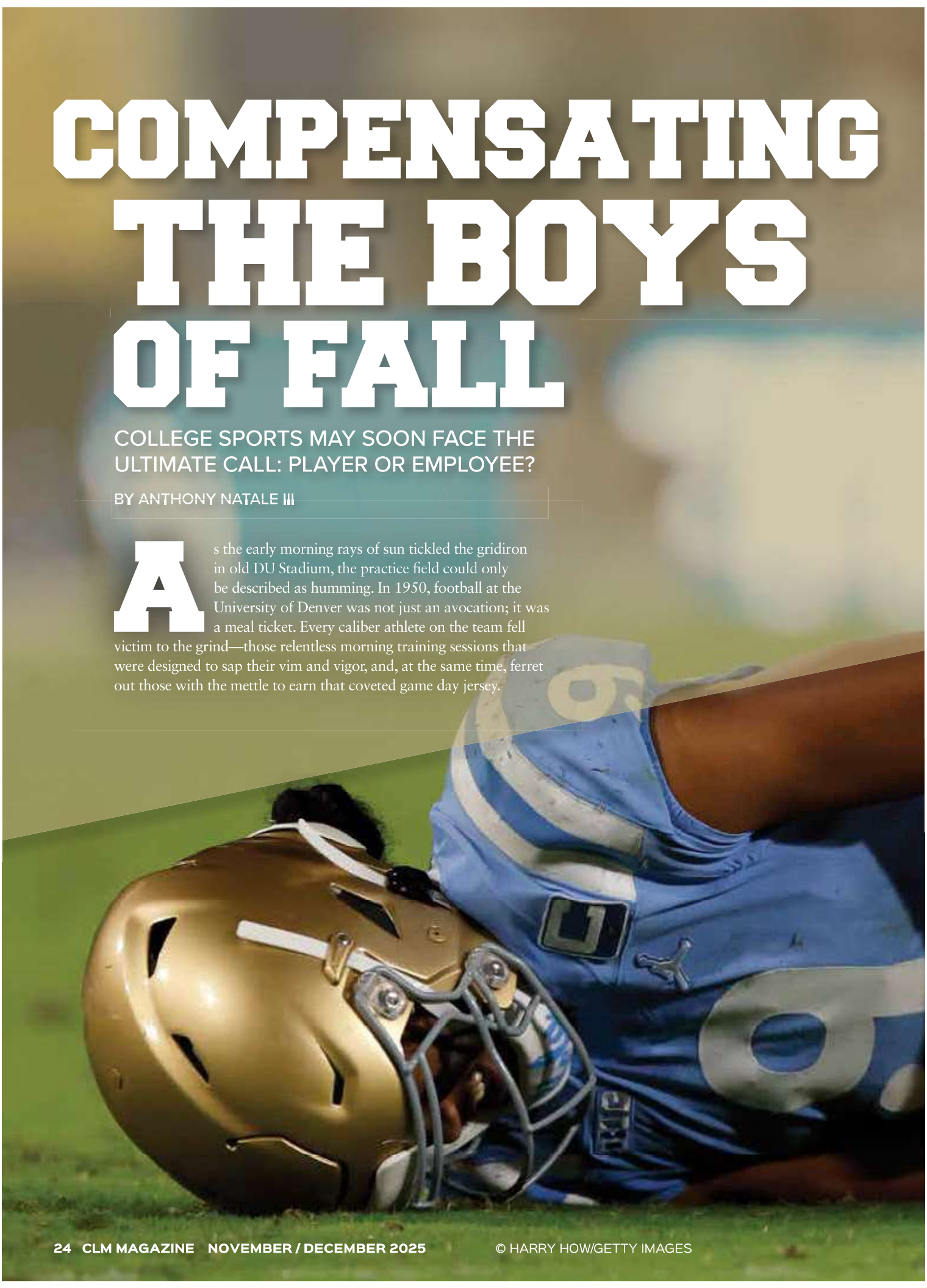
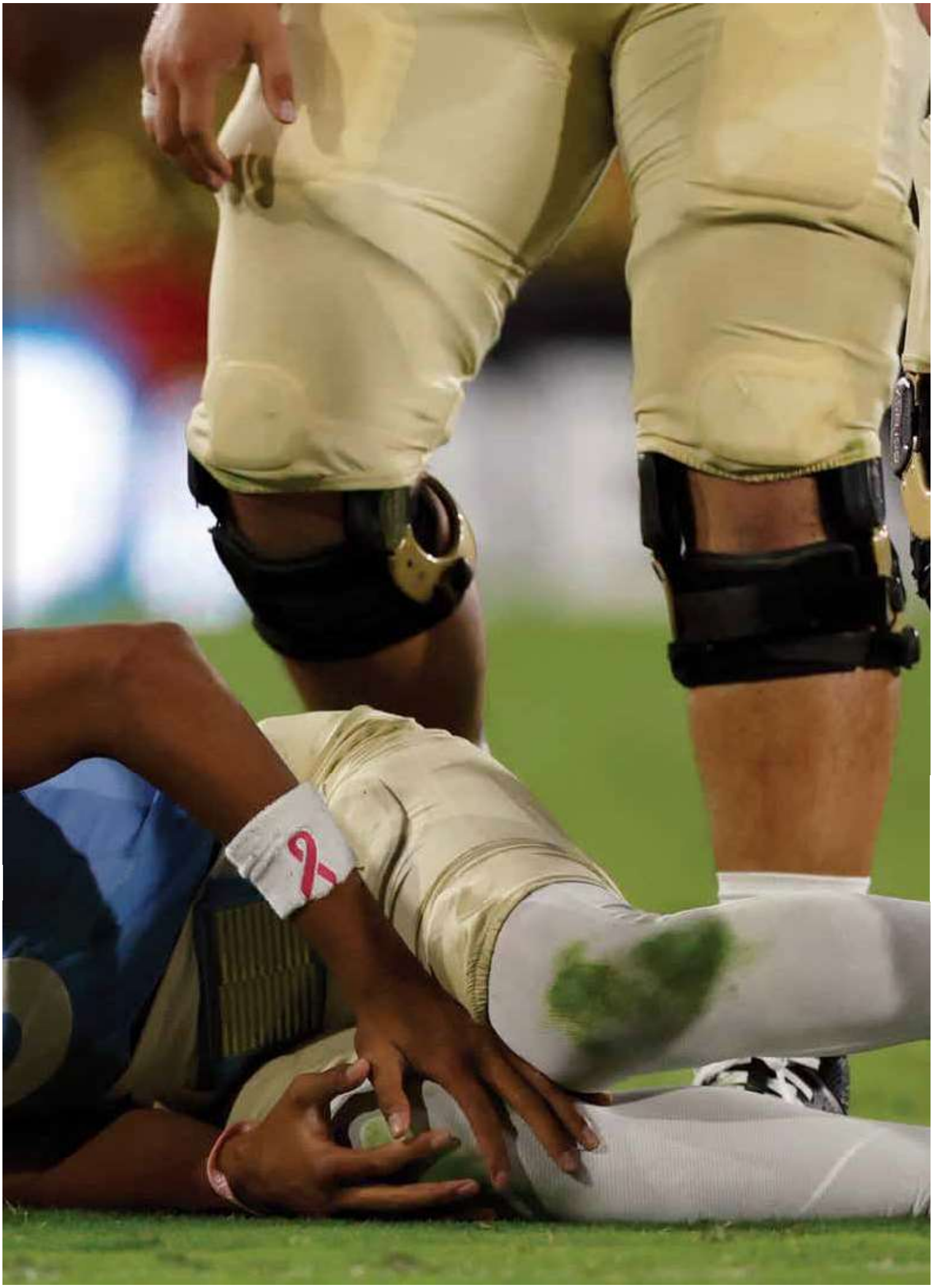
COMPENSATING THE BOYS OF FALL

COLLEGE SPORTS MAY SOON FACE THE ULTIMATE CALL: PLAYER OR EMPLOYEE?

BY ANTHONY NATALE III

As the early morning rays of sun tickled the gridiron in old DU Stadium, the practice field could only be described as humming. In 1950, football at the University of Denver was not just an avocation; it was a meal ticket. Every caliber athlete on the team fell victim to the grind—those relentless morning training sessions that were designed to sap their vim and vigor, and, at the same time, ferret out those with the mettle to earn that coveted game day jersey.






© JUSTIN CASTERLINE/GETTY IMAGES

BIG ERNIE NEMETH

Big Ernie Nemeth, at that time, was a member of the University of Denver's elite squad. He was able to work the trenches in a leather helmet, cleats, and flimsy shoulder pads that would not even pass muster in pee-wee football by today's standards. Membership on the starting lineup brought with it a campus job, a meal plan (three squares a day), housing accommodations, and the right to shine before 30,000 spectators by "knocking heads and talking trash" (thank you, Kenny Chesney).

Nemeth's meteoric rise was cut short in 1950 during a practice session. The exact facts are lost to history, but the culprit was a lumbar vertebral injury. He was out of the starting lineup, lost his campus job/housing accommodations, and never saw the inside of a huddle again. Medical bills were looming, money was tight, and Nemeth was hurting. He filed a workers' compensation claim in Colorado and pleaded his case. Football was not just a hobby for him—it was his job.

The underlying claim was accepted and affirmed by the Industrial Commission. The university appealed to the Supreme Court of Colorado. In the now mythical case of *University of Denver, et. al. v. Nemeth, et. al.*, the court upheld Nemeth's argument

It is only a matter of time before college athletes can be classified as employees and arguably entitled to workers' compensation benefits.

that he was in the course and scope of employment when he was injured while playing football for the university and was an employee for the purposes of the workers' compensation.

Case closed right? Wouldn't this decision be the proverbial "shot heard round the world" allowing college athletes to enjoy preferred status as employees with the protections and spoils that follow? Not even close. Based on the *Nemeth* decision, the NCAA devised a clarification technique. College athletes would now morph into student-athletes, a term that emphasized amateurism as a driving force behind athletic programs. After all, colleges and universities are in the business of education, not athletics. A college football player, therefore, could never reach the status of employee.

A few years later, the same court that decided *Nemeth* granted review of a similar case, *State Compensation Insurance Fund et. al. v. Industrial Commission of Colorado (Dennison)*. Dennison, a college football player, died as a result of a knee to the head during a game. His family filed for and received death benefits under the existing workers' compensation laws. The case moved through the appellate process and meandered to the Colorado Supreme Court. This time, the court found that the educational institution was "not in the business of football" (sound familiar?) and no link could therefore be construed between a student-athlete as part of an employment endeavor with the university. The irony here does not escape even the casual observer. Nemeth's vindication in his workers' compensation claim actually spawned the moniker student-athlete, which to this day carries ignominy far greater than that of Nathaniel Hawthorne's Hester Prynne in "The Scarlet Letter."

Those of us in the insurance industry or working as insurance defense attorneys do not have the time to read works the likes of Hawthorne. We read

© MELINDA MEIJER/ISI PHOTOS/ISI PHOTOS VIA GETTY IMAGES

the writing on the wall and manage the risk associated therewith. This article is not meant as a compendium of case law challenges involved in the never-ending saga of the rights of college athletes. Suffice it to say, nearly 75 years have gone by since *Nemeth* and we have no definitive answer as to whether college athletes can shed the student-athlete designation in favor of employee. But the writing on the wall speaks to us—the NIL (name, image and likeness) rulings, the antitrust case settlements that invoke revenue sharing, and even presidential executive orders act as harbingers of our collective fates in the business.

In workers' compensation, it is never acceptable to be reactive in the litigation process. We do not wait for claims to be filed before enacting safety protocol to prevent those claims. Risk must be managed from the inception of the policy and waiting for a decision to drop, finding a student-athlete to be an employee is tantamount to reactivity. Our goal is to prognosticate the future based on the clues available and create a workable action plan that benefits all parties.

THE WALL

In 2021, the U.S. Supreme Court, in *NCAA v. Alston et.al.*, unanimously held that the NCAA violated antitrust laws by limiting education-related compensation to so denoted student-athletes. While this case was founded in antitrust vernacular, it was a clear shot across the bow against the concept of amateurism as a benefit limiting classification. More importantly, when a Supreme Court justice asserts that the NCAA cannot build massive

money-raising enterprises "on the backs of students" and that the NCAA is not "above the law," we must accept the proposition that employer-employee status is being contemplated on the horizon. Most workers' compensation laws in the country value concepts of employer control over the manner of performance in exchange for valuable consideration as signifiers of an employer-employee relationship. Proactively speaking, the glove fits.

In 2024, in the case of *Johnson v. NCAA*, the U.S. Court of Appeals for the Third Circuit upheld the principle that the designation of "amateur" does not bar (as a matter of law) the college athlete's filing of a claim under the FLSA (Fair Labor Standards Act) for monetary compensation (minimum wage) while "working" as a student-athlete. The court remanded the case on the issue of whether college athletes are employees for this purpose. There could be no clearer prelude for the inevitable expected employment relationship outcome.

© MICHAEL HICKEY/GETTY IMAGES

In 2025, settlement was approved in the antitrust lawsuit, *House v. NCAA*, where it was argued that the NCAA prevented college athletes from monetizing their NIL and prevented earning other forms of "compensation." For the first time in history (after *Nemeth*), this settlement allows


© NICK CAMMETT/GETTY IMAGES

schools to compensate athletes through monetary compensation or revenue sharing. It is expected to be adhered throughout the SEC, ACC, BIG-12, BIG TEN, and PAC-12 conferences (they are parties to the litigation). We can call it revenue sharing and tie it to boosters or other sources, but, plain and simple, it is a form of pay-to-play (P2P). It is yet another step in the direction of establishing an employee relationship.

In 2025, the White House issued an executive order titled, "Saving College Sports," which was designed to institute "reasonable rules and guardrails" with reference to student-athlete compensation. Importantly, the order directs the secretary of labor and the National Labor Relations Board to clarify the legal status of college athletes. For sure, the issue of employer-employee status will be in the forefront of all future litigation and we are a case away from a formal decision on the issue.

PRACTICAL CONSIDERATIONS

We cannot ignore the wall—it is only a matter of time before college athletes can be classified as employees and arguably entitled to workers' compensation benefits. In fact, it is not beyond consideration that a state workers' compensation judge could review a claim petition on this very issue and, despite NCAA amateurism rules, find an employee relationship for the purposes of the Workers' Compensation Act at issue. Yes, we would defend on the federal preemption and other legal issues, but we did that with marijuana and look how it ended. The safe bet is to prepare now for the risk.

WITHOUT A FIRM BUSINESS MODEL IN PLACE FOR STUDENT-ATHLETES, THE CONCEPT OF EMPLOYEE STATUS WILL CARRY UNWANTED BURDENS FOR ALL PARTIES.

The naysayers speak to "tax consequences" as a disincentive for students to invoke employee status. They postulate that anything of value received by the college athlete through participation in sports would be taxable income. To that end, scholarships, tuition, books, supplies, meals, tutors, equipment, and nutritionists would likely be excluded from taxable income to the athlete based on current IRS standards. Salary (P2P) would be the only overt taxable income, and those payments can be made the subject of interpretation. Of course, poll any pro baseball player on how to divide up salary over number of "at bats" in various states over the course of a season and maybe the naysayers have a point. Workers' compensation, while sounding beneficial, may be more of a logistical problem from the athlete's standpoint.

Still, the logical approach here is to prepare for the potential of a new class of employee in the college setting. Under workers' compensation laws, an injured college athlete (if deemed an employee) could be entitled to medical benefits and perhaps some sort of wage loss benefit (among other things).

Many states control medical in varied ways through the workers' compensation laws. A prized athlete, for instance, may not want to be relegated to a panel physician for a period of time while treating for an injury or allow the insurance company to control medical treatment. The very idea of workers' compensation may therefore be an unpalatable alternative for some athletes. Colleges as employers, on the other hand, need to understand that an injury during the course and scope of employment could result in years of medical treatment. It is therefore necessary to revamp the panel doctors in an effort to prepare for sports-related injuries so as to deliver the best care possible and avoid long-term complications. Panel lists can be less than a trove of choice specialists, so dig out the lists and make modifications where necessary.

Certainly, the foundation for workers' compensation laws eliminates a claimant's negligence as a defense to a work injury. However, abiding by work rules is paramount in employee safety and offers a blueprint for continued employment. If college athletes become employees, work rules must be devised, implemented, and enforced in order for the employer-employee relationship to flourish. Codes of conduct, safety rules and disciplinary rules are indispensable in the workers' compensation forum but also with regard to other areas of employment law. Remember, an employee subject to workers' compensation law is also subject to employment law. Without a firm business model in place for student-athletes, the concept of employee status will carry unwanted burdens for all parties. Work rules should be reviewed and revised now to avoid costly errors in the future when it comes to employment practice. ■

Anthony Natale III is a shareholder in the workers' compensation department at Marshall Dennehey.
apnatale@mdwcg.com