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## Avoiding college football 'chaos'

Labor attorney Tilson discusses big win on behalf of Northwestern in players' union case

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Law Bulletin staff writer

**O**ne vote. As he prepared to make his case before the five-member National Labor Relations Board, Joseph E. Tilson hoped he could flip just one Democratic member to earn a historic labor victory for his client, Northwestern University.

Along with fellow Cozen, O'Connor LLP attorneys Alex V. Barbour, Annaeliese Wermuth, Jeremy J. Glenn and in-house attorneys from Northwestern, Tilson — the firm's labor and employment department co-chair — represented the university in its battle against football players trying to unionize.

Last year, Chicago-based NLRB Regional Director Peter S. Ohr ruled that scholarship players were employees of the university, granting them the right to unionize. The school's 76 scholarship players voted in April 2014 in a secret ballot.

Before the results could be announced, Northwestern took the fight up the NLRB ladder. Tilson expected support from the board's two Republican members.

His fingers were crossed for one of the three Democrats to cross the aisle to create a majority.

Instead, the vote in Northwestern's favor was unanimous.

"We had a glimmer of hope that perhaps we could get one vote to tip the balance," Tilson said. "But a unanimous decision was beyond our reasonable expectations."

In this interview with the Daily



**Joseph E. Tilson, co-managing partner of the Chicago office of Cozen, O'Connor LLP, represented Northwestern University in its victory last week before the National Labor Relations Board, which ruled in the school's favor in a dispute over whether NU football could form a union.** *Ralph Greenslade*

Law Bulletin, condensed for space, Tilson discusses the combination this year between his former firm — Meckler, Bulger, Tilson, Marick & Pearson LLP — and his current one, explains the Northwestern ruling from his vantage point and offers a vision of how a unionized Wildcats team could have spelled chaos for college athletics.

**Law Bulletin:** In April, after 21 years, you and most of MBT decided to join Cozen, O'Connor. Your longtime partner Bruce R. Meckler told the Daily Law Bulletin that "the future is for law firms to have much larger national footprints."

Is that the right move for all attorneys in shops like MBT?

**Joseph Tilson:** It certainly is the right move for labor and employment lawyers, where there's been a tremendous trend toward establishing a national

footprint. Many clients see the value of having people on the ground throughout the country to better service their needs on a national basis.

We felt that this move eliminated any competitive disadvantage that we had with other national firms in our space and enables us to not only offer labor and employment services around the country but also to offer the full range of services of a full-service firm like ours — such as corporate transactional services, IP services and the like.

**LB:** How has the move worked out so far?

**Tilson:** It has been terrific. At this point, we have already started to work together with our labor- and employment-law attorneys around the country to collaborate on cases in their geographical areas.

We recently had a retreat

where we brought in all 50 lawyers from around the country. Everyone has been extremely welcoming to our group and very anxious to work together.

There clearly is a lot of synergy between our offices. We came in with a lot of common clients and we've been able to expand our relationships with our existing clients already because of the additional resources and geographic reach.

**LB:** Last week you told me you were "on cloud nine" after the NLRB ruled in favor of your client, Northwestern University, and decided not to assert jurisdiction in the football unionization case.

How did you get here from last year when the regional director ruled that the students were indeed employees?

**Tilson:** In our briefs to the NLRB in Washington, we argued

vehemently that public policy considerations dictated that they decline to exercise jurisdiction in this case quite apart from the employee issue — that asserting jurisdiction here would lead to chaos in college sports.

We pointed out that there was no precedent in professional sports to have a union relationship with a single team. In every situation, the entire league was unionized as part of the same bargaining unit, because negotiating with only one team would create competitive imbalances.

In the context of college sports, that would be impossible because public universities are governed by individual state labor laws which vary widely from state to state, whereas private schools are governed by federal law and there are only 17 private schools among the Division 1 (Football Bowl Subdivision) teams.

**LB:** Your team came up with the “assert jurisdiction” argument. Where did that come from?

**Tilson:** It was a total team effort. ... We all felt that the board members could relate to the chaos that the regional director’s ruling would create if we focused on the practical realities of having a union represent a single Northwestern team. And actually, just a subset of the team — the scholarship football players.

There is limited precedent where the board has declined jurisdiction. For example, the horse-racing industry. We felt that this would provide a path for the board to dodge the emotionally and politically charged employee issue. And we were thrilled that it actually worked.

**LB:** Should the NLRB be trying to dodge tough issues?

**Tilson:** In this particular case, there was no hope that they could get a consensus on that issue and at the same time reach the right result. So I actually think that it was a brilliant solution on their part.

**LB:** And, kind of, on your team’s part.

**Tilson:** Correct.

**LB:** Let’s say it went the other way and Northwestern’s team could unionize. What chaos would there really be?

**Tilson:** Well, first of all, I don’t think that the union would have won the vote even if the NLRB would have come out the other way, based upon all of the reports that I have heard.

But if, hypothetically, the union were successful in unionizing the football team, there

could be all sorts of disputes such as grievances over playing time, grievances over practice schedules, potential strikes that could result in the cancellation of games by an individual team.

And you also have to appreciate the fact that only part of the team was deemed eligible to unionize — that is, the scholarship athletes.

Therefore you would have a team that was made up of union members and non-union members playing side by side on the same line. It really, to my way of thinking, would have resulted in absurd consequences.

**LB:** Like what?

**Tilson:** There could be, for example, a work stoppage right before a bowl game that would mean that Northwestern would not be able to field a team. There would be a lot of angry fans.

It’d add that the union would likely demand in negotiations compensation and benefits that would violate NCAA rules and preclude them from competing in NCAA-sponsored events despite assurances made by the union at the NLRB hearing in this case.

**LB:** Regarding the work stoppages though, how is that different than the countless work stoppages in professional sports?

**Tilson:** In professional sports, if there’s a work stoppage, it affects the entire league. Here, you’d have work stoppages that would only affect individual teams that happen to be unionized. This could happen sporadically and intermittently, all of which would lead to chaotic results.

**LB:** But whether it’s sporadic or leaguewide, what’s the difference? You’re still bothering fans and disrupting the product.

**Tilson:** If it’s a leaguewide work stoppage, that can be predicted and other arrangements can be made. But where you have individual teams going off on their own, it could happen any time, anywhere, without notice or planning.

**LB:** I assume you don’t think college football players are university employees.

**Tilson:** That is correct. Absolutely not.

**LB:** So do you think college athletes should be compensated with a piece of the NCAA’s nearly billion-dollar-a-year pie?

**Tilson:** Whether college athletes should be compensated more than they are today is really a totally separate issue.

There has already been a movement to increase the



## Joseph E. Tilson

Co-managing Partner, Cozen, O'Connor LLP's Chicago office

- **Lawyers in Chicago:** 57
- **Age:** 59
- **Law school:** University of Michigan Law School, 1979
- **Organizations:** Vice chair of the American Bar Association's Section on Labor and Employment Law; vice chair on the Board of Managers of the YMCA of Metropolitan Chicago; chair-elect of the Wage & Hour Defense Institute
- **Interests:** Spending time with his five children, including watching his son Charlie play minor league baseball and son Will sing the blues

amount of scholarships and benefits available to student-athletes by the NCAA and the power conferences, where the football program is particularly profitable.

But you have to bear in mind that in many schools even with very successful football programs, the overall athletic department continues to be subsidized by the university.

And the notion that college athletics is in general a cash cow at the majority of schools — even Division 1 schools — is simply not true.

The football programs often subsidize other non-revenue-producing sports. And I firmly believe that college sports are part of the overall educational process.

**LB:** You’re talking about scholarships and benefits, but I’m asking if players should get a piece of the revenue pie that they help create. Thoughts?

**Tilson:** I think that the value of a scholarship at an institution

like Northwestern is priceless. And Northwestern, unlike many schools, graduates the vast majority of their football players. So I do think that the football players are treated very fairly at Northwestern.

**LB:** But plenty of non-football players get scholarships without contributing to a billion-dollar industry.

**Tilson:** As I mentioned to you previously, the overall athletic program, which is a critical component of the educational process, continues to be subsidized by the university, notwithstanding the money generated by the football team.

**LB:** But the NLRB made the point in its ruling that college sports are separate from the academic curriculum.

**Tilson:** Student-athletes unquestionably learn life lessons by participating in intercollegiate sports that make them, as a group, more successful in their careers and in life. Studies have shown that they tend to be more successful in their careers because of the discipline and teamwork that they learn through the rigors of highly competitive collegiate sports.

And I can tell you as an employer that when I see a resume that includes participation in Division 1 athletics, that resume goes to the top of the pile.

**LB:** Where do you expect this case to go from here?

**Tilson:** I believe that the concept of unionizing student athletes is pretty much dead as a result of this ruling — certainly among private schools. It is certainly conceivable that certain state agencies or courts that are not bound by federal precedent could rule differently.

But quite frankly, I would be surprised to see that happen in the near future.

**LB:** So what else in your career are you most proud of? Because this Northwestern case is such a huge win.

**Tilson:** I’m very proud of being elected the vice chair — soon to be chair — of the ABA labor and employment section, which includes more than 20,000 members nationwide.

The ABA has provided me with another dimension to my practice that has enabled me to grow professionally and establish great friendships and contacts with other leading labor and employment lawyers around the country and around the world.

And it has been a tremendously rewarding experience.

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