

# A Wild Time On Campus: Higher Ed Whipsawed By September's Employment Law Developments

## Labor & Employment Law Update

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Colleges and universities have witnessed major developments in September with student teaching and research assistants at private schools losing the right to unionize but student-athletes in California gaining the right to be paid. U.S. higher education will see significant changes as a result.

### [In Major Reversal, U.S. Labor Board's New Proposed Rule Would Deny Students at Private Schools the Right Unionize](#)

In 2016, the National Labor Relations Board (NLRB) gave teaching and research assistants at private colleges and universities the right to unionize. Viewed as a major win for organized labor, student teaching and research assistants have conducted 15 union elections at private schools over the last three years with 12 of them deciding to unionize. State law separately governs the eligibility of employees at public schools to unionize where it is much more common.

However, the political leaning of the NLRB has tilted over the last couple of years. On September 23, 2019, the NLRB reversed course and proposed a new rule to exclude undergraduate and graduate students under Section 2 (3) of the National Labor Relations Act. The proposed rule will exempt from the NLRB's jurisdiction any undergraduate and graduate students who are paid to perform services in connection with their studies. The new rule effectively strips unionization rights from teaching and research assistants at private schools. At the moment, the NLRB has released the proposed rule for a 60-day period of public comment and will most likely implement the rule soon thereafter.

### [New California Law Allows Student-Athletes to Receive Endorsement Deals; Illinois and Other States Are Likely to Follow](#)

While federal law has once more reset the dynamic between administrators, teachers and research assistants at private schools, several states now see themselves as championing the cause of unpaid student-athletes. College athletics has been the subject of a long-running debate over whether student-athletes, who help schools raise huge sums of money, should be treated simply

as students or more like paid employees. A new California law seeks to upend the applecart in favor of paying college athletes.

On September 30, 2019, California Gov. Gavin Newsom signed a new law permitting student-athletes at California colleges and universities to be paid for the use of their name, image and likeness. Starting in 2023, student-athletes in California will be able to hire sports agents and pursue individual endorsement deals. It is a big change and strikes at the heart of the NCAA's broad amateurism rules. The NCAA has threatened to sue California and penalize California schools.

Unfortunately for the NCAA, California may just be the start. Legislators in Illinois, New York, South Carolina and Florida have all announced efforts to pursue similar bills. In Illinois, for example, soon after Gov. Newsom signed the California measure into law, Illinois State Rep. Emanuel "Chris" Welch introduced a similar bill. Illinois HB3904, known as the Student Athlete Endorsement Act, would prohibit schools or athletic conferences from interfering with the right of student-athletes to earn money from their name, image or likeness. Student-athletes could hire sports agents to help them obtain endorsement deals. In the wake of the California law, the Illinois bill appears very likely to move forward.

Some U.S. congressmen have also publicly declared their intent to take up the issue on the national level. U.S. Rep. Anthony Gonzalez from Ohio and U.S. Rep. Mark Walker from North Carolina both support enacting federal legislation to give college athletes the right to profit from endorsement deals. Rep. Gonzalez recently stated that he will give a group formed by the NCAA to study the issue some time to report their findings and recommendations to the NCAA before introducing federal legislation. Given that the California law only takes effect in 2023, the NCAA will have an opportunity to change its rules nationwide. However, it remains to be seen whether the NCAA's vehement opposition to paid student-athletes will give way in the face of the changing legal landscape that it must soon navigate.

### Uncertain Times Ahead

These recent changes in the law are likely to cause a fair level of uncertainty among many higher education administrators and spur a lot of litigation. During such times, it is always advisable to consult with attorneys well experienced in employment and higher education legal practice to help guide the best path forward for the college or university.

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