

NAME, IMAGE AND LIKENESS LEGISLATION

AGG
IES DO



Melissa J. Holloway. General Counsel & VC for Legal Affairs, Risk and Compliance
Earl Hilton, Director, Intercollegiate Athletics
Board of Trustee Retreat
July 16, 2021

HOW DID THIS START/HOW DID WE GET HERE?

NCAA Constitution, Article 2

2.9 The Principle of Amateurism. Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

HOW DID THIS START/HOW DID WE GET HERE?

NCAA Bylaw 12.1.2 Amateur Status. *An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (Revised: 4/25/02 effective 8/1/02, 4/23/03 effective 8/1/03, 4/29/10 effective 8/1/10)*

- (a) Uses athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw [12.2.5.1](#);
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team per Bylaw [12.02.12](#), even if no pay or remuneration for expenses was received, except as permitted in Bylaw [12.2.3.2.1](#);
- (f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw [12.2.4](#)); or
- (g) Enters into an agreement with an agent.

HOW DID THIS START/HOW DID WE GET HERE?

- The tension between amateurism principles and student-athlete's rights and opportunities has been building for decades:
 - > Multi-billion dollar revenue generation from College Football Playoff and March Madness broadcasting beginning in early 2000's.
 - > Ed O'Bannon lawsuit (2009) alleging NCAA violates anti-trust regulations,
 - > Northwestern football team attempts to unionize (2014).
 - > Shawn Alston v. NCAA (2014) alleging NCAA violates anti-trust regulations,
 - > California passes Fair Pay to Play Act (September 2019).
 - > NCAA directed all three divisions to develop legislation that will allow student-athletes to monetize their name, image and likeness (October 2019).
 - > NCAA will grant some version of temporary relief from amateurism regulations (June 30, 2021).

HOW DID THIS START/HOW DID WE GET HERE?

- The “*Fair Pay to Play*” act allows college athletes in the California to profit from their NIL beginning Jan. 1, 2023. The law also **prohibits** universities from revoking an athlete’s scholarship for accepting money earned through such means.
- The move put direct pressure on the NCAA to enact its own NIL legislation and kicked off a race for other states to introduce their own laws.
- The unfortunate irony –
 - The current limitation on NIL applies only to Division I athletes (DII and DIII, in general, may use their NIL to promote or sponsor commercial products or services), and
 - Since 2015, 98% of the request for waivers of NIL legislation by DI athletes have been granted.

WHICH STATES HAVE PASSED NIL LEGISLATION?

- To date, 19 states have officially passed specific NIL laws and seven of them are set to take effect in 2021:
 - > Alabama (July 1)
 - > Arizona (July 23)
 - > Florida (July 1)
 - > Georgia (July 1)
 - > Mississippi (July 1)
 - > New Mexico (July 1)
 - > Texas (July 1)

STATES (12) WITH FUTURE EFFECTIVE DATES:

- Arkansas (2022)
- California (2023)
- Colorado (2023)
- Maryland (2023)
- Michigan (2022)
- Montana (2023)
- Nebraska (No later than 2023 — can be implemented immediately on a by-school basis)
- Nevada (2022)
- New Jersey (2025)
- Oklahoma (No later than 2023 — can be implemented immediately on a by-school basis)
- South Carolina (2023)
- Tennessee (2022)

HOW WOULD COLLEGE ATHLETES BE ALLOWED TO MAKE MONEY?

- Under the NIL legislation passed to this point, college athletes would be able to earn money in a variety of different ways (including but not limited to):
- Social media (sponsored posts or advertisements)
- Autograph sales
- You Tube channels and Twitter videos
- Private training lessons
- Merchandise
- Endorsement deals

IS NIL A BAD THING?

- Those opposed to college athletes being allowed to earn compensation via NIL opportunities often point to what they feel will be unintended consequences of the system:
 - > Added recruiting advantages and an increased potential for cheating
 - > Opportunity for third parties or agent-types to scam college athletes
 - > Complicated tax ramifications and college athlete unfamiliarity with managing finances
 - > The slippery slope from the amateur model to NIL compensation to schools paying college athletes directly
 - > Deterioration of what makes college sports different from professional sports

IMPACT OF ALSTON SUPREME COURT RULING

- Holding – relatively narrow - enjoined the NCAA’s enforcement of restrictions on “education-related benefits”
 - > (like computer expenses, internship opportunities, study abroad programs, and other academically related expenditures). **This may create recruiting challenges for us as we vie for students who have been promised computers or funded-study abroad opportunities from other institutions. Conference legislation may provide some assistance here – it remains to be seen.**
- More problematic – Kavanaugh concurring opinion, *described Court’s action as an “important and overdue course correction.”*
 - > *Also noted that the NCAA’s remaining compensation rules also **raise serious questions under the antitrust laws and may not be able to “pass muster” under reason scrutiny. “NCAA must supply a legally valid procompetitive justification for its remaining compensation rules.”***

WHAT'S NEXT FOR NIL?

- NCAA issued an interim NIL policy on June 30, 2021
- Gov. Cooper issued NIL Executive Order 223 on July 2, 2021,
- Monitor progress of proposed North Carolina NIL legislation.
- Watch congressional activity on a possible federal NIL bill (or a [bundle of bills](#)) that will supersede all the various state laws.
- Monitor other federal legislative action – Booker bill (College athlete bill of rights) and Wicker bill

NCAA “INTERIM” NIL POLICY

- Effective July 1, 2021, and until such time that either federal legislation or new NCAA rules are adopted, member institutions and their student-athletes should adhere to the guidance below:
- NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect, subject to the following:
 - > For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect, if an individual elects to engage in an NIL activity, **the individual’s eligibility for intercollegiate athletics will not be impacted** by application of Bylaw 12 (Amateurism and Athletics Eligibility).
 - > For institutions in states with NIL laws or executive actions with the force of law in effect, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual’s eligibility for and/or the membership institution’s full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.
 - > Use of a professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.
 - > The NCAA will continue its normal regulatory operations but will not monitor for compliance with state law.
 - > Individuals should report NIL activities consistent with state law and/or institutional requirements.

NC EXECUTIVE ORDER 223 (JULY 02, 2021)

- NC Student-athletes enrolled in a postsecondary are allowed by the laws of this state to earn compensation, and obtain related representation, for use of their name, image, and likeness while enrolled at the institution, and such compensation and representation for their name, image, and likeness shall not affect a student-athlete's scholarship eligibility, subject to the following conditions:
- Student-athletes and prospective student-athletes shall not enter into contracts or receive compensation for use of their name, image, and likeness as a direct inducement to enroll or continue enrollment at a particular institution for purposes of participating in that institution's athletic program or as compensation for performance, participation, or service in an intercollegiate sport.
- A student-athlete's authorized representative relating to any agreement for use of his or her name, image, and likeness rights must comply with Article 9 of Chapter 78C of the General Statutes (North Carolina Athlete Agent Act), and applicable federal law, including the Sports Agent Responsibility and Trust Act, 15 U.S.C. § 7801 et seq, and nothing in this Executive Order shall modify or supersede these laws.
- Post-secondary institutions may not compensate student-athletes for use of their name, image, and likeness.

NC EXECUTIVE ORDER ALLOWABLE LIMITATIONS

- May prohibit NIL agreements or contracts if such arrangements conflict with a contract of the institution;
- May prohibit student-athletes from receiving NIL compensation from supporting organizations of the institution including entities that are wholly or partially owned or controlled by the institution;
- May impose reasonable limitations or exclusions on the categories of products and brands that a student-athlete may receive compensation for endorsing to the extent that the institution reasonably determines that a product or brand is antithetical to the values of the institution or association may negatively impact the image of the institution
- May limit NIL compensation during official team activities or institution-sponsored events:

NC EXECUTIVE ORDER ALLOWABLE LIMITATIONS

- May require and establish procedures for ascertaining. that a student athlete's NIL use is commensurate with fair market value.
- May limit a student-athlete's NIL compensation as it pertains to use of the institutions intellectual property. facilities ,or other equipment and gear provided by the institution, including but not limited to uniforms, insignias, and logos.
 - > The order explicitly state that it does not establish or grant any right to any student-athlete the right to use the name, trademarks, service marks. symbols, logos or any other intellectual property that belong to an institution, athletic conference. or athletic association

WHAT'S NEXT FOR N.C. A&T?

- Finalize a departmental policy and procedure that is consistent with NC Executive Order and NCAA/Big South policy. (July 2021)
- Socialize new policy and procedure among our student-athlete population (August 2021)
- Operationalize new policy and procedures across Athletics and other University departments who will be impacted by new processes (August – September 2021)
- Update BOT on roll-out of new policy and procedure with our student-athletes (September 2021)
- Evaluate implementation and adjust procedures as necessary (December 2021, May 2022)

QUESTIONS

AGG
IESDO