

Sports & Esports Alert

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The State of P(l)ay for College Athlete NIL

The National Collegiate Athletic Association (NCAA) has adopted an interim policy suspending previous name, image and likeness (NIL) rules that prohibited the commercialization of a student-athlete's NIL. The interim policy, effective July 1, allows student-athletes to receive NIL-related compensation from third-party endorsements and other business activities without jeopardizing their NCAA eligibility, provided that the athletes follow the requirements prescribed by their states' laws and their schools' NIL policies.

Key Takeaways

- The nascent college athlete NIL space remains in flux, essentially governed by a patchwork of state laws, the NCAA interim policy and the rules of individual colleges and universities.
- State and individual school rules govern and often restrict the opportunities in which athletes can engage. Restrictions vary by state and school and can include prohibitions on types of products athletes can endorse, use of school logos and other intellectual property, and deals that conflict with the school's existing sponsorship agreements.
- The NCAA has asked Congress for help in creating a federal NIL law. Any new federal law could invalidate — or at least impact — agreements and deals that have already been entered into by athletes and institutions.

Policy Change

The NCAA's policy shift was in response to ongoing efforts by numerous states to enact laws explicitly providing NIL rights to student-athletes and permitting them to engage in professional representation. The shift was accelerated by the U.S. Supreme Court's June 21 ruling in *NCAA v. Alston* that the NCAA could not bar its member schools from providing student-athletes with various education-related benefits.



NIL Rights

NIL rights generally refer to a person's ability to receive compensation for the commercial use of name, image or likeness. Generally, NIL rights are available to anyone under the right of publicity law — either through common law or by statute. In the context of sports, NIL rights could include when an athlete is paid to endorse a product, appear in a video game or autograph a photo to be sold, for example. The NCAA previously required student-athletes to forfeit those rights in order to remain eligible to participate in NCAA college athletics, emphasizing that these are students first and athletes second.

California led the way in efforts to permit college athletes to be paid for their NIL rights, passing the Fair Pay to Play Act in 2019, which allows student-athletes in California to grant the use of their NIL for certain commercial purposes beginning in 2023. Two years later, a majority of states have enacted NIL laws or orders, more than a dozen of which became effective as of July 1, 2021.

After the NCAA's interim policy took effect on July 1, schools began releasing their own guidelines governing their student-athletes, including approval procedures for

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NIL deals. Although there are similarities among them, each state and school has specific rules governing NIL agreements, and the nuanced differences are important to review and understand prior to engaging in contracts in that state or with an athlete at a particular school.

Common Threads

A common thread among the school regulations is that certain opportunities are restricted, although the types of restrictions vary based on state laws and school policies. State laws and school policies may prohibit athletes from endorsing certain types of products, including alcohol, tobacco or gaming products. Some schools prohibit or restrict the use of the school's logos, mascots or other intellectual property, while other schools permit and even encourage the use.

Some but not all school policies prohibit athletes from entering into deals that conflict with the school's sponsorship agreements. For example, if a school's athletic team has an apparel agreement with Nike, a student-athlete may not be able to enter into a deal with Adidas or Reebok.

A school's involvement in the agreement between athletes and third-party sponsors is another common thread in state laws. Many state laws provide a time frame in which athletes need to share the details of any potential NIL deals with the school. In some states, the school needs to approve deals ahead of time, necessitating that any confidentiality provisions need to carve this out in order to avoid an inadvertent breach of confidentiality. Other state laws restrict schools from arranging deals for their athletes.

One aim of state NIL laws is the protection of young, unsophisticated athletes. While student-athletes can hire professional help in the form of lawyers, agents, tax professionals and others, contracts with agents cannot stipulate that the agent will represent the athlete in future negotiations if the athlete eventually goes pro.

Contracting for student-athlete NIL rights is further complicated by the nature of college athletics — student-athletes regularly transfer schools. Agreements for these types of endorsements need to take into account the scenario in which the student-athlete transfers to

a school where the team has a conflicting sponsorship arrangement. If a student-athlete transfers to a new school in a different state while already engaged in an endorsement deal governed by the state laws and the policies in place at the student-athlete's previous school, it is unclear whether the contract will be legal, permissible and/or enforceable under the laws and policies applicable to the student-athlete at the new school. Parties should consider the terms of agreements in light of diverse laws, and should include "make-good" provisions in the contract in the event these potential laws and changing rules frustrate the benefits the parties expect to receive under the arrangement.

Other Considerations

Parties should also take into account other uncertainties swirling in the college athlete space that could affect NIL-related agreements.

For example, unlike professional athletics, college sports do not have unions, which typically negotiate group deals for athletes. While current NCAA interim policy doesn't expressly prohibit group licensing, it's unclear how future rules might address those kinds of arrangements. Some companies are currently working to find ways to form group licenses with college athletes without needing a union. Some schools are arranging group deals on behalf of their athletes; others are strictly prohibiting these arrangements and efforts. The Ohio State University, The University of Alabama and The University of North Carolina became three of the first programs to partner with a third party, the Brandr Group, a brand management and licensing agency, in three-way deals that allow athletes to earn compensation from jerseys and other merchandise outfitted with school logos and their names or likenesses.

Whether they like it or not, college athletes have suddenly become akin to small-business owners. Many schools are partnering with companies to help educate their athletes on NIL, financial concepts and professional development. Tax, in particular, is an area ripe for error by these students who already have a lot on their plate. While smaller deals may be easier to navigate and simple enough to report on a 1040 tax form, compliance becomes more challenging as the dollars tick up.

Finally, a suddenly hot topic is the interplay between the evolving college athlete NIL space and professional sports. Professional sports leagues, such as the NFL, currently have strict guidelines for their member teams on contact between the professional team and college athletes. The leagues will have to adjust their rules — and soon — since teams are already expressing interest in this new potential income stream. For example, the National Hockey League’s Florida Panthers have already begun entering into NIL deals with college athletes. How the various professional leagues react could limit teams’ future abilities to enter into these agreements — or encourage these arrangements and add to the deal frenzy.

The Positives

Although the college athlete NIL space has created some chaos, it is proving to be a positive change for some athletes, such as those at Brigham Young University and University of Miami.

The Brigham Young University football team announced a multiyear NIL agreement with Built Brands — a company that produces protein bars, and other protein and energy products — that will include compensation for all 123 of its members as well as provide full tuition for walk-on players. According to the program, the agreement calls for players to wear Built branding on their practice helmets and participate in experiential events for Built.

Each scholarship football player at University of Miami has been offered a \$500-per-month contract worth up to \$6,000 per year to endorse American Top Team, a South Florida-based MMA training company, on his social media accounts and through personal appearances and other marketing vehicles.

These deals and many more like them are certainly beneficial to athletes, but are also likely to heavily impact college recruiting. The new NCAA policy does prohibit pay-for-play and impermissible inducements, and all agreements should reflect that athletes cannot accept compensation in exchange for athletic performance or participation, as an inducement for enrollment, or in exchange for enrollment at a particular school. Where that line actually is, however, remains a blurry one — at least for now.

The Uncertain Future

The nascent college athlete NIL space remains in flux, essentially governed by a patchwork of state laws, the NCAA interim policy, and the rules of individual colleges and universities. As the school year begins, significant developments and the rationalization of applicable laws and regulations will likely emerge. Of course, deals are being made every day now, so agreements will need to take into account the current state of uncertainty, including the fact that new federal NIL law may be on the horizon.

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