

The New Name, Image and Likeness Playing Field for Colleges and Universities - What You Need to Know

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Prior to 2015, student athletes were not permitted by NCAA rules to exploit commercially their name, image and likeness ("NIL"). However, the decision that year in *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049,1074 (9th Cir. 2015) changed the landscape for student athletes and third parties. The Court held that the NCAA's NIL rules violated the Sherman Antitrust Act, although the Court upheld the NCAA's commitment to amateurism.

In the wake of the *O'Bannon* decision, some states (California, Colorado, Florida and New Jersey) have enacted legislation to permit student athletes to license their NIL rights. There are more than 30 other states with pending legislation that would provide student athletes with some control over the value and exploitation of their NIL rights although each state has different terms and would prohibit the NCAA and the student athlete's school from precluding the student athlete from receiving NIL compensation during their college sports career.

Colleges and universities face new challenges, including (i) understanding the hodgepodge of state legislation that creates different rights and obligations for colleges and universities depending on the state, (ii) dealing with third parties (including professional agents, media companies and sponsors), each of whom seeks to monetize on the student athlete's NIL rights in different ways, (iii) dealing with third parties as early as the recruitment process because some student athletes already may have started to exploit their NIL rights, and (iii) the explosion of social media and online sports, especially the growing focus on e-sports and fantasy leagues in the age of COVID.

The Goulston & Storrs College Sports Law Practice can help. With our deep experience representing colleges and universities and in sports, we can assist you in, among other things:

- Identifying, understanding and complying with the different state laws applicable to NIL rights.
- Partnering with you to develop rules and policies to protect student athletes from exploitation by agents, sponsors and the media.
- Partnering with you to develop pre-recruitment policies applicable to NIL that are consistent with your college or university's guidelines, applicable state laws and NCAA rules.
- Reviewing your existing endorsement and media contracts, and renegotiating if necessary.
- Protecting your school from improper or inconsistent uses of its intellectual property by the student athlete and third parties.

- Working with your school and department to protect it from unnecessary regulatory burdens, either by the federal government, states or NCAA rules and principles.
- Structuring policies and programs to enable student athletes to retain status as non-employees and avoid categorization as professional athletes.
- Creating educational programs to advise student athletes on professional services and contracts that they will encounter in exploiting their NIL.

The Hodgepodge of State Legislation

Four states have enacted NIL legislation. Over 30 additional states have introduced NIL legislation. The common threads in all the state legislation are that student athletes will be permitted to be compensated for the use of their NIL and existing rules by colleges, universities and athletic governing bodies, such as the NCAA, will be overridden. However, with over 30 states, there are over 30 different and sometimes inconsistent sets of applicable rules. They will present significant compliance challenges.

The NCAA Response to the Hodgepodge of State Legislation

Rather than battle 50 states or try to comply with the laws of 50 different states, in April 2020, the NCAA Board of Governors issued a Final Report of its Federal and State Legislation Working Group (the "Report") discussing how the NCAA desires to maintain its fundamental principles governing collegiate athletics while addressing student athletes' desire to reap the financial benefits from exploiting their NIL rights. The NCAA recognizes that it may no longer prevent student athletes from exploiting their NIL rights (as the *O'Bannon* court stated), but is concerned that the NCAA principles governing collegiate athletics will be eroded if the states are allowed to adopt regulations that override or limit the NCAA's authority over NIL rights. To try to reconcile these positions, the Report endorses the adoption of uniform federal legislation that would govern student athletes' control and exploitation of their NIL rights; that would preempt individual state laws; and that would exempt NCAA rules from the antitrust laws.

The NCAA's goal is to capture the following fundamental principles in its rules:

- Ensure student athletes are treated similarly to nonathlete students unless a compelling reason exists to differentiate.
- Maintain the priorities of education and the collegiate experience to provide opportunities for student athlete success.
- Ensure rules are transparent, focused and enforceable, and facilitate fair and balanced competition.
- Make clear the distinction between collegiate and professional opportunities.
- Make clear that compensation for athletics performance or participation is impermissible.
- Reaffirm that student athletes are students first and not employees of the educational institution.
- Enhance principles of diversity, inclusion and gender equity.

- Protect the recruiting environment and prohibit inducements to select, remain at or transfer to a specific institution.

The NCAA is striving for adoption of new rules in time for the 2021-22 academic year.

As the NCAA has been working through its own process for addressing student athletes' NIL concerns, at least three federal bills have been introduced in Congress. The most recent, proposed on September 24, 2020, is H.R. 8382 "To prohibit a covered athletic association and institution of higher education from prohibiting a student athlete from participating in intercollegiate athletics because such student athlete enters into an endorsement contract, and for other purposes." The full text of the legislation has not yet been published but according to published summaries, the legislation is consistent with the NCAA's proposed principles. However, the NCAA has suggested that the Act does not provide the "guardrails" necessary to prevent student athletes from losing their student and non-employee status and does not go far enough to protect the amateur nature of collegiate sports. Further, the bill does not include the antitrust exemption the NCAA desired.

According to summaries, the Act, if passed, would:

- Pre-empt state NIL legislation;
- Prohibit any athletic association or institute of higher education from restricting or prohibiting an athlete from entering into an endorsement contract;
- Prohibit the school from compensating its athletes for use of their NIL;
- Protect the athlete's status as a student and non-employee;
- Prohibit schools from withdrawing athletic scholarships if the athlete enters into an endorsement contract;
- Provide rules that permit schools to limit the scope of endorsements, including by rules to prohibit endorsement deals with businesses involving, for example, tobacco, vaping, alcohol, marijuana, gambling or adult entertainment;
- Permit the school to prohibit the athlete from wearing or displaying a sponsor's insignia or logo during any school game or event when that insignia or logo conflicts with that of the college or university;
- Prohibit boosters from paying athletes directly;
- Create a federal standard for NIL contracts; and
- Create a new federal commission to oversee NIL related disputes between student athletes and their school or athletic association and to recommend changes to the law as its consequences become clear; and
- Appoint the United States Federal Trade Commission as the enforcement agency for the Act.

With or without the adoption of federal legislation, NCAA has continued to adopt its own rules enabling student athletes to capitalize on their NIL rights.

NAIA Also Adopts NIL Rules for Student Athletes

On October 6, 2020, the National Association of Intercollegiate Athletics (NAIA) adopted rules to enable the student athlete to profit from the use of their NIL without endangering their student status or rights to participate in intercollegiate sports..

The NAIA rules focus not only on the rights of the student athlete, but also include opportunities for the collegiate team to profit from the student athlete's reputation. Under the NAIA rules, the student athlete and her or his collegiate team are allowed to be compensated for promoting any commercial product or enterprise or for any public or media appearance. The NAIA adopted its rules to address situations including participation in movies and commercials, as well as for promotion of specific products such as nutritional supplements. The student athlete may promote self-branded products, including her or his own art and music. The NAIA rules do not address how profiting from a student athlete's NIL will interact, interfere or conflict with the policies and endorsement deals of the student athlete's college or university.

Managing Third Parties

In potentially over 30 states, student athletes will be able to exploit their NIL rights, regardless of college or university rules to the contrary. Issues abound for athletic departments and other parts of the college or university. These issues range from:

- Protecting student-athletes from aggressive or even unscrupulous professional agents;
- Protecting sponsorship and media revenues that colleges and universities currently receive from being undermined by a student athlete's own endorsement deal (for example, what if the college has a sponsorship deal with Nike and Adidas enters into a sponsorship deal with a student-athlete);
- Interpreting and applying statutory rules and NCAA and NAIA "guideposts" to new and evolving business models and opportunities, and making necessary adjustments over time based on experience;
- Enforcing "guidepost" rules and trademark violations, and resolving any disputes (internal and/or with third parties) efficiently and in a non-public manner;
- Managing real or perceived conflicts of interest or tension between athletes, teams and colleges over revenue opportunities and risks/liabilities that could impact culture, performance and reputation;
- Protecting the college and university athletic program from additional federal and state regulatory oversight resulting from student-athletes being reclassified from student to school employee or to independent contractor;
- Creating a uniform playing field for third parties and prospective student-athletes by creating a uniform set of pre-recruitment guidelines that would apply to NIL rights; and
- Protecting the values, culture and reputation of the college and university from damaging or unflattering display or acts by the student athletes' sponsors or other contract parties.

The range of issues presents unique and evolving legal and internal challenges for the college and university as each navigates the "guideposts", new business models and real-life situations.

The Explosion of Social Media and On-Line Sports

Intercollegiate e-sports have grown exponentially in the past few years. At the college level, e-sports has thousands of student participants, coaches, IT members and other athletic department personnel. It also attracts sponsors and, more recently, media attention.

For colleges and universities, this explosion creates new revenue opportunities and legal concerns. [1] As relates to the exploitation of NIL rights, colleges and universities face the same legal challenges noted above concerning the need to protect its student athletes from undue commercial exploitation by agents, to prevent sponsors and the media from undermining the institution's revenue stream, to protect the institution from additional and unnecessary regulatory oversight, and to protect the image and culture of the college or university. In addition, the colleges and universities need to meet the challenge of providing its student athletes in traditional sports with the same NIL revenue opportunities as its e-sports participants have, as well as the legal challenges involved in fantasy sports participation by the e-sports participants and other members of the community.

Meeting the Legal and Regulatory Challenges

Colleges and universities will be subject to increased restrictions on how they govern their student athletes' exploitation of NIL rights, whether from NCAA and NAIA rules, state legislation or federal legislation. Schools need to address what role they will take with respect to the student athlete and third parties including the professional agent, sponsors and the media. Administrators, coaches and directors need to assess what they need to do legally to protect their students from undue exploitation and to protect their institutions' stream of revenue, rights and culture from undue regulation. They also need to develop a consistent and fair set of rules and policies that apply to student athletes in traditional sports and e-sports.

We can help. The Goulston & Storrs College Sports Law Practice is comprised of lawyers with expertise in such diverse areas as intellectual property, contract negotiation, compliance, corporate governance and litigation. The Practice also is diverse in background, reflecting the diversity in the colleges and universities. We can assist athletic departments and educational institutions in, among other things:

- Identifying, understanding and complying with the hodgepodge of different state laws (and federal law) applicable to NIL rights;
- Developing policies to develop rules and policies to protect student athletes from exploitation by agents, endorsers and the media;
- Partnering with the athletic departments and schools to develop pre-recruitment policies applicable to NIL that are consistent with your college or university's guidelines, applicable state laws and NCAA rules;
- Reviewing existing sponsorship and media contracts, and renegotiating them, if necessary;
- Protecting the school from improper or inconsistent uses of its intellectual property by the student athlete and third parties;

- Working with each school and department to minimize the regulatory and compliance burdens, either by the federal government, states or NCAA rules and principles;
- Structuring policies and programs to enable student athletes to retain status as non-employees and avoid categorization as professional athletes; and
- Creating educational programs to advise student athletes on professional services and contracts that they will encounter in exploiting their NIL.

[1] For some of the legal issues involved in creating these new revenue opportunities, we refer you to the Goulston & Storrs' advisory on E-sports.