

Are You Ready to Comply With Evolving Name, Image and Likeness (NIL) Rules and Regulations?

December 15, 2020

Since the publication of this advisory, there have been a number of newly passed and proposed state and federal laws we would like to highlight. Please click [here](#) to read the latest updates.

Six states have enacted NIL legislation,^[1] another 27 states have proposed NIL legislation,^[2] the U.S. Congress has at least two bills proposed, the NAIA has enacted NIL rules, and in January 2021 the NCAA likely will endorse its own set of NIL rules. Idaho's NIL law and the NAIA rules are already in effect. Florida's NIL laws will go into effect on July 1, 2021. The other states' NIL laws will go into effect between 2023 and 2025. The NCAA proposed rules, if adopted in January 2021, are expected to become effective August 1, 2021.

These laws and rules have common features in addition to prohibiting schools and athletic associations from penalizing student-athletes who seek compensation for the use of their NIL rights. There are also significant differences among them. These differences affect the risks for schools and decision-makers. Now is the time for athletic directors and their schools to plan for compliance with these new rules and regulations, especially because the proposed NCAA rules require schools to manage both the school's and the student athlete's compliance. Athletic directors will be facing new challenges affecting:

- Recruitment of student-athletes;
- Use and protection of the school's athletic brands and logos;
- The school's sports related revenue streams;
- Risks to student-athlete's eligibility; and
- Personal liability.

The Goulston & Storrs College Sports Law Practice can assist athletic directors and their schools in identifying and interpreting the applicable laws and rules, helping to determine their effect, and how athletic directors and their schools can minimize risks in this evolving field. In this advisory, we identify the principal themes of the differing laws and rules. For a summary of the competing enacted and proposed NIL laws and rules, [download our summary chart, "Goulston & Storrs' NIL Requirements Chart."](#) This chart is current as of December 1, 2020. Both the chart and this advisory are summaries and should not be used as a statement of the text of the rules or laws or how they apply to your school. The Chart should be used for informational purposes only.

Common Goals and Tools

Some common goals for the enacted and proposed laws and rules include the need to:

- Protect student-athletes' eligibility as they try to monetize their NIL rights.
- Avoid diluting grant-in-aid packages as a result of student-athletes' monetizing their NIL rights.
- Protect student-athletes from unscrupulous or overly sophisticated agents and third-parties.
- Create general recruiting guidelines.
- Create a framework to protect the school's revenue streams.
- Provide mechanisms to monitor compliance.

The most common tools to implement these goals include: (i) disclosure of NIL agreements; (ii) managing conflicting endorsements; (iii) agent regulation; and (iv) eligibility guidelines. Although these are common goals and tools, there are some significant differences in their scope and implementation. These tools and their differences introduce new risks for athletic directors and their schools.

Differences and Risks

1. Disclosure of NIL Activities

Almost all of the enacted and proposed laws and rules require student-athletes to disclose their endorsement contracts. Most of the laws and rules require disclosures to be made to an administrator at the school, often specifying the athletic director. The NCAA proposes that disclosures be made to a third-party administrator, who has not yet been defined. There is typically a deadline for student-athletes to disclose their endorsement contracts. For example, Colorado and Idaho explicitly require disclosure to be made within seventy-two (72) hours of the student-athlete entering into the contract. By contrast, the proposed NCAA rules require enrolled student-athletes to disclose *prior* to entering into the agreement, with an update to be provided within 14 days of any change.

Athletic directors or other administrators will be required to collect, file, and monitor compliance with student-athletes' endorsement contracts. Failure to maintain compliance could result in penalties and other adverse consequences to the school or the student-athlete.

1. Managing Conflicting Endorsements

Five of the six states (except Idaho) that have passed NIL legislation prohibit student-athletes from entering into contracts that conflict with a contract between the school and another party. The NCAA's proposed rules provide schools with discretion to prohibit a student-athlete from entering into a NIL contract with a sponsor whose products or values conflict with school's values. Schools would be required by NCAA to adopt policies identifying the NIL activities in which student-athletes may or may not engage.

None of the laws or rules define the term "conflict." This omission could lead to significant confrontations and potential liabilities between schools and their student-athletes as they try to define the scope of a student-athlete's rights to enter into, or comply with, endorsement contracts. If a school elects to adopt subject matter restrictions on student-athletes' NIL endorsements, such

as prohibiting endorsements of tobacco or weapons, the schools and athletic directors will need guidance to avoid improperly infringing on student-athletes' freedom of expression.

1. Agent Activity

43 states have adopted the Uniform Athlete Agents Act or some version of it, which requires that agents be licensed and identifies licensing, disclosure and other provisions that must be included in contracts between athletes and agents. Most states' NIL laws require that agents be licensed and the laws identify some licensing, disclosure, and other provisions that must be included in contracts between student-athletes and the agents. By contrast, the NCAA focuses on restricting the types of agent relationships and transactions and imposes restrictions on how the schools interact with agents and student-athletes in connection with monetizing their NIL. The NCAA prohibits schools from selecting agents on the student-athlete's behalf and from accepting any compensation from a service provider for assisting student-athletes with a NIL agreement. Staff members are prohibited from accepting any compensation in connection with a student-athlete NIL deal.

Schools will need to proactively identify the agents who are permitted to enter into agreements with student-athletes to avoid penalties for violating law or NCAA rules. In addition, schools will need to carefully assess whether the resources that they provide to assist their student-athletes in monetizing their NIL comply with the NCAA restrictions.

1. Eligibility Implications

Compliance with the enacted and proposed NIL laws and rules protect a student-athlete's eligibility and grant-in-aid packages if the student-athlete receives NIL compensation. However, a student-athlete risks loss of eligibility if he or she enters into a NIL deal for purposes of securing an opportunity as a professional athlete.

Athletic directors and their schools will need (i) to incorporate NIL compliance into their current compliance and education programs; (ii) expand those programs to educate the student athletes on the scope of their NIL rights; and (iii) adopt guidelines to maintain student-athlete eligibility and avoid penalties to the school, the athletic directors, and the student-athlete.

* * *

The Goulston & Storrs College Sports Law Practice can assist you with understanding, instilling "best practices," and complying with the evolving NIL legislation and rules that may affect you, your student-athletes, and your school, including by: (a) developing policies to manage potential liability to schools, athletic departments, and athletic directors; (b) drafting and implementing policies and practices that mitigate against the loss of recruits or student-athletes; (c) working with you and your school to develop transparent policies that reflect the school's values and comply with the NIL laws and rules; (d) reviewing existing contracts and negotiating new agreements that are consistent with your school's values and that protect existing and new sponsor relations; and (e) creating educational programs to advise student-athletes on professional services and contracts that they will encounter in exploiting their NIL.

[1] California, Colorado, Florida, Idaho, Nevada and New Jersey.

[2] Alabama, Arizona, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia and Washington.