

State of Play: Reopening Considerations for College and University Athletic Programs

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Colleges and universities have a host of issues to consider before reopening athletic programs amid the COVID-19 pandemic, from the day-to-day operation of campus facilities to specific challenges around gameday operations and off-the-field activities such as recruiting. These considerations are particularly important for college athletics given that high levels of respiratory activity, large crowds, and travel all exacerbate the transmission of the virus.

College athletics programs should pay particular attention to two areas that impact all aspects of athletic activities: government orders and liability concerns. The list below is by no means comprehensive but it is intended to provide a starting point for consideration of these threshold issues. Even as most institutions and conferences have moved to cancel fall sports, these issues impact ongoing off-the-field activities, such as recruiting, training, and administration. They will also remain relevant in the winter and/or spring seasons if restrictions are lifted.

COMPLIANCE WITH GOVERNMENT ORDERS

Since the onset of the pandemic, state and local jurisdictions have issued a host of evolving and occasionally contradictory orders to attempt to control the spread of COVID-19. The checklist below evaluates the potential impact of these orders on athletics operations.

Reopening Requirements. Many jurisdictions have outlined detailed requirements for reopening businesses and institutions, including colleges and universities. These requirements may change depending on the extent of the spread of the virus at a given time, and in some jurisdictions, businesses and institutions may require governmental approval in order to reopen. All programs and conferences should be aware of these requirements, which may change not only from state to state but also from locality to locality.

At a high level, reopening requirements impacting athletic programs include:

- Sanitation requirements for keeping facilities clean – including restrictions on the use of shared objects such as athletic equipment.
- Physical distancing requirements limiting the number of users in spaces and facilities at any one time.
- Screening and testing requirements for students, faculty, and staff.
- Distanced housing and food service operations.
- Quarantining students who test positive for the virus.
- Licensing and permitting for temporary facilities.

- Limiting non-essential travel. (See below for a fuller discussion regarding the impact of travel restrictions on recruiting activities.)

Enforcing Screening, Masks and Physical Distancing Requirements. As noted above, many jurisdictions require safety and physical distancing measures. While universities may be able to compel students, faculty, and staff to adhere to these requirements (whether through directives or a sense of obligation to the shared university community), requiring adherence to such measures may be more challenging for visitors and guests, particularly those from communities with different practices and norms regarding these measures. Some gameday considerations stemming from these requirements follow below:

- Are universities required to compel compliance with / enforce government orders for masks and physical distancing?
- May universities require screening and/or testing for visitors, and prohibit entry for those who refuse to comply?
- Will universities be required to implement sanitation practices even if they create other adverse impacts (for example, the implementation of cashless-only payment or electronic-only ticketing, even if they have a disparate impact on groups that rely on paper as a primary medium)?
- Are other gameday experiences put on hold? Or does the marching band figure out how to play clarinet with a mask on?

Mandatory Quarantine for Out-of-State Visitors. Amid the resurgence of the virus over the past several weeks, some jurisdictions have imposed a mandatory quarantine for individuals traveling into the state from “high-risk” locations (which include the majority of states).

- General University Operations. Based in part on these orders, many institutions concluded that it would be nearly impossible to bring students back to campus—even those who had planned to limit the on-campus population to a subset of students—because such a mandatory quarantine would be infeasible. Consequently, these institutions switched to all-virtual operations.
- Athletic Competitions. Mandatory quarantine orders also apply to visiting teams and their fans traveling from a defined “high-risk” area. Even if competitions are played without spectators, this effectively prohibits games with many out-of-state opponents.

These requirements also affect teams returning from out-of-state competition. As a result, it potentially places athletes in a state of continued quarantine for the entire season and effectively prohibits participation in in-person academic or practice activities.

- Recruiting, Fundraising, and Other Athletic Operations. Beyond competitions, athletics programs rely on extensive travel for other activities, including recruiting and fundraising efforts. As noted above, many reopening guidelines limit “non-essential travel.” Even if recruiting or fundraising is considered to be “essential,” a mandatory quarantine requirement severely impacts these activities. It may be impractical for coaches, scouts, and prospective students to balance the intense travel required for recruiting visits with mandatory multi-

week quarantining requirements for travel to states with such requirements (and doubly so if they then need to return to a state with similar restrictions).

Only some states have imposed these restrictions, and the list of “hot spots” that are restricted vary from state to state. This creates a geographic inconsistency that could impose a greater burden on programs and/or athletes based on their location and create a disadvantage unless recruiting guidelines are adjusted to acknowledge these inconsistencies.

LIABILITY

1. **Waivers.** As institutions continue to navigate the impact of the COVID-19 pandemic, some are exploring ways to mitigate the risk of liability related to potential COVID-19 exposure claims. One risk mitigation strategy some institutions have considered is the use of contractual liability waivers for students, staff, and spectators. In determining whether and how to use liability waivers as part of the reopening process, institutions should consider the following:
 - **Limitations.** There are limits to the effectiveness of liability waivers. For example, while waivers may shield an institution from liability for ordinary negligence, in many jurisdictions, they cannot be used to protect institutions from liability for claims based on gross negligence, intentional acts, recklessness, or willful conduct. Liability waivers also do not absolve institutions of their duty under the [Occupational Safety and Health Act](#) (and its state counterparts) to maintain a workplace that is free from recognized hazards, or their duty to comply with federal, state, or local orders related to COVID-19 and reopening. In addition, state workers’ compensation laws may limit the applicability of waivers to claims arising out of workplace injuries.
 - **Impact.** The use of liability waivers may have an impact that goes beyond mere mitigation of risk. For example, an institution’s request for waivers may cause students, staff, and the public to question the institution’s commitment to exercising its best efforts to ensure that the institution is reopening no sooner than it is safe to do so. Such waivers could also cause students, staff, and spectators to question the safety and cleanliness of the institution’s programs and facilities. In addition, an institution’s request for waivers could impact relationships—including with organizations like the NCAA—and trigger public relations issues, further complicating what has already been a complex reopening process.

It also remains to be seen whether an NCAA member institution’s use of COVID-19 liability waivers for student athletes and student coaches or trainers would interfere with the students’ eligibility for benefits under the NCAA’s catastrophic injury insurance program. Through that program, the NCAA covers the cost of insurance for student-athletes who are “catastrophically injured while participating in a covered intercollegiate athletic activity.” (See [NCAA Catastrophic Injury Insurance Program](#)). However, where an institution requires a student-athlete to sign a liability waiver based on a medical condition, the student also waives coverage under the NCAA’s policy for injuries related to that condition. While the [NCAA has indicated](#) that it does not expect “most COVID-19 scenarios” to fall within the scope of the policy, that could change as our understanding of the effects of COVID-19 continues to evolve.

- **Use.** Institutions that are considering the use of liability waivers will need to consider who will be asked to sign the waivers. That decision may be informed by the considerations outlined above regarding the effectiveness and potential impact of waivers, and the [NCAA's requirement](#) that member institutions refrain from requiring student-athletes to sign COVID-19-related waivers as a condition of the NCAA's support for fall championships and postseason programming. Obtaining waivers may position an institution to argue that those who chose to sign a waiver knowingly assumed the risk of COVID-19 exposure. However, the use of waivers for student-athletes could have broad implications for athletics programs, and institutions will still be expected to exercise reasonable care to keep students safe. In addition, as noted above, institutions are required to provide a safe and healthful workplace for their employees. With these considerations in mind, some institutions may choose to adopt a narrower approach to waivers, including by making them mandatory only for third parties (i.e., spectators) who opt to visit the institution to participate in or observe its athletics programs.
- **Content.** State law governs the enforceability of liability waivers. Accordingly, any institution that opts to use waivers as part of its COVID-19 risk mitigation strategy should consult with counsel to ensure the waivers are permissible, clear and conspicuous, and include any language that may be required or recommended for the relevant jurisdiction. Institutions should also ensure that, if used, liability waivers are coupled with comprehensive, sustainable plans for keeping institutions and their facilities safe and sanitary, and minimizing the risk of exposure to COVID-19.

2. Privacy Issues. As institutions work to develop reopening procedures for student-athletes and staff, institutions must take potential privacy issues into consideration. Some key considerations include:

- **Employee Privacy.** The pandemic has not eliminated the need for institutions to be cautious about the manner in which they collect and store medical and other personal information of employees. Institutions still must ensure that medical information gathered regarding an employee—including in the context of screening and testing, and requests for accommodations—is treated sensitively and maintained in a confidential medical file, not in the employee's personnel file.

In the unfortunate event that an employee contracts COVID-19, the institution may disclose the name of the employee to health authorities, as needed. However, when communicating internally, institutions must refrain from disclosing or confirming the identity of the employee who has been diagnosed with COVID-19 to anyone other than those who need the identifying information to help protect others at the institution from a direct threat of exposure.

In an effort to protect employees from risks of exposure, a number of employers are considering applications and other technology-based contact tracing and tracking solutions. Any institution that seeks to incorporate these methods into its reopening procedures should first gain a full understanding of the privacy-related risks they create.

- **Student Privacy.** The privacy issues institutions must consider as they plan to resume operations are not limited to the employment context. The Family Educational Rights and Privacy Act (FERPA), which applies to all institutions that receive funds under programs of the United States Department of Education, prohibits institutions from disclosing students' names or identification numbers, or other information that can be used to determine students' identities ("personally identifiable information") without prior written consent, unless an exception applies. One such exception is when an institution needs to disclose a student's personal identifying information, including contact information, to a public health agency to protect the health and safety of students and other individuals.

In March, the Department of Education issued guidance confirming that, where an institution believes that students or others at an institution are exposed to a significant threat to health and safety due to COVID-19, a student's records, including health records, may be disclosed to public health departments without prior written consent from the student. However, if a student contracts COVID-19, an institution is not permitted to disclose information about the student's illness to other students without prior written consent, unless the institution is able to share information without disclosing the student's identity or other personally identifiable information.

In light of these and other privacy restrictions, institutions would be well advised to consider taking a proactive approach to obtaining written consent forms authorizing disclosure of student information that may be necessary for the institutions to monitor COVID-19 risks both within athletic departments and the broader campus community.