of the 2014 tournament, and the highest average viewership for any tournament since 1993.⁶² The national championship game averaged 28.3 million viewers, a thirty-three percent increase from 2014.⁶³ By further example, the College Football Playoff is similarly popular, drawing an average of 25.7 million viewers in 2016.⁶⁴

54. *Id.* at 18.

55. *Id.* at 30.

56. 29 U.S.C. § 207(a)(1); *see also* DIXON, *supra* note 35, at 30.

57. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L. J. 985, 990–91 (1987).

58. James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L. J. 9, 12 (1985).

59. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Apr. 22, 2018).

60. *Id.*

61. *2015 NCAA tournament has highest average viewership in 22 years*, NCAA (Apr. 7, 2015), <http://www.ncaa.com/news/ncaa/article/2015-04-07/2015-ncaa-tournament-has-highest-average-viewership-22-years>.

62. *Id.*

63. *Id.*

64. Richard Sandomir, *College Football Championship Game TV Viewership Drops 23 Percent*, N.Y. TIMES (Jan. 12, 2016), <http://www.nytimes.com/2016/01/13/sports/ncaafotball/college-football-championship-game-tv-ratings-drop-23-percent.html> (“Alabama’s 45-40 victory over Clemson in the College Football Playoff championship game Monday night on ESPN drew an average of 25.7 million viewers.”).

The College Football Playoff, started two years ago, is not operated by the NCAA, but money is still distributed to member schools, so it is relevant to this discussion.⁶⁵ Each member school that becomes bowl eligible receives \$300,000, each conference that has contracts with a certain bowl receives \$54 million each, and the conferences that have teams in the semifinals receive \$6 million each.⁶⁶ The conferences that participate in the semifinal games, national championship game, or certain other designated bowl games, also receive \$2.25 million each to cover expenses for each game played.⁶⁷

In the fiscal year 2014, the NCAA generated \$989 million in revenue.⁶⁸ Its expenses for the same period were \$908.6 million, leaving the NCAA with \$80.5 million in net revenue.⁶⁹ The assets the NCAA had accumulated by the end of 2014 were more than double the total assets at the end of 2008.⁷⁰ The NCAA receives most of its revenue from the contracts it signs with television networks to broadcast college sporting events, primarily the NCAA tournament.⁷¹ In fiscal year 2014, the NCAA received nearly \$700 million from these contracts.⁷²

According to the NCAA, the Association transfers almost all of this revenue to the member schools and conferences.⁷³ The NCAA website lists many different places it distributes this money, including: \$94.3 million to Division I Championships; \$37.1 million for membership support services; \$38.8 million to Division II schools; and \$26.2 million to Division III schools.⁷⁴ The NCAA

65. *Revenue Distribution*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited May 14, 2017).

66. *Id.*

67. *Id.*

68. Steve Berkowitz, *NCAA nearly topped \$1 billion in revenue in 2014*, USA TODAY (Mar. 11, 2015), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/>. The amount of revenue the NCAA takes in is staggering:

The NCAA had total revenue of nearly \$1 billion during its 2014 fiscal year, according to an audited financial statement the association released Wednesday.

The total resulted in a nearly \$80.5 million surplus for the year – almost \$20 million more than the surplus the NCAA had in 2013 and the fourth consecutive year in which the annual surplus has exceeded \$60 million.

Id.

69. Maxwell Strachan, *The NCAA Just Misses \$1 Billion in Annual Revenue*, HUFFINGTON POST, http://www.huffingtonpost.com/2015/03/11/ncaa-revenue-2014_n_6851286.html (last updated Dec. 6, 2017). It is interesting to note that “[a] large percentage of the surplus will go to an ever-growing endowment fund whose main purpose is to safeguard the institution against a financial catastrophe, particularly related to its primary moneymaker: the March Madness basketball tournament.” *Id.*

70. Berkowitz, *supra* note 68.

71. *Id.*

72. *Id.*

73. *Where Does the Money Go?*, NCAA, <http://www.ncaa.org/about/where-does-money-go> (last visited Feb. 5, 2018).

74. *Id.*

and its member colleges and universities provide close to \$3 billion in scholarships per year.⁷⁵

C. *Judicial Development of the Intern Doctrine: Are Interns Employees Under the FLSA?*

The Supreme Court first determined whether the FLSA should apply to interns in *Walling v. Portland Terminal Co.*⁷⁶ Specifically, the Supreme Court determined whether the unpaid trainees of a railroad company were subject to FLSA protection.⁷⁷ The railroad company instituted a mandatory training program for any applicant who wished to be hired as a brakeman.⁷⁸ The average length of any one applicant's training was approximately seven or eight days, and the trainee during this period would "learn[] the routine activities by observation, and . . . then gradually [be] permitted to do actual work under close scrutiny."⁷⁹ If the training was completed satisfactorily, the applicant would be placed on a list which the railroad would use to fulfill its future staffing needs.⁸⁰

The Supreme Court held that the trainees were not covered by the FLSA.⁸¹ The Court found significant that the trainees' "activities [did] not displace any of the regular employees, who [did] most of the work themselves and [had to] stand immediately by to supervise whatever the trainees [did]."⁸² The Court also noted that the trainees' "work [did] not expedite the company business, but may [have], and sometimes d[id], actually impede . . . it."⁸³ Ultimately, the Court concluded that because "the railroads receive[d] no 'immediate advantage' from any work done by the trainees, . . . they [were] not employees within the Act's meaning."⁸⁴

While listing several factors in its decision, the Court in *Portland Terminal* did not articulate an explicit test that lower courts could apply in similar

75. Strachan, *supra* note 69. According to Stacey Osburn, the NCAA's director of public and media relations, "The NCAA and our member colleges and universities together award \$2.7 billion in athletic scholarships every year to more than 150,000 student-athletes." *Id.*

76. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947). While this case determined whether "trainees" specifically are covered by the FLSA, courts have interpreted this decision to apply in the intern context as well. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015) (stating "[t]his flexible approach is faithful to *Portland Terminal*"); see also *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015) (applying the Second Circuit's test articulated in *Glatt* and stating "[t]he factors that the Second Circuit has identified effectively tweak the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships like the type at issue here").

77. *Portland Terminal*, 330 U.S. at 149–50.

78. *Id.* at 149.

79. *Id.*

80. *Id.* at 150.

81. *Id.* at 153.

82. *Id.* at 149–50.

83. *Portland Terminal*, 330 U.S. at 150.

84. *Id.* at 153.

situations.⁸⁵ However, the lower courts have interpreted the holding in *Portland Terminal* “to require a . . . flexible test.”⁸⁶ Recently, in *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit articulated a non-exhaustive list of factors for courts to apply when determining whether an intern is an employee under the FLSA.⁸⁷ The court stated that the factors should be used to determine which party—the intern or the school—derives the primary benefit from the relationship.⁸⁸ The factors articulated by the court are:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa[;]
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions[;]
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit[;]
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar[;]
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning[;]
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern[;]
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.⁸⁹

While listing these factors, the court noted that “[a]pplying these considerations requires weighing and balancing all of the circumstances.”⁹⁰ In addition, the court stated, “No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an

85. See generally *id.*

86. *Berger v. NCAA*, 162 F. Supp. 3d 845, 853 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285 (7th Cir. 2016). The Seventh Circuit on appeal affirmed the lower court’s determination that college athletes were not employees under the FLSA. The factual findings and legal arguments made were identical to those made in front of the district court. Therefore, for the remainder of this Comment, any reference to the *Berger* decision will be to the district court opinion.

87. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015). In this case, the court was asked to determine whether interns at the defendant’s New York offices were improperly labeled as unpaid interns instead of employees under the FLSA. *Id.* at 531–32. The interns did tasks such as “copying, scanning, and filing documents,” as well as “picking up and setting up office furniture; arranging lodging for cast and crew; taking out the trash” and making “travel arrangements, organiz[ing] catering, ship[ing] documents, and set[ting] up rooms for press events.” *Id.* at 532–33. The interns in this case all worked over eight hours a day at times during their internships. *Id.* at 532.

88. *Id.* at 536.

89. *Id.* at 536–37.

90. *Id.* at 537.

employee entitled to the minimum wage.”⁹¹ This “new”⁹² test, the court reasoned, “better reflects the role of internships in today’s economy than the DOL factors, which were derived from a 68-year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen.”⁹³

D. *The Berger and Northwestern Decisions*

1. *The Northwestern Decision: A Punt in the Red Zone?*

The tactic employed by college athletes that has garnered the most public recognition is using the NLRA to argue that college athletes should be allowed to unionize and collectively bargain with the schools or universities they play for. The seminal case on this argument is *Northwestern University and College Athletes Players Association (CAPA)*.⁹⁴ In this case, Northwestern scholarship football players attempted to form a union to collectively bargain for better working conditions and compensation with Northwestern University.⁹⁵

CAPA presented the NLRB regional director with evidence demonstrating that football players regularly participated in football activities at the direction and control of the coaching staff.⁹⁶ Kain Coulter, a four-year player on the team, testified in the regional director’s decision that the football schedule could “be divided into eight periods: (1) training camp;⁹⁷ (2) regular season;⁹⁸ (3) post

91. *Id.*

92. New is in quotes here because the test, while articulating specific factors a court may look to in making the determination of whether an intern is entitled to FLSA protections, is essentially a re-articulation of the reasoning behind the Supreme Court’s decision in *Portland Terminal*—both look to the primary beneficiary of the relationship between the intern and the employer).

93. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537–38 (2d Cir. 2015).

94. *See* *Nw. Univ., Emp’r & Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC-121359, 2014 WL 1922054 (N.L.R.B. Mar. 17, 2014).

95. *See id.* at *2.

96. *See id.* at *4.

97. In training camp, which begins in early August and continues until a week before the team’s first game, the players participate in football related activities every day “from early in the morning to late in the evening.” *Id.* at *5. During training camp, “[a] typical day . . . lasts from 8 am until 10 pm. . . . Coulter estimate[s] that [p]layers devote 50 to 60 hours a week to football-related duties.” *Id.* During this period, “[t]he [p]layers must attend all scheduled activities. If they fail to do so, they are subject to discipline.” *Id.*

98. The regular season begins immediately after training camp concludes, running from the beginning of September until late November or early December. *Id.* at *6. The regular season consists of twelve games, mostly played on Saturdays. *Id.* During the week, the players must attend full team, position meetings, weight lifting sessions, film sessions, as well as participate in mandatory practice with full-pads. *Id.* Many nights, players will watch additional film not mandated by the coaching staff. *Id.* On Fridays and Saturdays, when the team is playing an away game, the players will spend more than twenty-four hours on football-related activities. *Id.* at *8. After games are played, the athletic communications department will decide which players must make themselves available to the media post-game. *Id.* at *7. During the regular season, players

season;⁹⁹ (4) winter workouts;¹⁰⁰ (5) Winning Edge;¹⁰¹ (6) spring football;¹⁰² (7) spring workouts;¹⁰³ and (8) summer workouts.”¹⁰⁴ Along with a player’s other routine activities, the head coach, along with his staff, would create a daily schedule for each player.¹⁰⁵ The players were required to complete the activities on the schedule “‘unless they ha[d] a legitimate excuse,’ and the [p]layers [were] told by [the Head Coach] and in written rules that there [were] consequences if they fail[ed] to adhere to those schedules.”¹⁰⁶ The NLRB regional director decided that the scholarship football players could hold an election to determine union representation.¹⁰⁷

In reviewing the NLRB regional office’s decision, the full NLRB was faced with deciding whether scholarship college athletes are employees for the

usually spend over forty hours a week on mandatory football-related activities, and when the additional “voluntary” film sessions are added in, the number climbs even higher. *Id.* at *9.

99. If the football team qualifies for a “bowl game,” the team will continue the regular season activities discussed above until game-day, which could be anytime in late December or early January. *Id.* The players are still given schedules by the coaching staff and must follow the schedules or be subject to disciplined. *Id.* The players spend a comparable amount of time to the regular season on football-related activities during this period. *Id.*

100. The winter workout period begins in mid-January and lasts until mid-February. *Nw. Univ., Emp’r & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1922054, at *10 (N.L.R.B. Mar. 17, 2014).* During this period, strength and conditioning coaches assist the players in completing mandatory workouts. *Id.* The time requirements and activities completed during this period are selected by the coaches, and attendance is taken. *Id.* The players spend approximately twelve to fifteen hours a week on football-related activities during this period. *Id.*

101. The next period is called “Winning Edge,” which is a one-week period where players “work out on four days and lift weights on other days in accordance with the schedules prepared by the coaching staff.” *Id.* During this week, players spend approximately fifteen to twenty hours on football-related activities. *Id.*

102. After “Winning Edge,” the team begins Spring Football. *Id.* at *10. This period continues until mid-April, and “the [p]layers have mandatory football-activities six days a week.” *Id.* In addition to practices and training similar to the regular season, players also watch film with the coaches, both in mandatory sessions and in voluntary meetings similar to those in the regular season. *Id.* During this period, players spend approximately twenty to twenty-five hours a week on football related activities. *Id.*

103. One week following the conclusion of Spring Football, the Spring Workout period begins and continues until the end of May. *Id.* at *11. This period is very similar to the Winter Workout period discussed above, with players having to attend mandatory strength and conditioning workouts throughout the week. *Id.* Players spend approximately twelve to fifteen hours a week on football-related activities during this period. *Id.*

104. The next period is Summer Workouts, which begins approximately two weeks after the Spring Workout period and lasts until early August, when Training Camp begins again. The players participate in workouts four days a week, as well as player-run “7 on 7” drills in the afternoon. *Id.* During this period, players spend approximately twenty to twenty-five hours a week on football-related activities. *Id.*

105. *Id.* at *4.

106. *Nw. Univ., Emp’r & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1922054, at *4 (N.L.R.B. Mar. 17, 2014).*

107. *Nw. Univ. & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2015 WL 4882656 at *1 (N.L.R.B. Aug. 17, 2015).*

purposes of the NLRA.¹⁰⁸ The parties had largely filed their briefs on this issue, and it seemed the case could not be adjudicated without deciding this fundamental disagreement.¹⁰⁹ However, in a somewhat stunning move, the Board decided the case without reaching this key issue.¹¹⁰ The Board ruled that allowing college athletes to hold union elections “would not effectuate the policies of the Act.”¹¹¹ The Board seemed to dismiss the case because of two main concerns: the fact that the schools Northwestern would compete against were state schools and therefore not subject to the NLRB’s jurisdiction,¹¹² and the fact that the NCAA had recently undertaken reforms that had substantially altered the standing of the Northwestern Football players, and the Board did not want to intervene where the NCAA might make more reforms.¹¹³

2. *The Berger Decision: Blocked at the Rim*

College athletes have only recently attempted to deploy the FLSA as a strategy for rearranging their relationship with the schools for which they play. In February 2016, a district court in Indiana decided *Berger v. National Collegiate Athletic Association*.¹¹⁴ The plaintiffs in this case were three current or former female track athletes at the University of Pennsylvania (Penn) who sought

108. *Id.*

109. *Id.*

110. *Id.* at *3.

111. *Id.* at *6.

112. *Id.* at *5 (“In particular, of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions. As a result, the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by ‘employers’ within the meaning of Section 2(2) of the [NLRA].”). The Board further noted, “More starkly, Northwestern is the only private school that is a member of the Big Ten, and thus the Board cannot assert jurisdiction over any of Northwestern’s primary competitors.” *Id.* The Board concluded:

In such a situation, asserting jurisdiction in this case would not promote stability in labor relations. Because most FBS teams are created by state institutions, they may be subject to state labor laws governing public employees. Some states, of course, permit collective bargaining by public employees, but others limit or prohibit such bargaining. At least two states—which, between them, operate three universities that are members of the Big Ten—specify by statute that scholarship athletes at state schools are not employees. Under these circumstances, there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams. In other contexts, the Board’s assertion of jurisdiction helps promote uniformity and stability, but in this case, asserting jurisdiction would not have that effect because the Board cannot regulate most FBS teams. Accordingly, asserting jurisdiction would not promote stability in labor relations.

Id. at 6.

113. *Nw. Univ. & Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC-121359, 2015 WL 4882656 at *5 (N.L.R.B. Aug. 17, 2015) (“As an additional consideration, we observe that the terms and conditions of Northwestern’s players have changed markedly in recent years and that there have been calls for the NCAA to undertake further reforms that may result in additional changes to the circumstances of scholarship players.”).

114. *Berger v. NCAA*, 162 F. Supp. 3d 845 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285 (7th Cir. 2016).

minimum wage and overtime for the work they performed for the university.¹¹⁵ The plaintiffs named as defendants the NCAA and 123 private institutions that participated in Division I athletics.¹¹⁶ The plaintiffs asked the court to certify their case as a “collective action . . . of ‘all current and former Division I student athletes’” on both men’s and women’s teams from the year 2012–2013 to the present.¹¹⁷ The defendants moved to dismiss the case.¹¹⁸

The court first addressed whether the plaintiffs had standing to sue any defendant other than the University of Pennsylvania, the school they attended.¹¹⁹ Looking to the parties’ arguments, the court noted that the plaintiffs were relying on “joint employer theory” to establish liability of institutions other than Penn.¹²⁰ The plaintiffs, however, had not explicitly mentioned joint employer theory in their amended complaint.¹²¹ Thus, the court held that “the only fair reading of the Amended Complaint is that the Plaintiffs are alleging that they are employees of only Penn, not of the other Defendants[,]” meaning the plaintiffs did not have standing to sue any defendant other than Penn.¹²²

Turning to the case against Penn, the court noted the plaintiffs’ success “hinge[s] on whether they are properly characterized as ‘employees’ of Penn under the FLSA.”¹²³ The plaintiffs relied on an intern fact sheet the DOL had released in 2010, which listed factors that, *if all present*, meant that an internship was not subject to the provisions contained in the FLSA.¹²⁴ The plaintiffs argued that they were in fact interns of Penn, and therefore the intern fact sheet should govern whether their “internships” were subject to the minimum wage and overtime protections of the FLSA.¹²⁵ The court was not persuaded by this argument, noting that the DOL did not intend for the Intern Fact Sheet to apply to college athletes, and even if it had, courts in other circuits had rejected the

115. *Id.* at 846–47.

116. *Id.* at 847. It is interesting to note, as the court does in footnote 2, that the plaintiffs did not name any public institutions as defendants, “presumably because the Plaintiffs determined that they enjoy immunity under the Eleventh Amendment.” *Id.* at 847 n.2. This Comment will not look at any constitutional issues surrounding immunity enjoyed by public institutions.

117. *Id.* at 847.

118. *Id.* The defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that because plaintiffs were not employees under the FLSA, there was no colorable claim the plaintiffs could bring under the statute. *Id.* at 849.

119. *Id.* at 848–49.

120. *Berger v. NCAA*, 162 F. Supp. 3d 845, 849 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285 (7th Cir. 2016).

121. *Id.* The court stated that “joint employment is not mentioned in the Amended Complaint.” *Id.* It seems that the only place the plaintiffs mentioned joint employer theory is in a reply to the defendants’ motions. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 850–51; *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP’T OF LABOR, WAGE & HOUR DIV., <https://www.dol.gov/whd/regs/compliance/whdfs71.htm> (last updated Jan. 2018).

125. *Berger*, 162 F. Supp. 3d at 850.

factors contained in the Intern Fact Sheet and applied the “more flexible test” set forth in the *Portland Terminal* decision.¹²⁶ Thus, the court held the Intern Fact Sheet was not binding.¹²⁷

The court declined to apply any one test to college athletes, explaining that any test would “fail to capture the nature of the relationship” between Penn and the plaintiffs.¹²⁸ Instead, the court looked to the economic reality of the relationship between the plaintiffs and Penn.¹²⁹ The court made three arguments in support of its conclusion that college athletes are not employees for purposes of the FLSA. First, it noted that there is a “revered tradition of amateurism in college sports,” as the Supreme Court stated in *National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma*.¹³⁰ This fact, the court argued, needed to be taken into account when determining the economic reality of the relationship.¹³¹ Second, the court pointed out that the DOL had taken no steps to apply the FLSA to college athletes, even though there are “thousands of unpaid college athletes on college campuses each year.”¹³² Third, the court relied on the DOL’s Wage and Hour Division’s Field Operations Handbook provision 10b03(e) as exempting college athletes from FLSA coverage.¹³³ Provision 10b03(e) states, in relevant part:

As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution.¹³⁴

126. *Berger v. NCAA*, 162 F. Supp. 3d 845, 851, 853 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285 (7th Cir. 2016); *see also* *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (“But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”)

127. *Berger*, 162 F. Supp. 3d at 855 (“The Intern Fact Sheet is not a proper distillation of *Portland Terminal*; rather, that case requires a flexible approach that considers the totality of the circumstances.”).

128. *Id.* at 855–56.

129. *Id.* at 856.

130. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

131. *Berger*, 162 F. Supp. 3d at 856.

132. *Id.*

133. *Berger v. NCAA*, 162 F. Supp. 3d 845, 851, 857 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285 (7th Cir. 2016).

134. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK (FOH), https://www.dol.gov/whd/FOH/FOH_Ch10.pdf (last updated Aug. 31, 2017).

The court concluded that, “[g]iven the popularity of NCAA regulated sports,” it is unlikely the DOL would have promulgated this regulation without taking into consideration the thousands of Division I athletes that compete every year.¹³⁵ Thus, the court reasoned, if the DOL meant to exclude Division I athletes in this exemption, it would have said so.¹³⁶

II. A Game Plan – The FLSA Intern Doctrine

A. Out of Bounds: The Berger Court was Misguided in its Decision

As previously discussed, the *Berger* decision was the first to apply the internship doctrine to college athletes.¹³⁷ The court declined to extend FLSA coverage to college athletes.¹³⁸ The court announced three main reasons to justify this conclusion: (1) the amateurism tradition in college sports;¹³⁹ (2) the DOL’s inaction on this issue, despite the existence of thousands of employees not receiving minimum wage and overtime pay;¹⁴⁰ and (3) the U.S. DOL, Wage and Hour Division’s Field Operations Handbook provision 10b03(e) exempting college athletes from FLSA coverage.¹⁴¹

However, this is an incorrect characterization of the relationship between Division I Men’s Basketball and Football players and their respective universities. First, the court discussed the “spirit of amateurism” at length using historical perspectives as a basis.¹⁴² However, the ideals of amateurism have been deteriorating over recent decades, and the *Berger* court seems to have ignored the amount of revenue taken in by the schools, as well as the amount of money paid to coaches, trainers, and scouts.¹⁴³

The *Berger* court also failed to correctly apply the DOL guideline 10b03(e). The guideline, which is produced in full in section I.D2, states that colleges and universities do not have to pay minimum wage for student participation in activities such as interscholastic athletic competition if the participation is “conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution.”¹⁴⁴ However, this fails to capture the true essence of big-time college

135. *Berger*, 162 F. Supp. 3d at 857.

136. *Id.*

137. *Id.* at 855.

138. *See id.* at 856.

139. *Berger v. NCAA*, 162 F. Supp. 3d 845, 851, 856 (S.D. Ind. 2016), *aff’d*, 843 F.3d 285 (7th Cir. 2016).

140. *Id.*

141. *Id.* at 857.

142. *See id.* at 856.

143. *See id.*; *see also* Warren K. Zola, *The Illusion of Amateurism in College Athletics*, HUFFINGTON POST, http://www.huffingtonpost.com/warren-k-zola/college-athletes-pay-to-play_b_2663003.html (last updated Apr. 11, 2013).

144. *Berger*, 162 F. Supp. 3d at 856–57.

football and basketball. The NCAA and its member institutions make inordinate profits off these games.¹⁴⁵ In return, the players spend more than forty hours a week during the regular- and post-season on athletic activities, including having to remain on campus during school breaks and holidays.¹⁴⁶ In addition, players often have to miss class in order to meet their athletic responsibilities, and many wish they could spend less time on the field and more time in the classroom.¹⁴⁷ While the NCAA will argue that this is done for the players' benefit, studies show that Division I Basketball players, for example, have a graduation rate 20 percentage points lower than the regular student body.¹⁴⁸ In addition, the chances of a Division I Men's Basketball player going pro are 1.1 percent.¹⁴⁹ For football players, that number is 1.5 percent.¹⁵⁰ Thus, section guideline 10(b)03 should not apply because the primary benefit is to the NCAA and its member schools, not the players.

B. A Brief Timeout: A Note on the English Language

It is important to take a timeout (apologies for the sports pun) and recognize the conditioning Americans have experienced with the word "intern" or "trainee." If someone were to argue that college athletes should be labeled as interns or trainees, most Americans would scoff at the idea. This is because the public has been conditioned, by pop culture and through educational experience, to interpret the terms narrowly. An "intern" is defined in Merriam-Webster Dictionary as "an advanced student or graduate usually in a professional field (such as medicine or teaching) gaining supervised practical experience (as in a

145. See Zola, *supra* note 143.

146. See *Nw. Univ., Emp'r & Coll. Athletes Players Ass'n (CAPA)*, 13-RC-121359, 2014 WL 1922054, at *4–12 (N.L.R.B. Mar. 17, 2014) (discussing of the amount of time spent on football activities by the Northwestern football team throughout the year).

147. See David Moltz, *How Athletes Spend Their Time*, INSIDE HIGHER ED. (Feb. 14, 2011), https://www.insidehighered.com/news/2011/02/14/ncaa_survey_details_athletes_missed_class_time ("In one of the study's more interesting findings, a significant proportion of athletes in certain sports expressed a preference to spend less time on athletics.")

148. Paul Steinbach, *Record NCAA Graduation Rates Don't Tell the Whole Story*, THE ATLANTIC (Dec. 2011), <http://www.athleticbusiness.com/Governing-Bodies/record-ncaa-graduation-rates-don-t-tell-the-whole-story.html>. The NCAA had been reporting that graduation rates had "hit [an] all-time high," but that may not tell the whole story, as the NCAA uses a different technique in measuring graduation rates than the Department of Education. See *id.*

149. *Estimated probability of competing in professional athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Feb. 5, 2018).

150. *Id.* Even when the NCAA adds in other sports leagues aside from the National Football League and the National Basketball Association, the number for football players only rises to 1.9 percent, while Men's Basketball rises to 12.2 percent (this number is higher because there are more basketball leagues around the world than football leagues). See *generally id.*

hospital or classroom).”¹⁵¹ The word “trainee” is defined as “one that is being trained especially for a job.”¹⁵²

Pop culture has provided the perfect snapshot of an American intern in the movie “The Intern” starring Anne Hathaway and Robert De Niro.¹⁵³ De Niro stars as Ben Whittaker, a seventy-year-old widower who is hired as an intern at a fashion website owned by Hathaway’s character, Jules Ostin.¹⁵⁴ The movie encapsulates what being an intern has become (or at least how pop culture views it): Ben has to do Jules’s dry cleaning, sort through mail, clean up a messy area in the office, or act as a chauffeur for a boss, while gaining “valuable experience in that industry,” all in the hopes of getting a job after the internship ends.¹⁵⁵ Ben does all this work with no pay.¹⁵⁶

Based on this depiction of an intern, most Americans would immediately dispute that college athletes are interns or trainees. This is because college athletes do not fit the mold of a quintessential “intern:” they do not provide work to a professional in return for some type of compensation, or as is more likely, just the experience and the opportunity to possibly secure employment at the end of the internship.¹⁵⁷ However, as demonstrated in previous sections, the legal definitions of an intern are much different than a layman’s or pop culture definition.

The FLSA’s intern doctrine is drastically different than the above descriptions of an internship and, this Comment will argue, is the only appropriate path

151. *Intern*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/intern> (last visited Feb. 10, 2018). Other relevant definitions include: “a student or recent graduate who works for a period of time at a job in order to get experience” and “a student or recent graduate in a special field of study (as medicine or teaching) who works for a period of time to gain practical experience.” *Id.*

152. *Trainee*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/trainee> (last visited Feb. 18, 2018).

153. *See* THE INTERN (Warner Bros. Pictures 2015).

154. *See id.*

155. *See id.* The movie is interesting because Ben, who is at least 30 years older than everyone else in the office, becomes the mentor to not only the other interns (both students), but also to Jules. *Id.*

156. *See id.* Another pop culture reference to interns is the movie “The Internship” starring Owen Wilson and Vince Vaughn. *See* THE INTERNSHIP (Twentieth Century Fox 2013). Wilson’s and Vaughn’s characters are hired as interns at Google, where they compete with students from the nation’s best colleges and universities for jobs at the company. *See id.*

157. *See What is an Internship?*, INTERNSHIPS.COM, <http://www.internships.com/student/resources/basics/what-is-an-internship> (last visited Feb. 10, 2018). The site’s definition of an internship is:

An internship is an official program offered by an employer to potential employees. Interns work either part time or full time at a company for a certain period of time. Internships are most popular with undergraduates or graduate students who work between one to four months and have a goal to gain practical work or research related experience.

Id.

forward for college football and basketball players to gain compensation.¹⁵⁸ To be successful however, players must alter the common perception of internships likely held by the judges hearing their cases. To aid college athletes, this Comment, when discussing the intern/trainee doctrine, will substitute the word “intern” with the term “student-employee.” This should help clear the hurdle of word association that poses arguably the biggest obstacle to FLSA application to college athletes.

C. *Division I Men’s Basketball and Football Players are “Student-Employees” Under the FLSA’s “Student-Employee” Doctrine*

Division I Men’s Basketball and Football players should argue that they are student-employees under the FLSA. As student-employees, if the primary benefit of their relationship with the school is to the school, then they are “employees” and entitled to minimum wage and overtime protections.¹⁵⁹ While the *Berger* court declined to use any specific test to answer this question, other courts should adopt the Second Circuit’s test set forth in *Glatt* to guide them in the primary benefit analysis. As the *Glatt* test is the most informative and exhaustive, this section will apply its factors to Division I Men’s Basketball and Football players.

The first *Glatt* factor is “[t]he extent to which the [student-employee] and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that . . . [the student-employee] is an employee—and vice versa.”¹⁶⁰ Applying this factor to Division I Men’s Basketball and Football players, there is a clear expectation that players will be “compensated” for their play. According to the NCAA, 56 percent of all Division I college athletes “receive some level of athletics aid.”¹⁶¹ On its website, the NCAA states that “[f]ull scholarships cover tuition and fees, room, board and course-related books.”¹⁶² Some of the highest-level recruits receive multi-year scholarships, many for the entire four years of school if they decide to stay that long.¹⁶³ Others receive only one-year scholarships, and the coach has the right to decide whether to renew the scholarship for the next year.¹⁶⁴

158. See *infra* Section II.C.

159. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947); see *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537–38 (2d Cir. 2015); *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518, 529 (6th Cir. 2011).

160. *Glatt*, 811 F.3d at 536–37.

161. *NCAA Recruiting Facts*, NCAA (July 2016), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf>.

162. *Scholarship*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> (last visited Feb. 19, 2018).

163. *Id.*

164. *Id.* There is a procedure and appeals process a player can use to try and fight a decision to reduce or not renew a scholarship. *Id.*

This shows that there is an expectation of compensation between college athletes and the employer. Each Division I Men's Basketball team is allowed thirteen scholarship players, meaning that each team can give some level of athletic scholarship to only thirteen players.¹⁶⁵ For football teams, that number climbs to eighty-five.¹⁶⁶ In essence, schools are bidding for the services of the best athletes.¹⁶⁷ Thus, the first factor favors Division I Men's Basketball and Football players as student-employees.

The second factor is "[t]he extent to which the . . . [experience provides the student-employee with] training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions."¹⁶⁸ This factor supports the conclusion that Division I Men's Basketball and Football players are student-employees of their respective universities. As the testimony in the *Northwestern* NLRB decision demonstrates, these high-level Division I sports are year-round jobs.¹⁶⁹ Athletes spend an inordinate amount of time during the academic year on athletics.¹⁷⁰ These athletes, therefore, especially during the regular- and post-season, are not receiving the same type of educational experience as other students.¹⁷¹ According to a 2010 study of 20,000 current college athletes, a Division I Men's Basketball player misses an average of 2.4 classes per week.¹⁷² The study also found that 10 percent of Division I Men's Basketball players and 23 percent of Division I Football players would prefer spending more time on academics, and less time on athletics.¹⁷³

Recent scandals brought to light through investigative reporting have also demonstrated that some high-level Division I universities do not recruit these

165. *College Athletic Scholarship Limits 2017-2018*, SCHOLARSHIP STATS, <http://www.scholarshipstats.com/ncaalimits.html> (last visited Feb. 19, 2018).

166. *Id.*

167. The best athletes have multiple, full-scholarship offers from schools, and the school and sports networks, such as ESPN, publicize the decision when the athlete chooses a school. *See, e.g.*, Tom VanHarren, *Tyreke Smith chooses Ohio State; Auburn lands WR Anthony Schwartz*, ESPN (Jan. 4, 2018), http://www.espn.com/college-sports/recruiting/football/story/_/id/21961676/tyreke-smith-espn-300-defensive-end-commits-ohio-state.

168. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

169. *See* Nw. Univ., Emp'r & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1922054, at *4 (N.L.R.B. Mar. 17, 2014).

170. *See id.* at *6-13.

171. *See* Moltz, *supra* note 147.

172. *Id.* The same study found that a Division I Football player missed an average of 1.7 classes per week. *Id.* The article begins, "Division I . . . football players report that they missed more classes during the season last year than their peers did five years ago, according to a recent study of how National Collegiate Athletic Association athletes spend their time. But men's . . . basketball players continue[] to miss more classes than players in all other sports." *Id.*

173. *Id.* The article noted "[i]n one of the study's more interesting findings, a significant proportion of athletes in certain sports expressed a preference to spend less time on athletics." *Id.*

football and basketball players for academic reasons.¹⁷⁴ In fact, schools recruit these players with the knowledge that, without athletics, it would be impossible for them to gain admission, let alone add any value to the academic prestige of their institutions.¹⁷⁵ Because many athletes miss at least one class a week for sports-related activities, and because the universities do not accept these students with any expectation for academic growth or performance, this factor favors Division I Men's Basketball and Football players as student-employees.

The third factor is “[t]he extent to which the . . . [experience for the student-employee] is tied to the [student-employee’s] formal education program by integrated coursework or the receipt of academic credit.”¹⁷⁶ College athletes do not receive academic credit in return for their athletic performance.¹⁷⁷ Over recent years, many scholars have advocated for this type of compromise between the players, the NCAA, and its member institutions, with one article stating “[i]nstead of feigning ignorance about why big-time college athletes are on campus in the first place, universities should award academic credit for the hours athletes already devote to sports.”¹⁷⁸ Another posits that forcing college athletes to “[t]ak[e] classes they have no interest in will not help them in their chosen careers[,]” and argues that “a course that gives three credits to athletes who chart each day’s practice performance” should be instituted.¹⁷⁹

Based on a player’s schedule during the academic year, it seems that any formal educational program is secondary to athletic interests and responsibilities.¹⁸⁰ With players missing class and spending more than forty hours a week on athletic responsibilities, it is clear that the expectation is for the player to be an athlete first, and a student second.¹⁸¹ Coupled with the cheating scandals that have erupted at schools across the country, it is evident that some

174. See Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th Graders*, CNN (Jan. 8, 2014), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/>.

175. See *id.* The article noted that “[t]he issue was highlighted at UNC two years ago with the exposure of a scandal where students, many of them athletes, were given grades for classes they didn’t attend, and where they did nothing more than turn in a single paper.” *Id.* Thus, not only do the schools admit students who do not meet admissions standards, but they take active part in ensuring that, regardless of the educational background or needs of the individual, the player remains eligible to compete. *Id.* As a former professor Florida State University notes, the academic assistance the player may receive does not continue if the player suffers a career-ending injury. *Id.*

176. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015).

177. See Tate Watkins, *College Football 101: College Athletes Deserve Academic Credit for Playing*, BLEACHER REPORT (Nov. 16, 2011), <http://bleacherreport.com/articles/943613-college-football-101-college-athletes-deserve-academic-credit-for-playing>.

178. *Id.*

179. Donna Ditota, *Give athletes academic credit for playing sports says Syracuse University professor Bill Coplin*, SYRACUSE (May 8, 2015), http://www.syracuse.com/orangebasketball/in dex.ssf/2015/05/syracuse_profession_bill_coplin_proposes_allowing_academic_college_credit_f or_at.html.

180. See generally *Nw. Univ., Emp’r & Coll. Athletes Players Ass’n (CAPA)*, 13-RC-121359, 2014 WL 1922054 (N.L.R.B. Mar. 17, 2014).

181. Moltz, *supra* note 147.

of the players do not garner any academic benefit from their experience as student-employees.¹⁸² Thus, this factor supports Division I Men's Basketball and Football players as student-employees.

The fourth factor is “[t]he extent to which the . . . [experience provided to the student-employee] accommodates the [student-employee’s] academic commitments by corresponding to the academic calendar.”¹⁸³ The athletic season does not correspond with the academic calendar for most Division I Men's Basketball and Football players. Football players at Northwestern spend fourteen-hour days on football activities during training camp, which occurs before the academic year begins.¹⁸⁴ The regular- and post-season include Thanksgiving and potentially Christmas, times when the regular student-body is on break.¹⁸⁵ Athletes do not enjoy this same luxury, and must continue their athletic duties throughout these “academic breaks.”¹⁸⁶ For basketball, the season runs from the middle of October until as late as April for some teams.¹⁸⁷ This includes not only the Thanksgiving and Christmas holidays, but potentially spring break as well.¹⁸⁸ Considering that players compete during academic

182. *See id.*

183. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

184. *See Nw. Univ., Emp’r & Coll. Athletes Players Ass’n (CAPA)*, 13-RC-121359, 2014 WL 1922054, at *5 (N.L.R.B. Mar. 17, 2014); Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNN (Mar. 31, 2014, 6:58 AM), <http://money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/?iid=EL>.

185. For example, at Duke, the fall semester in 2016 ended on December 19, and students did not need to be back to campus until the spring semester began on January 11, 2017. *See Academic Calendar 2016-2017*, <https://registrar.duke.edu/academic-calendar-2016-2017> (last visited Feb. 5, 2018). During this time period, the Duke Men's Basketball Team played five games. *See Men's Basketball - 2016-17 Schedule/Results*, GO DUKE, http://www.goduke.com/SportSelect.dbml?SPSID=22726&SPID=1845&Q_SEASON=2016 (last visited Feb. 5, 2018).

186. For example, the regional director noted in his NLRB decision that during Christmas break:

Although regular students are off for the holidays, . . . the Players are limited in any vacation they may take to see their families due to their football responsibilities. For instance, when the football team played in the Gator Bowl following the 2012 regular season, the Players could not leave until after 3pm on December 20 and were required to return on Christmas Day. . . . [In addition,] [t]he Players must get their travel plans approved by their position coaches.

CAPA, 2014 WL 1922054, at *9. For Thanksgiving, when most students are home celebrating with their families, “the [p]layers report for required meetings and practice on Thanksgiving morning like any other Thursday.” *Id.* at *8.

187. *See Joe Bozell, When does college basketball season start?*, NCAA (Oct. 14, 2016), <http://www.ncaa.com/news/basketball-men/article/2016-10-14/when-does-college-basketball-season-start>.

188. During Christmas break, the Duke Men's Basketball team played in five games. *See Men's Basketball 2016-17 Schedule/Results*, *supra* note 185. Spring break began on March 10th and concluded on March 20th. *Academic Calendar*, *supra* note 185 at 7. During this time, the Duke Men's Basketball team competed in the ACC Tournament. *See Men's Basketball 2016-17 Schedule/Results*, *supra* note 185.

recess, the fourth factor supports the conclusion that Division I Men's Basketball and Football players are student-employees of their respective universities.

The fifth,¹⁸⁹ sixth,¹⁹⁰ and seventh¹⁹¹ factors enumerated by the Second Circuit in *Glatt* are not applicable to this scenario. However, it is important to note that the court in *Glatt* emphasized that not every factor will apply in every scenario.¹⁹² A court ruling on whether an unpaid student-employee should be covered by the FLSA can apply any factor as long as its final determination is “whether the [student-employee] or the employer is the primary beneficiary of the relationship.”¹⁹³

After weighing the applicable factors, the primary benefit of the relationship between college athletes and the schools they attend is to the school. In 2014, the NCAA had close to one billion dollars in revenue.¹⁹⁴ It received most of its revenue from contracts it signed with television networks to broadcast college sporting events, including the NCAA tournament.¹⁹⁵ The NCAA and the universities are essentially using college athletes as revenue machines to fund other sports programs.¹⁹⁶ As a result, students are being extorted into working an inordinate number of hours for little in the way of compensation.¹⁹⁷

The NCAA and its member institutions argue that paying college athletes will destroy amateurism and minor league sports.¹⁹⁸ However, this argument is illogical based on the revenue the NCAA makes off Division I Men's Basketball

189. The fifth factor is “[t]he extent to which the internship’s duration is limited to the period in which the internship provides [the student-employee] with beneficial learning.” *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 538 (2d Cir. 2015).

190. The sixth factor is “[t]he extent to which . . . [the student-employee’s] work complements, rather than displaces, the work of paid employees while providing significant educational benefits to . . . [the student-employee].” *Id.*

191. The seventh and final factor listed by the Second Circuit is “[t]he extent to which . . . [the student-employee] and the employer understand that the [experience] is conducted without entitlement to a paid job at the conclusion of the [experience].” *Id.*

192. *Id.* at 537 (stating “[a]pplying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction [T]he factors we specify are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases.”)

193. *Id.* at 536.

194. Berkowitz, *supra* note 68.

195. *Id.*

196. *Men’s Basketball*, NCAA, <http://www.ncaa.org/about/resources/research/mens-basketball> (last visited Mar. 10, 2017); *see also Football*, NCAA, <http://www.ncaa.org/about/resources/research/football> (last visited Mar. 10, 2017).

197. *See generally* Nw. Univ., Emp’r & Coll. Athletes Players Ass’n (CAPA), 13-RC-121359, 2014 WL 1922054 (N.L.R.B. Mar. 17, 2014).

198. Tim Dahlberg, *NCAA President: Paying Athletes Could Destroy College Sports*, DIVERSE ISSUES IN HIGHER EDUCATION (June 19, 2014), <http://diverseeducation.com/article/65078/> (“To convert college sports into professional sports would be tantamount to converting it into minor league sports.”). NCAA President Mark Emmert described amateurism as “one of the most fundamental principles of the NCAA and intercollegiate athletics.” *Id.*

and Football players.¹⁹⁹ The NCAA's large profits, coupled with the academic issues at many schools, demonstrate that it is already running a "minor sports league."²⁰⁰ The idea that paying these players will erode support for the college sports is nonsensical. Opponents of paying these players argue that fans' "connection to the athletes is deeper [than just admiring athletic excellence] These student athletes walk the same halls, have the same professors, and sweat the same midterms that we did, however long ago."²⁰¹ This argument fails to account for the fact that many of these players are not held to the same academic standards as their non-athlete counterparts, as many schools accept players that, without their athletic capabilities, would never "walk the same hall" as non-athlete alumni.²⁰² Division I Football and Men's Basketball coaches "are the highest-paid public employees in their states—a five-million-dollar salary is no longer eye-popping—and that paycheck doesn't include gifts from boosters, who will occasionally pay for a coach's house to make sure that he stays happy."²⁰³ It seems the only people not compensated in the "amateur" model of Division I Men's Basketball and Football are the most important—the players.

III. Conclusion

College athletics are in a state of change. Due to social media, athlete grievances with the NCAA are more scrutinized than ever before. College campuses have become the epicenter of one of the most hotly contested labor issues in the 21st century. How these issues are adjudicated will impact not only the lives of the student athletes, but also countless other industries as well. That is why these issues are so important.

The intern doctrine is the best route forward for Division I Men's Basketball and Football players. The primary beneficiary, considering the time spent on the athletic field by the players as well as the revenue taken in by the NCAA and its member institutions, is the school's. The student athlete gains little in the way of compensation through athletic endeavors, while sacrificing valuable time that could be spent on academics.

As the issue reaches a boiling point, it is important to remember why Congress passed the FLSA in 1938: to relieve suffering of workers who lacked the bargaining power to obtain fair wages and hours. As Shabazz Napier's quote at the beginning of this Comment shows, the reality for many college athletes is that the current system does not provide the benefits to allow some to even obtain the necessities many take for granted. This is the exact issue the FLSA was

199. See Berkowitz, *supra* note 68.

200. See *id.*; see also Ganim, *supra* note 173.

201. Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn't Be Paid*, THE NEW YORKER (Oct. 14, 2015), <https://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid>.

202. See Ganim, *supra* note 173.

203. Yankah, *supra* note 201.

enacted to remedy, and players—*student-employees*—should look to enforce the statute against the NCAA and the member institutions for which they work.