

NLRB REGIONAL DIRECTOR HOLDS THAT DARTMOUTH BASKETBALL PLAYERS ARE EMPLOYEES ENTITLED TO UNION ELECTION

On February 5, 2024, the National Labor Relations Board's Regional Director for Region 1 held that the student-athletes on Dartmouth's men's basketball team are "employees" of Dartmouth, as the National Labor Relations Act defined that term, and are entitled to vote on whether or not a union will represent them. Previously, a different region had held that Northwestern University's scholarship football players were employees of that university, but the Board declined to exercise jurisdiction (*Northwestern University*, 362 NLRB 1350 (2015)), citing state law complications, and those players were left without a union. The Regional Director's decision is subject to review by the Board. However, if the Board affirms this decision (*Trustees of Dartmouth College and Service Employees International Union, Local 560*, Case 01-RC-325633, Feb. 5, 2024), or if other NLRB regions follow it, it will be a major step towards unionization for student-athletes across the country.

To decide whether the players in *Dartmouth* were employees, the Regional Director examined two aspects of the definition of "employee": whether Dartmouth exerted sufficient control over the players and their work, and whether the players were compensated. The players' status as students, the Regional Director noted, did not automatically exclude them from the definition of "employee" under the recent *Columbia University* Board decision.

In *Dartmouth*, the Regional Director first found that the school exerts extensive control over the players, consistent with "employee" status. Dartmouth, through its coaches, schedules and determines the content of the players' practices, game film review, weightlifting sessions, and other team-related activities. Dartmouth dictates when the players will be available for alumni events. Dartmouth imposes a Student-Athlete Handbook to govern the players' conduct. Dartmouth closely monitors the players' conduct and schedules when the team travels for road games—a player must ask permission if he wants to leave the team for any reason, including to get a haircut. The Regional Director concluded that this control goes far beyond what Dartmouth's student body is subject to, and weighs in favor of the players being employees.

The Regional Director also found that the players received compensation for playing basketball. The Regional Director recognized that compensation extended beyond wages; fringe benefits, even if small in value, could establish compensation. Here, Dartmouth does not award athletic scholarships, and no players received Name and Image Likeness ("NIL") compensation. But the Regional Director found other compensation. The players receive equipment and apparel from Dartmouth far beyond what is necessary for them to play basketball, estimated to be worth \$2,950 per player per year. Players also receive tickets to games, lodging, meals, and a performance program created to benefit them. The Regional Director noted these and other forms of compensation far exceeded any compensation that the general Dartmouth student body received—and rejected Dartmouth's argument that any student who receives aid and participates in any extracurricular activity could be an employee. The benefits received by the players here were compensation sufficient to establish them as employees.

Finally, the Regional Director found that *Northwestern* did not demand a different outcome. In *Northwestern*, the Board expressed concern that Northwestern was the only private school in the Big Ten Conference. The other schools—its competitors—were state-run and subject to their own state labor laws. The Board declined jurisdiction to avoid creating inconsistent sets of laws among schools in the same conference. Here, Dartmouth and its fellow Ivy League Conference schools are all private. Allowing the players to unionize under federal law does not raise the concerns present in *Northwestern*.

The *Dartmouth* decision is notable for its straightforward reasoning and its likely-extensive reach. Dartmouth's players do not receive athletic scholarships or NIL compensation, yet the Regional Director noted numerous examples of compensation that supported the finding that they are employees. Under this definition of compensation, it will be difficult for any private university to say its athletes are not compensated. Universities may be able to argue that they exert less control over their athletes than Dartmouth did here, but may of the examples of Dartmouth's control, such as its practice schedule and required interactions with alumni, are likely found throughout college athletics. Ultimately, student-athletes will frequently be found to be employees if the *Dartmouth* decision, and its reasoning, are approved by the Board or applied by other regions.

ASHER, GITTLER & D'ALBA, LTD. 200 West Jackson Boulevard, Suite 720 Chicago, IL 60606 – 312.263.1500 www.ulaw.com

© 2024 Asher, Gittler & D'Alba, Ltd. All rights reserved. Dated. February 29, 2024

This release informs you of items of interest in the field of labor relations. It is not intended to be used as legal advice or opinion.

U.S. News & Report's Best Law Firms Designation is for Chicago Tier 1 rankings in Employment Law (Individuals), Labor Law (Union), and Litigation (Labor and Employment) and a National Tier 2 ranking in Litigation (Labor and Employment).

