SC Pay-For-Play Bill For Student-Athletes Faces Obstacles

By **Christina Stylianou and Gregg Clifton** (December 22, 2022)

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As name, image and likeness developments continue to move forward, the National Labor Relations Board continues its efforts to reclassify student-athletes as university employees.

Current cases like Ralph Johnson v. National Collegiate Athletic Association in the U.S. Court of Appeals for the Third Circuit attempt to further reclassify student-athletes as employees under the jurisdiction of the Fair Labor Standards Act, and state legislatures are also beginning to imagine a world in which some form of pay-for-play for student-athletes becomes a reality.

South Carolina Sen. Marlon Kimpson has prefiled S. 306, a bill intended to create a pathway to pay football players and men's and women's basketball players at NCAA Division I public universities that generate over $50 million per year.

If passed, S. 306 provides that the governing body of every participating university will authorize the institution's athletic director to use funds generated from the school's intercollegiate sport gross revenue to award an annual stipend to each student-athlete participating in either football or basketball.

The stipend would be awarded provided the athlete maintains good academic standing, which means achieving a cumulative GPA of 2.00 or higher during the previous academic year, including the athlete's senior year in high school. The bill defines intercollegiate sport gross revenue as any revenue generated from the following sources:

- The use of the commercial value of a student-athlete's name, image or likeness;
- Ticket sales;
- Television rights;
- Merchandise; or
- Broadcasting licensing agreements.

The amount of the stipends that will be awarded to each individual student-athlete will be determined by the total number of hours that each student-athlete spends associated with the sport multiplied by the university's established hourly rate for a work-study program.

The stipends are to be awarded in addition to any scholarships, including the cost of attendance or financial aid, and they are to be considered financial aid for educational purposes and not income for state income tax purposes.

For athletes participating in more than one sport, only one stipend would be permitted. The bill does not explain how the sport would be chosen for purposes of calculating the athlete's hours and corresponding stipend amount.

For instance, if a student-athlete participates in both football and basketball, but spends more hours involved in football-related activities — e.g., practices, games, weight training,

etc. — than they do in basketball-related activities for the year, the bill does not specify whether they receive the higher stipend payout or the lower. It also fails to define what activities constitute time spent associated with the sport.

One would expect that participation at games and practices would be a clear fit, but activities like time spent traveling to games or participating in press events or marketing tasks for the university are less clear on their face.

S. 306 also seeks to offer athletes covered by the bill a further benefit in addition to the financial stipend: a one-time bonus payout at the time of graduation.

Per the terms of the bill, each participating university would create a trust fund, funded with a percentage of the intercollegiate sport gross revenue. Then, for each year a student-athlete in either football or basketball maintains good academic standing, $5,000 would be deposited into the trust fund on the athlete's behalf, with a total across the athlete's years of education not to exceed $25,000.

At the time of graduation and upon completion of a state-approved financial literacy course by the athlete, the participating university would then provide a one-time payment of the total amount that was deposited on their behalf into the trust fund. The payment must be made 30 days after graduation.

Like the work-study stipend, the one-time payment would be awarded regardless of additional scholarships or financial aid received, and would be deemed financial aid not subject to state income tax. Also similar to the work-study stipend, athletes participating in multiple sports would only be eligible for one trust fund payment not to exceed $25,000.

This current effort by South Carolina is not the first time a state has sought to create a legislative path to pay its student-athletes. Earlier this year, California attempted a similar approach with its College Athlete Race and Gender Equity Act, which was ultimately unsuccessful.

Indeed, even if passed, new laws in the spirit of S. 306, depending on their language, could still face challenges due to conflicts with NCAA guidelines and Title IX.

For instance, according to the most recent name, image and likeness guidance from the NCAA, while member institutions can and should educate student-athletes on topics like financial literacy, taxes and social media practices, institutions may not provide free support services, such as actual tax preparation services or contract review to student-athletes, unless those same services are offered to the general student body.

If this guidance is extended to pay-for-play as well, S. 306 itself, if passed, could pose a conflict with these recent NCAA mandates by requiring student-athletes to complete the financial literacy course in order to access the trust fund payment upon graduation, unless the universities offered the same course to the general student population.

Even then, it is not entirely clear whether the same terms attached to the course — i.e., the trust fund payout at the end or any fee or lack thereof to take the course — would need to be extended to the general student population as well in order to comply with the new guidance.

Moreover, in order to comply with Title IX, universities are required to provide male and female athletes with equal benefits and services in their athletics programs. How this would

be applied in a state authorized pay-for-play system across a university's entire athletic program of both male and female student-athletes is unclear.

Arguably, however, offering the work-study payment created by S. 306 for the men's football team and men's basketball team, but limited to only the women's basketball team and no other women's program, could certainly be viewed as providing unequal benefits.

Other iterations of legislation like S. 306, for instance, creating a financial threshold of media revenue or ticket sales in order for the student-athletes to qualify for the payment, could also lead to the same result.

Given the historic resistance by the NCAA and its member institutions to view student-athletes as employees, it is not difficult to imagine the obstacles that the proposed South Carolina legislation and any other similar proposals will face.

Nevertheless, the ever-increasing litigation and legislative efforts to legalize a system of pay-for-play in direct conflict with current NCAA rules and guidelines offers one more signal that change in the college sports business model — and a potential change in the treatment and employment classification of student-athletes — may be on the horizon.

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