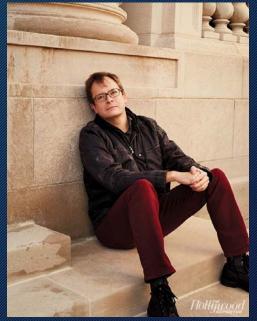
# Recent Employment Law Issues in Sports and Entertainment



Prof. Paul Anderson Director, National Sports Law Institute & Sports Law program Marquette University Law School







## College Athletics

- Background → characteristics of the relationship between a student athlete and a college
- 2. Student athletes as employees?

Nothing in the educational regime of our higher institutions perplexes the European visitor so much as the role that organized athletics play. On a crisp November afternoon he finds many thousands of men and women, gathered in a great amphitheater, wildly cheering a group of athletes who are described to him as playing a game of football, but who seem to the visitor to be engaged in a battle. He is the more mystified when he discovers that of the thousands of onlookers, not one in a hundred understands the game or can follow the strategy of the two teams. At the end, the vast majority of the onlookers only know, like old Kaspar of Blenheim, that "'t was a famous victory" for one university or the other.

When the visitor from the European university has pondered the matter, he comes to his American university colleagues with two questions:

"What relation has this astonishing athletic display to the work of an intellectual agency like a university?"

"How do students, devoted to study, find either the time or the money to stage so costly a performance?"

### AMERICAN COLLEGE ATHLETICS

BY

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ND

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WITH A PREFACE BY

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### NEW YORK

THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 522 FIFTH AVENUE

1929

### Scholarship as Contract

Dear Dear

CONGRATULATIONS!!! Enclosed you will find the following: two copies of this scholarship letter and two copies of the National Letter of Intent. You and one of your parents should sign all copies on or after Wednesday, November 9, 2011, keep one of the scholarship letters and one of the National Letters of Intent for yourself, and return the other signed copies using the enclosed Fed Ex materials. **Please also fax** these documents to me at

By signing the Financial Agreement Letter, pending your qualification under NCAA initial eligibility standards and formal acceptance to

The elements making up your scholarship are tuition, fees, room, board, and required textbooks.

Under NCAA legislation, all scholarships are for one year and are renewable for your remaining years of eligibility. Examples of ways you could lose this scholarship would be to fail in your academic endeavors, do something against University rules which would require your dismissal, not adhere to team rules as set up by your coach, or voluntarily withdraw from the team.

- 2016-2017 National Letter of Intent
- Form 15-3a Student Athlete Statement NCAA Division I

## Scholarship as Contract - Judicial Support

- Taylor v. Wake Forest, 191 S.E.2d 379 (Ct. App. NC 1972)
  - Football player sued when school terminated his scholarship because he decided to stop participating in football
  - He wanted the scholarship to continue to pay for his education
  - COURT → Gregg Taylor, in consideration of the scholarship award, agreed to maintain his athletic eligibility and this
    meant both physically and scholastically. As long as his grade average equaled or exceeded the requirements of Wake
    Forest, he was maintaining his scholastic eligibility for athletics. Participation in and attendance at practice were
    required to maintain his physical eligibility. When he refused to do so in the absence of any injury or excuse other
    than to devote more time to studies, he was not complying with his contractual obligations
- Barile v Univ. of Va., 2 Ohio App. 3d 233 (Ct. App. Ohio 1981).
  - Injured playing football → gave some treatment but stopped when he went home
  - Case was about whether he could sue UVA in Ohio
  - COURT → It is well established in law that the relationship between a student and a college is contractual in nature.
     This contract doctrine is particularly applicable to college athletes who contract by financial aid or scholarship agreement to attend college and participate in intercollegiate athletics.

# Relationship between Student Athlete and the University

- 1) Based in Contract
  - Embodied in Letter of Intent, Financial Aid Agreement, Scholarship
  - School → provide aid and opportunity to compete
  - SA → remain eligible and available to compete

## Are student athletes paid?

### 1.3 FUNDAMENTAL POLICY [\*]

**1.3.1 Basic Purpose.** [\*] The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

### 2.9 THE PRINCIPLE OF AMATEURISM [\*]

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

### Are student athletes paid?

### BYLAW, ARTICLE 12

## **Amateurism and Athletics Eligibility**

### 12.01 General Principles.

- **12.01.1 Eligibility for Intercollegiate Athletics.** Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.
- **12.01.2 Clear Line of Demarcation.** Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.
- **12.01.3 "Individual" vs. "Student-Athlete."** NCAA amateur status may be lost as a result of activities prior to enrollment in college. If NCAA rules specify that an "individual" may or may not participate in certain activities, this term refers to a person prior to and after enrollment in a member institution. If NCAA rules specify a "student-athlete," the legislation applies only to that person's activities after enrollment.
- **12.01.4 Permissible Grant-in-Aid.** A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership.

**12.02.9 Pay.** Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.

**12.1.2 Amateur Status.** An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (*Revised: 4/25/02 effective 8/1/02, 4/24/03 effective 8/1/03, 4/29/10 effective 8/1/10*)

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1;
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team per Bylaw 12.02.11, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1;
- (f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or
- (g) Enters into an agreement with an agent.

**12.01.4 Permissible Grant-in-Aid.** A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership.

### NCAA v. Board of Regents, 468 U.S. 85 (1984)

• The NCAA seeks to market a particular brand of football - college football. . . . In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend classes, and the like. . . . the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice - not only the choices available to sports fans but also those available to athletes - and hence can be viewed as procompetitive.

## Scholarship as pay - Judicial Support

- Coleman v. Western Michigan Univ., 336 N.W. 2d 224 (Ct. App. Mich 1983)
  - Football player workers compensation claim against university → lost his claim but
  - In return for his services as a football player, plaintiff received certain items of compensation which are measurable in money, including room and board, tuition and books. Plaintiff was in fact dependent on the payment of these benefits for his living expenses. . . When his scholarship was not renewed, plaintiff pursued his education elsewhere. The "payment of wages" factor weighs in favor of the finding of an employment relationship.

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a form of pay (that is not prohibited by the NCAA)







### White v. NCAA Class Action (2006)

- Class of student athletes in revenue sports suing over Grant in Aid cap in NCAA rules
- White v. NCAA, 2006 U.S. Dist. LEXIS 101366 (C.D. CA 2006)
  - Decision on Motion to Dismiss → GIA Cap restricts price at which student athletes purchase higher education and coaching services by forcing SAs to bear a greater portion of Cost of Attendance then they would have borne if the GIA cap was not in place
- Settled 2008
  - New access to \$218 million
  - \$10 million to SAs in the class
  - Start of discussion of 5 year athletic scholarships (now the rule)
  - Attorneys fees = \$8.6 M paid by NCAA
  - Each plaintiff gets \$5,000

## Impact of Settlement?

- Inside Higher Education, 2/4/08
  - Will it exacerbate tensions between the richest sports programs and the "have-nots" in Division I, by allowing wealthier programs to offer health insurance and injury insurance to athletes that smaller or less-wealthy athletics departments might not be able to afford?
  - And does the settlement propel or slow down the push by college athletes to seek more money?

- •Jim Brown (July 2008) (football Cleveland Browns)
- •Samuel Keller (May 5, 2009) (football ASU)
- Ryan Hart (June 15, 2009) (football, Rutgers)
- •Ed O'Bannon (July 21, 2009) (basketball UCLA)
- Joseph Agnew (Oct. 25, 2010) (football, Rice)











### Old Form 08-3a (Student Athlete Statement)

### • Part I and II affirm amateur status

# Part IV: Promotion of NCAA Championships, Events, Activities or Programs. You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs. Name (Please Print) Signature of Student-Athlete Date

- Agnew v. NCAA, 683 F.3d 328 (7<sup>th</sup> Cir. 2012).
  - The fact that certain procompetitive, legitimate trade restrictions exist in a given industry does
    not remove that industry from the purview of the Sherman Act altogether. Rather, all NCAA
    actions that are facially anticompetitive must have procompetitive justifications supporting their
    existence.
  - Presumption
    - when an NCAA bylaw is clearly meant to help maintain the "revered tradition of amateurism in college sports" or the "preservation of the student-athlete in higher education," the bylaw will be presumed procompetitive
    - most—if not all—eligibility rules fall comfortably within the presumption
    - same goes for bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education—a rule that clearly protects amateurism.

- O'Bannon v. NCAA, 7 F.Supp.3d 955 (N. Dist. Cal. 2014)
  - Court concludes that the NCAA's challenged rules unreasonably restrain trade in violation of § 1 of the Sherman Act.
  - Enjoins NCAA from enforcing these rules, and prohibits it from preventing schools from offering to deposit a limited share of licensing revenue in trust for student athletes (cap cannot be less than \$5,000)

# Power 5 leagues pass cost of attendance proposal, don't stop there

By Eye on College Football **staff** January 17, 2015 5:08 pm ET

### 15.1 Maximum Limit on Financial Aid—Individual. [A]

A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2. A student-athlete may receive institutional financial aid based on athletics ability (per Bylaw 15.02.4.2) and any other financial aid up to the value of his or her cost of attendance. (See Bylaws 15.01.6.1, 16.3, 16.4 and 16.12.) (Revised: 4/29/04 effective 8/1/04, 5/26/09, 1/15/11 effective 8/1/11, 8/7/14, 1/17/15 effective 8/1/15)

- O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015)
  - NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the rule of reason
  - Would not adopt the Agnew presumption
  - Related to DC decision on trust fund money → in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a form of pay (that is not prohibited by the NCAA)
  - Limitations on scholarship aid now subject to antitrust review
  - Aid now allowed up to cost of attendance

# Claims over Compensation Limits – Right of Publicity

- Keller v. Elec. Arts Inc., 724 F.3d 1268 (9th Cir. 2013)
  - As the district court found, Keller is represented as "what he was: the starting quarterback for Arizona State" and Nebraska, and "the game's setting is identical to where the public found [Keller] during his collegiate career: on the football field."
  - changes do not render the NCAA Football games sufficiently transformative to defeat a right-of-publicity claim.
  - Could be Right of Publicity

# Claims over Compensation Limits - Right of Publicity

- September 2013 EA settled and stopped production of NCAA football → \$40 M
- •NCAA sued EA and CLC (November 21, 2013)
- NCAA sought to block the settlement and have EA Sports be required to pay for future liability judgments, legal fees and costs







# Claims over Compensation Limits - Right of Publicity

- Maloney v. T3Media, 2015 U.S. Dist. LEXIS 86183 (C.D. Cal. 2015)
  - Members of a Catholic University's basketball team (D III) brought ROP claim against media company that entered into an agreement with the NCAA to store, host, and license photographs that were owned by the NCAA.
  - The Court held that the Copyright Act preempted the plaintiffs' right to publicity claim
    - The plaintiffs did not identify any use of the likenesses independent of the copyrighted work (the photographs); therefore, the Copyright Act preempted any right of publicity claim.
    - Court did not address whether they actually had a ROP

# Claims over Compensation Limits - Right of Publicity

- Marshall v. ESPN, Inc., 2015 WL 3606645 (M.D. Tenn. 2015)
  - Sued conferences, networks and licensees who allegedly profited form the use of their images and likenesses without permission
  - COURT →
    - 1) matter of law, <u>Plaintiffs do not have a right to publicity in sports broadcasts</u>.
    - 2) language in Board of Regents about amateurism and players not being paid may well be dicta. Still, that language cannot be blithely ignored
      - under NCAA rules, other than the requirement that an athlete be a student, there can be no more basic eligibility rule for amateurism than that the athlete not be paid for playing his or her sport.

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a form of pay (that is not prohibited by the NCAA)
- 3) Student athletes do not have a right of publicity in their image or likeness

## Relationship & Duty

- Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3<sup>rd</sup> Cir. 1993)
  - Student injured and died on practice field
  - A special relationship existed between the College and Drew in his capacity as a school athlete. His medical emergency was within a reasonably foreseeable class of unfortunate events that could arise from participation in an intercollegiate contact sport
  - College owed a duty to Drew to have reasonable measures in place at the practice on the afternoon of September 16, 1988 to provide prompt treatment in the event that he or any other member of the lacrosse team suffered a life-threatening injury.

### Duty a school owes its athletes

- Factors
  - 1) actively recruited > intended to benefit from SAs participation in athletics
  - 2) participating as athlete > injury or issue comes from this not role as student
- Based on special relationship with recruited SAs
  - 1. giving adequate instruction in the activity,
  - 2. supplying proper equipment,
  - 3. making a reasonable selection or matching of participants,
  - 4. providing non-negligent supervision of the particular contest, and
  - 5. taking proper post-injury procedures to protect against aggravation of the injury

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a for of pay (that is not prohibited by the NCAA)
- 3) Student athletes do not have a right of publicity in their image or likeness
- 4) Special Relationship between recruited student athlete and university -> may lead to heightened duty

### Relationship with Conference or NCAA

- Hairston v. Pac. 10 Conf., 101 F.3d 1315 (9th Cir. 1996)
  - Players sued conference due to discipline of University of Washington that impacted scholarship limits and put football team on probation
  - Argued were 3<sup>rd</sup> party beneficiaries
    - to create a third-party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract
    - COURT 

      key here is that appellants have not demonstrated that the parties intended
      to create direct legal obligations between themselves and the students

### Relationship with Conference or NCAA

- Bloom v. NCAA, 93 P.3d 621 (Ct. App. Colo. 2004)
  - Student athlete wanted waiver of NCAA endorsement and media activity rules so he could receive endorsement money for participation in one sport, while remaining an amateur in another
  - COURT -> NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes.
  - . . . to the extent Bloom's claim of arbitrary and capricious action asserts a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, his position as a third-party beneficiary of that contractual relationship affords him standing to pursue this claim
  - Bloom lost his case against the NCAA as it was not inconsistent in applying the rules to him

### Relationship with Conference or NCAA

- Knelman v. Middlebury College, 898 F.Supp.2d 697 (D. VT. 2012)
  - Student athlete kicked off of hockey team, sued for breach of contract
  - COURT → Because third-party beneficiary status constitutes an exception to the general rule that a contract does not grant enforceable rights to nonsignatories . . . a person aspiring to such status must show with special clarity that the contracting parties intended to confer a benefit on him. . . . These requirements are not satisfied merely because a third party will benefit from the performance of the contract.
  - although a few courts have recognized intended third-party beneficiary status based upon the relationship between a member institution and the NCAA, these cases are confined to enforcement of NCAA's eligibility requirements. See, e.g., <u>Bloom</u>

### Relationship with NCAA

- Lanni v. NCAA, 42 N.E.3d 542 (Ind. Ct. App. 2015)
  - Injured during fencing competition
  - COURT 

    It is commendable for the NCAA to actively engage its member institutions and student-athletes in how to avoid unsafe practices, but those acts do not rise to the level of assuring protection of the student-athletes from injuries that may occur at sporting events.
  - The NCAA's conduct does not demonstrate that it undertook or assumed a duty to actually oversee or directly supervise the actions of the member institutions and the NCAA's student-athletes.
  - Lanni cannot demonstrate the element of duty required for her negligence claim against the NCAA. . .

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a form of pay (that is not prohibited by the NCAA)
- 3) Student athletes do not have a right of publicity in their image or likeness
- 4) Special Relationship between recruited student athlete and university may lead to heightened duty
- 5) May be 3<sup>rd</sup> party beneficiary of contract between NCAA and school
  - Only in regard to eligibility rules
  - Still rarely means will recover
  - Still no NČAA duty to protect student athletes from harm

# Student athlete Constitutional Rights?

- Hysaw v. Washburn University, 690 F.Supp. 940 (D. Kans. 1987)
  - The court has determined that the only interests created by those agreements are interests in receiving scholarship funds.
  - no right to pursue a college football career exists
- Jackson v. Drake Univ., 778 F.Supp. 1490 (S.D. Iowa 1991)
  - Jackson has admitted that Drake has performed all obligations imposed by the financial aid agreements, but argues that implicit in the agreements is the right to play basketball. The financial aid agreements make no mention of such a right... The court concludes that the financial aid agreements do not implicitly contain a right to play basketball
- Bloom v. NCAA, 93 P.3d 621 (Ct. App. Colo. 2004)
  - Bloom is not a member of the NCAA, and he does not have a constitutional right to engage in amateur intercollegiate athletics at CU.

#### Right in Professional Career?

- Colorado Seminary (University of Denver) v. NCAA, 417 F.Supp. 885 (D. Col. 1976)
  - interest in future professional careers must nevertheless be considered speculative and not of constitutional dimensions
  - plaintiff student-athletes have no constitutionally protected property or liberty interest in participation in intercollegiate athletics, postseason competition, or appearances on television
- Justice v. National Collegiate Athletic Ass'n 577 F.Supp. 356 (D. Ari. 1983)
  - In response to the plaintiffs' argument that the college athletic forum is a vital training ground for professional athletic careers, the court stated that "the interest in such future professional careers must be considered speculative and not of constitutional dimensions"

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a form of pay (that is not prohibited by the NCAA)
- 3) Student athletes do not have a right of publicity in their image or likeness
- 4) Special Relationship between recruited student athlete and university may lead to heightened duty
- 5) May be 3<sup>rd</sup> party beneficiary of contract between NCAA and school
- 6) No protected rights in participation or in future athletic career

# Are Student Athletes Employees?

- 1) Workers compensation
- 2) Labor Law
- 3) Fair Labor Standards Act

#### General Rule

- Court → Kavanagh v. Trust. Boston Univ., 795 N.E.2d 2003)
  - The benefits that may accrue to a school from the attendance of particularly talented athletes is conceptually no different from the benefits that schools obtain from the attendance of other forms of talented and successful students -- both as undergraduates and later as alumni, such students enhance the school's reputation, draw favorable attention to the school, and may increase the school's ability to raise funds.
  - Again, scholarship or financial aid notwithstanding, neither side understands the relationship to be that of employer-employee or principal-agent. Thus, in various contexts, courts have rejected the theory that scholarship athletes are "employees" of their schools.

### Workers Comp → Not Employee

- State Comp. Ins. Fund v. Ind. Comm, 135 Colo. 570 (1957)
  - Fatally injured during game
  - Had athletic scholarship and worked part time on college farm
  - Review of the evidence disclosed that none of the benefits he received could, in any way, be claimed as
    consideration to play football, and there is nothing in the evidence that is indicative of the fact that the
    contract of hire by the college was dependent upon his playing football, that such employment would have
    been changed had deceased not engaged in the football activities
- Waldrep v. Tex. Emp. Ins. Assoc., 21 S.W.3d 692 (2000)
  - Critically injured during football
  - No tax return
  - No control over him as could control employee
  - Joint intention that he was an amateur (following NCAA policy) and not a professional

# Workers Comp → Is Employee?

- *Univ. of Denver v. Nemeth*, 127 Colo. 385 (1953)
  - He worked part time for the university as caretaker (\$50 a day, free meals) (keep the tennis courts free from gravel) → given time off to participate in football
  - University said all of his pay had nothing to do with football, but evidence showed it was not until
    participating in football that he would receive job and meals
- Van Horn v. Industrial Accident Comm, 219 Cal. App. 2d 457 (Ct. App. Cal. 1963)
  - Died in airplane crash after game
  - Worked in cafeteria
  - Had contract of employment

# Are Student Athletes Employees?

- 1) Workers compensation -> NO
- 2) Labor Law
- 3) Fair Labor Standards Act

### National Labor Relations Act, Section 2(3)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

### Teaching Assistants as Employees



- Brown Univ. v. Int'l Union, 342 NLRB 483 (2004)
  - Teaching assistants argued were employees under NLRA, looking to represent unit of 450 graduate students
  - School argued they were TAs as part of their degree requirements
  - Precedent > until 2000 NYU decision, found similar individuals were "primarily students" and not employees
  - BOARD 

    Because they are first and foremost students, and their status as a graduate student assistant is contingent on their continued enrollment as students, we find that they are primarily students.
  - the money is not "consideration for work." It is financial aid to a student



- Northwestern University, Case 13-RC-121359 (March 26, 2014)
  - Control by Northwestern over its players' lives:
    - Freshmen and sophomore football players are required to live in dorms, and upperclassmen living off campus have to submit their leases to Fitzgerald for approval.
    - Players are restricted from what they can post on the internet, Facebook, Twitter, etc., and must accept friend requests from Fitzgerald or other coaches so that their posts can be monitored.
    - Players cannot profit off of their likeness or image, and are required to sign a release allowing Northwestern and the Big Ten to use their name, likeness, and imag
- Players as employees
  - 1] the letter of intent and scholarship offer is the employment contract,
  - [2] the hours of practice and play that generates millions of dollars of revenue for the school are the employer's benefits,
  - [3] the coach's rules are the control, and
  - [4] the scholarship itself is the pay.
- Different than Brown decision, as football players are not "primarily students" and their duties in athletics are not a core element in their educational degree requirements

- Ohio Revised Code § 3345.56 Student's not employee's based upon athletic participation (effective Sept. 15, 2014).
  - Notwithstanding any provision of the Revised Code to the contrary, a student attending a state
    university as defined in section 3345.011 of the Revised Code is not an employee of the state
    university based upon the student's participation in an athletic program offered by the state
    university.
- Michigan House Bill No. 6074 (effective Dec. 30, 2014)
  - (iii) An individual serving as a graduate student research assistant or in an equivalent position, a student participating in intercollegiate athletics on behalf of a public university in this state, or any individual whose position does not have sufficient indicia of an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1987-1 C.B. 296 is not a public employee entitled to representation or collective bargaining rights under this act.

- Northwestern Univ. v. CAPA, Case 12-RC-121359 (August 17, 2015)
  - NLRB declined to assert jurisdiction over Northwestern University grant-in-aid scholarship football players and dismissed the representation petition.
    - "because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.
    - 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

# Are Student Athletes Employees?

- 1) Workers compensation -> NO
- 2) Labor Law → NO
- 3) Fair Labor Standards Act



- Sackos v. NCAA, Civ. Action No. 1:14-CV-1710 WTL-MJD (S.D. Ind. Oct. 20, 2014)
  - Under the Fair Labor Standards Act (FLSA), colleges are required to pay work study participants at least the federal minimumwage of \$7.25 per hour.
  - Wants unpaid wages, damages, and injunction stopping NCAA rules restricting pay
  - ■Became Anderson v. NCAA July 2015
    - Sackos out as attended Houston and worried about immunity of public schools

#### Fair Labor Standards Act, 29 USC §216(b)

- Establishes minimum wage, overtime pay eligibility, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local government
- The FLSA defines "employ" to mean "to suffer or permit to work"
  - "written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy."

- Berger v. NCAA, 2016 U.S. Dist. Lexis 18194, 26 Wage & Hour Cas. 2d (BNA) 38 (Dist. Ind. 2016)
  - COURT → The Supreme Court has recognized that there exists in this country a "revered tradition of amateurism in college sports... a fact that cannot reasonably be disputed. That tradition is an essential part of the "economic reality" of the relationship between the Plaintiffs and Penn. So, too, is the fact that generations of Penn students have vied for the opportunity to be part of that revered tradition with no thought of any compensation.
  - Indeed, millions of Americans participate in amateur sports in countless contexts; they do so for myriad reasons, none of them, by definition, involving monetary compensation, but all of them, it is fair to assume, involving benefit of some sort to the participants—enough benefit to justify the amount of effort the participants choose to put into it
  - Also supporting a finding that student athletes are not employees for FLSA purposes is the fact that the
    existence of thousands of unpaid college athletes on college campuses each year is not a secret, and
    yet the Department of Labor has not taken any action to apply the FLSA to them

# Are Student Athletes Employees?

- 1) Workers compensation → NO
- 2) Labor Law → NO
- 3) Fair Labor Standards Act -> NO

# Relationship between Student Athlete and the University

- 1) Based in Contract
- 2) Scholarship is a form of pay (that is not prohibited by the NCAA)
- 3) Student athletes do not have a right of publicity in their image or likeness
- 4) Special Relationship between recruited student athlete and university -> may lead to heightened duty
- 5) May be 3<sup>rd</sup> party beneficiary of contract between NCAA and school
- 6) No protected rights in participation or in future athletic career
- 7) Student athletes are not employees

# FLSA Challenges - Beyond College Athletics

- 1. Minor League Baseball™
- 2. Miscellaneous Sports Cases
- 3. Cheerleaders
- 4. Interns
  - In Sports
  - In Entertainment

### Minor League Baseball™

- Miranda v. Office of the Commissioner, Order Granting Motion to Dismiss, Case No. 3:14-cv-5349 (N.D. Cal. September 15, 2015)
  - ANTITRUST DISMISSED → MLB motion to dismiss granted finding that "there can be no reasonable dispute that the alleged restrictions on the pay and mobility of minor league baseball players fall into the articulation of the antitrust exemption recognized in City of San Jose. .
- Senne v. Office of the Commissioner, Case No. 3:14-cv-00608 (N.D. Cal. February 7, 2014); Marti v. Office of the Commissioner, Case No. 4:14-cv-03289-KAW (N.D. Cal. July 21, 2014) (consolidated with Senne 10/10/14)
  - FLSA CLAIM CONTINUES → October 20, 2015 → court granted class certification



leaguers who make it to the majors: About

# Seasonal Amusement or Recreational Establishments Exemption

- U.S. Department of Labor, Wage and Hour Division, Fact Sheet #18: Section 13(a)(3) Exemption for Seasonal Amusement or Recreational Establishments Under the Fair Labor Standards Act (FLSA)
  - (b) "Does not operate for more than seven months in any calendar year." Whether an amusement or recreational establishment "operates" during a particular month is a question of fact, and depends on whether it operates as an amusement or recreational establishment. If an establishment engages only in such activities as maintenance operations or ordering supplies during the "off season" it is not considered to be operating for purposes of the exemption.
  - (c) 33-1/3 % Test. Because the language of the statute refers to receipts for any six months (not necessarily consecutive months), the monthly average based on total receipts for the six individual months in which the receipts were smallest should be tested against the monthly average for six individual months when the receipts were largest to determine whether this test is met

#### Other Sports Cases

- Met recreation or amusement exemption
  - Adams v. Detroit Tigers, Inc., 961 F. Supp. 176 (E.D. Mich. 1997) (Bat Boys)
  - Jeffery v. Sarasota White Sox, 64 F.3d 590 (11th Cir. 1995) (Groundskeeper)
- Did not meet recreation or amusement exemption
  - Bridewell v. Cincinnati Reds, 68 F.3d 136 (6th Cir. 1995), aff'd, 155 F.3d 828 (6th Cir. 1998) (Maintenance Workers)
  - Liger v. New Orleans Hornets NBA Ltd. P'ship, 565 F. Supp. 2d 680 (E.D. La. 2008) (Retail)

#### Other Sports Cases

- Wyckoff v. Office of the Commissioner of Baseball et al., case number 1:15-cv-05186 (S.D. N.Y. July 2, 2015)
  - Wyckoff worked for the Kansas City Royals from 2012 to 2013 as a part-time scout on a \$15,000 annual salary, scouting players throughout the Northeast. He said that during one week in peak season he worked close to 60 hours including travel time but was paid only \$300, or roughly \$5 per hour.

#### Major League Baseball Scouting Bureau

The Major League Baseball Scouting Bureau (MLBSB) is a centralized scouting organization within the Baseball Office of the Commissioner. The MLBSB employs many full-time and part-time scouts throughout the United States, Canada and Puerto Rico who provide information on amateur prospects as a part of its mission to support the efforts of MLB clubs in the First-Year Player Draft. The MLBSB also provides professional scouting services, including the collection of video footage of players throughout the professional ranks, both domestically and internationally. Founded in 1974 as an independent organization supported by the Clubs, the Scouting Bureau has officially been under the domain of Major League Baseball since 1985.

#### Cheerleader Claims in the NFL



- Lacy T. v. Oakland Raiders, Case No. RG 14710815 (Super. Ct. Cal. Jan. 22, 2014)
  - Cheerleaders are required to pay \$150 or more to have their hair done by a stylist selected by the team; pay for replacements if uniforms and pom-poms are lost or damaged; purchase required material such as false eyelashes, tights, and white bras; and pay for specified makeup once the provided cosmetics run out
  - September 2014 Settlement = \$1.25 M
    - Under the proposed settlement, the Raiders will pay the 90 plaintiffs from \$2,460 to \$6,832 per season worked during the 2010-2012 period, depending on the season worked
- Alexa Brenneman v. Cincinnati Bengals, Case No. 1:14-cv-136 (SD Ohio Feb. 11, 2014)
  - alleges that she worked more than 300 hours while serving as a Ben-Gals cheerleader but was compensated by Defendant a total of only \$855, which amounts to less than \$2.85 per hour and which is below the required minimum wage
  - Court denied team's motion to dismiss October 2014
  - New York Jets, Buffalo Bills, and Tampa Bay Buccaneers similar lawsuits

#### Cheerleader Claims in the NFL

- March 2014
  - The U.S. Labor Department said Wednesday it has closed its investigation of what the Oakland Raiders pay its cheerleader squad, the Raiderettes, after finding that the team is a "seasonal" operation exempt from federal minimum-wage laws.

#### THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Section 2754 is added to the Labor Code, to read:

2754. (a) For the purposes of this section, the following definitions shall apply:

- (1) "California-based team" means a team that plays a majority of its home games in California.
- (2) "Cheerleader" means an individual who performs acrobatics, dance, or gymnastics exercises on a recurring basis. This term shall not include an individual who is not otherwise affiliated with a California-based professional sports team and is utilized during its exhibitions, events, or games no more than one time in a calendar year.
- (3) "Professional sports team" means a team at either a minor or major league level in the sport of baseball, basketball, football, ice hockey, or soccer.
- (b) Notwithstanding any other law, for purposes of all of the provisions of state law that govern employment, including this code, the Unemployment Insurance Code, and the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), a cheerleader who is utilized by a California-based professional sports team directly or through a labor contractor during its exhibitions, events, or games, shall be deemed to be an employee.
- (c) The professional sports team shall ensure that the cheerleader is classified as an employee.

Herington v. Milwaukee Bucks, LLC, No. 2:15-cv-01152-LA (E.D. Wis. 2014).



ROBERT SABO/NEW YORK DAILY NE

The Jets became the fourth team to reach a settlement with their cheer squad, agreeing to pay \$324,000. The Bills are the only team that has yet to reach a deal with its cheerleaders.

# Interns in Sports & Entertainment

- Walling v. Portland Terminal Co., 67 S.Ct. 639 (1947)
  - Railroad trainee not employee
- Led to → 2010, U.S. Department of Labor, Wage and Hour Division Fact Sheets: Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act

#### Internship Programs Under The Fair Labor Standards Act

- The following six criteria must be applied when making this determination:
  - 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
  - 2. The internship experience is for the benefit of the intern;
  - 3. The intern does not displace regular employees, but works under close supervision of existing staff;
  - 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
  - 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
  - 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
- If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern

#### Sport Interns

#### Most claims dismissed

- West v. Vanderbilt Univ., Complaint, No. 3:14-cv-00964 (M.D. Tenn. 2014) (athletic department)
  - · Parties dismissed
- Fraticelli v. MSG Holdings, L.P., 2014 U.S. Dist. LEXIS 63167 (S.D.N.Y. 2014) (corporate intern)
  - Class certification denied
- Chen v. Major League Baseball, 798 F.3d 72 (2nd Cir. 2015) (worked at Fan Fest during All Star Game)
  - Claim dismissed as fell in exemption
- Boyle v. Shaner Arena Football, LLC, No. 2:13-cv-00645(W.D. Pa. 2014) (team intern)
  - Settled

#### Sport Interns

- Wolfe v. AGV Sports Group, Inc., 2014 U.S. Dist. LEXIS 155398 (D. Md. 2014).
  - Unpaid intern with company producing motorcycle safety clothing
  - Company has no other paid employees but its founder and president
  - Does not follow DOL test -> "defendants were the primary beneficiaries of his labor"
    - "worked on assignments that directly corresponded to and advanced AGV's . . Interests, rather than Wolfe's educational and career interests"
    - Intern program is,... A"sham" intended to circumvent federal and state wage and hour laws

#### **Entertainment Interns: Television**

- Mainly Settled → \$100,000 to \$6.4 M
  - Bickerton v. Charlie Rose, Inc., 2012 NY S. Ct. Motions LEXIS 1 (2012) (intern on Charlie Rose show).
    - Settled for \$110,000
  - Hicks v. Crooks Brothers Productions, Inc., No. 13-cv-4472 (S.D.N.Y. 2013) (production intern on Nickelodeon).
    - Settled
  - Moore v. NBCUniversal, Inc., No. 13-cv-4634 (S.D.N.Y. 2013) (interns for MSNBC and Saturday Night Live).
    - Settled for \$6.4 Million
  - MacKown v. News Corporation, No. 12-cv-4406 (S.D.N.Y. 2013) (intern for Fox Soccer Channel)
    - Ongoing litigation

#### **Entertainment Interns: Television**

- Intern work (NBC Settlement 2014) → \$6.4 M
  - Booked cars and travel arrangements for correspondents and guests on MSNBC's morning programs.
  - Answered phones.
  - Greeted guests, escorted them to hair and makeup, and then to the show's set.
  - Researched segment details and provided that information to guests.
  - Provided guests with "dub copies" of the shows on which they appeared.
  - Obtained and completed paperwork for extras and background actors.
  - Filed.
  - Processed petty cash envelopes.
  - Went on errands to get props, food and coffee.
  - Did set lockdowns to ensure that no one walked onto the set or made noise to disturb the shoot.
  - Otherwise assisted at shoots of skits.

#### **Entertainment Interns: Music**

- Settled (\$23,000 \$4.2 M) or dismissed
  - Moreno v. Sony Music Entertainment, No. 1:13-cv-05708-GBD (S.D.N.Y. 2013) (Sony intern).
    - Settled
  - Birch v. Stadiumred, Inc., No. 1:14-cv-00379-HB (S.D.N.Y. 2014) (record company intern).
    - Settled for \$23,000
  - Henry v. Warner Music Group Corp., 2014 U.S. Dist. LEXIS 39309 (S.D.N.Y. 2014) (record company interns).
    - Settled for \$4.2 Million
  - Voluntarily dismissed by plaintiff
    - Rivers v. Premier Studios, No. 1:13-cv-05969-KPF (S.D.N.Y. 2013) (recording studio intern).
    - Salaam v. Universal Music Group d/b/a Bad Boy Entertainment, No. 1:13-cv-05822-JPO (S.D.N.Y. 2013) (intern for Sean "Diddy" Combs)

#### **Entertainment Interns: Music**

- Grant v. Warner Music Group Corp., 2014 U.S. Dist. LEXIS 65664 (S.D.N.Y. 2014).
  - 50 hours a week work consisted of routine office tasks, such as answering telephones, making photocopies, making deliveries, preparing coffee, and organizing and cleaning the office.
  - COURT → uses DOL test as guidance
    - Performed the same work as non-exempt employees in their respective departments, and that they received no compensation or academic credit for their work
    - postings that uniformly state, "Every Intern is assigned a special project that will both assist them in increasing their understanding of how each department operates, and <u>aid the</u> <u>department in addressing a business need"</u>

#### **Entertainment Interns: Music**

- Grant v. Warner Music Group Corp
- Settlement June 2015 = \$4.2 Million (Court approved August 21, 2015)
  - 4,500 interns will be paid \$750 for each academic semester they served as an intern, with a maximum payout of \$1,500, and Grant will receive an enhancement award of \$10,000.
  - Class counsel will receive \$787,500, about 19 percent of the settlement.

#### Entertainment Interns: Multimedia

#### Settled or Dismissed

- Settled
  - Behzadi v. International Creative Management Partners, LLC, No. 1:14-cv-04382-LGS (S.D.N.Y. 2014) (interns for ICM nationwide).
    - Mediated Settlement 2014
  - O'Jeda v. Viacom, Inc., 2014 U.S. Dist. LEXIS 47242 (S.D.N.Y. 2014) (Viacom interns).
    - Class certification granted, settlement 2015
- Dismissed
  - Fields v. Sony Corporation of America, No. 1:13-cv-6520 (S.D.N.Y. 2013) (Sony intern).
    - Dismissed
  - Anderson v. Bazillion Pictures, Inc., No. 4:14-cv-79-DW (W.D. Mo. 2014) (animation studio intern).
    - Dismissed

#### Entertainment Interns: Multimedia

- Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015), amended, Jan. 25, 2016.
  - ISSUE -> When is an unpaid intern entitled to compensation as an employee under the FLSA?
    - Will not defer to DOL test as too rigid
  - Follows PRIMARY BENEFICIARY TEST -> Whether the intern or the employer is the primary beneficiary of the relationship.
  - Purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting
    - Focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors

#### Entertainment Interns: Multimedia

- Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015).
  - Nonexhaustive Considerations (no one factor is controlling)
    - 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.
  - Vacated and remanded
    - Test adopted in 11<sup>th</sup> Circuit as well

## Entertainment Interns: Publishing

- Wang v. Hearst Corporation, No. 13-4480 (2nd Cir. Nov. 26, 2013).
  - Ongoing litigation
- Ballinger v. Advance Magazine Publishers, Inc., d/b/a Conde Nast Publications, No. 1:13-cv-04036-HBP (S.D.N.Y. 2013).
  - Settled for \$5.8 Million 2014
- Iseri v. Junker, No. 30-2013-00665521-CU-OE-CJC (Ca. 2013).
  - Dismissed

## Entertainment Interns: Publishing

- Mark v. Gawker Media LLC, 2016 U.S. Dist. LEXIS 41817 (S.D.N.Y. 2016).
  - 20 hours per week → assisting the blog's editors and writers, taking photos and videos, editing images, researching, writing, and editing posts and articles, conducting interviews, covering events, and monitoring comments on articles
  - pursuing a degree in journalism
  - FLSA Claim → Court follows *Glatt* primary beneficiary test

## Entertainment Interns: Publishing

- Mark v. Gawker Media LLC, 2016 U.S. Dist. LEXIS 41817 (S.D.N.Y. 2016).
  - 1) both parties no expectation of compensation
  - 2) provided mentorship and opportunities to learn journalism skills that were not offered to full-time employees
  - 3) received academic credit for his work, and required to complete internship for class
  - 4) accommodated academic commitments
  - 5) academic report completed 2 weeks before end of internship
  - 6) role largely complementary to paid writers, still some work was same as paid employees (factor *mildly* favors plaintiffs)
  - 7) no entitlement to job after internship done
  - 8) intern is primary beneficiary
  - Under the totality of the circumstances, and resolving all ambiguities and drawing all
    inferences in favor of Plaintiffs, Mark was properly classified as an unpaid intern rather than
    an employee.

#### Interns and FLSA

- Sport
  - Teams and other organizations typically exempt
  - Little discussion of DOL test for internships
- Entertainment
  - Some dismissed but lots of high value settlements
  - Followed DOL test until recently
  - New test from Glatt, tied to educational environment more explicitly
  - Now seem less likely to settle as interns connected to educational environment may be properly unpaid

# Recent Developments: Final Rule: Overtime (May 18, 2016)

- To qualify for exemption, a white collar employee generally must:
  - 1. be salaried, meaning that they are paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
  - be paid more than a specified weekly salary level, which is \$913 per week (the equivalent of \$47,476 annually for a full-year worker) under this Final Rule (the "salary level test"); and
  - 3. primarily perform executive, administrative, or professional duties, as defined in the Department's regulations (the "duties test").
- Certain employees are not subject to either the salary basis or salary level tests (for example, doctors, teachers, and lawyers). The Department's regulations also provide an exemption for certain highly compensated employees ("HCE") who earn above a higher total annual compensation level (\$134,004 under this Final Rule) and satisfy a minimal duties test.





## PAYMENT OF COACHES & ATHLETIC TRAINERS UNDER FEDERAL LAW

On May 18, 2016, the U.S. Department of Labor ("DOL") announced its Final Rule revising the "white-collar" exemptions from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements. Although sweeping changes were possible, the Final Rule's key revision is a significant increase to the minimum salary level generally required for exemption, raising it from \$455 per week (i.e., \$23,660 annually) to \$913 per week (i.e., \$47,476 annually). This new salary level will go into effect on December 1, 2016.

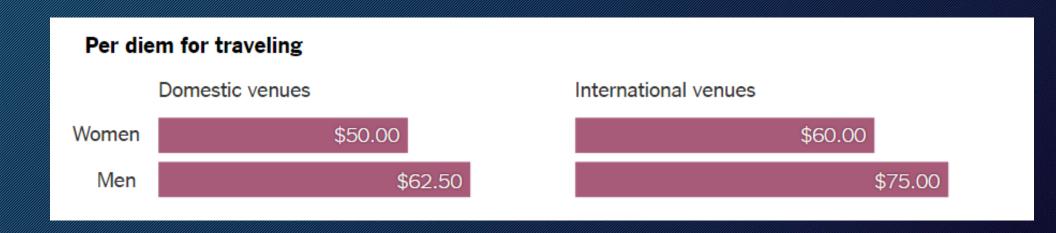
Although the Final Rule did not make any revisions to the duties required to take advantage of the exemption, the substantial increase to the salary level brings increased importance to consideration of the duties required for the exemption. For example, as is discussed below in more detail, the exemption for employees who can be classified as "teachers" does not carry any salary requirement, and, thus, is unaffected by the Final Rule.

# Recent Developments: Women's Soccer Pay Dispute

- January 2016 → seeks to affirm ability to strike for better pay
- March 2016 → EEOC complaint







## Women's Soccer Pay Dispute

- U.S. Soccer Federation v. U.S. Women's National Soccer Team Players Association, Case 1:16-cv-01923 (N.Dist. III. June 3, 2016)
  - Court grants summary judgment to US Soccer Federation
  - "undisputed material facts establish that the MOU incorporates the unmodified terms of the 2005 CBA, including the no-strike, no lockout provision, ..."



## KEEP CALM

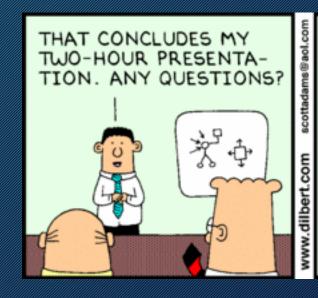
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### Questions



DID YOU INTEND THE PRESENTATION TO BE INCOMPREHENSIBLE, OR DO YOU HAVE SOME SORT OF RARE "POWER-POINT" DISABILITY?



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