



Webinar

Rewriting the Athletics Playbook: Legal and Practical Issues Arising from *Alston* and NIL Developments

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Thanks to Our Speakers



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Agenda

- Caselaw & Developments Overview
- Legal & Governance Issues
- Questions & Answers
- Practical Issues & Takeaways
- Questions & Answers



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Caselaw & Developments Overview



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Antitrust Law Basics

- Section 1 of Sherman Act: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.”
- Every contract in restraint of trade is illegal.

Why do
we need
antitrust
law?



GREED IS GOOD.

Competition
at work

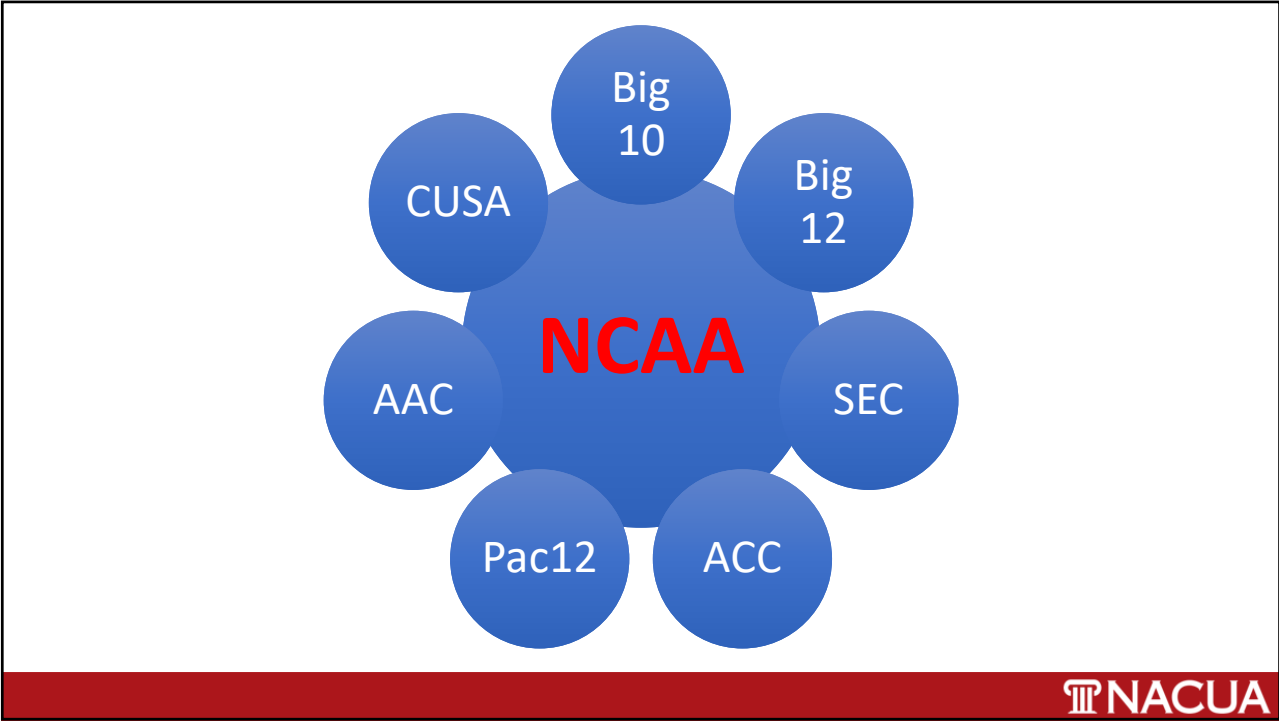




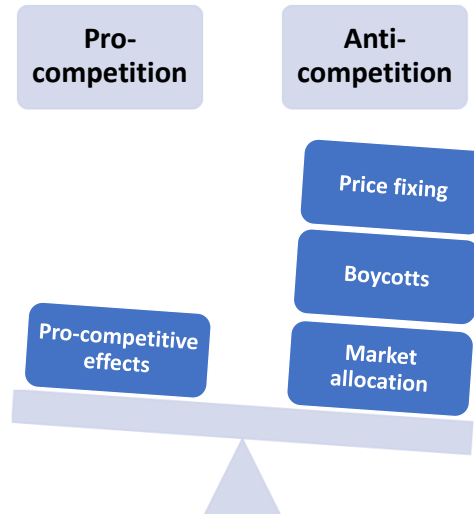
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Per se = certain conduct is presumed to result in unreasonable restraint of trade and is per se unlawful



Because conduct is deemed to unreasonably restrain trade, the plaintiff is not required to present evidence of effects.

The Rule of Reason

Balancing procompetitive benefits versus anticompetitive effects to determine the **net competitive effect** of the restraint

The Rule of Reason

Procompetitive
benefits



Anticompetitive
effects

Association Antitrust Issues

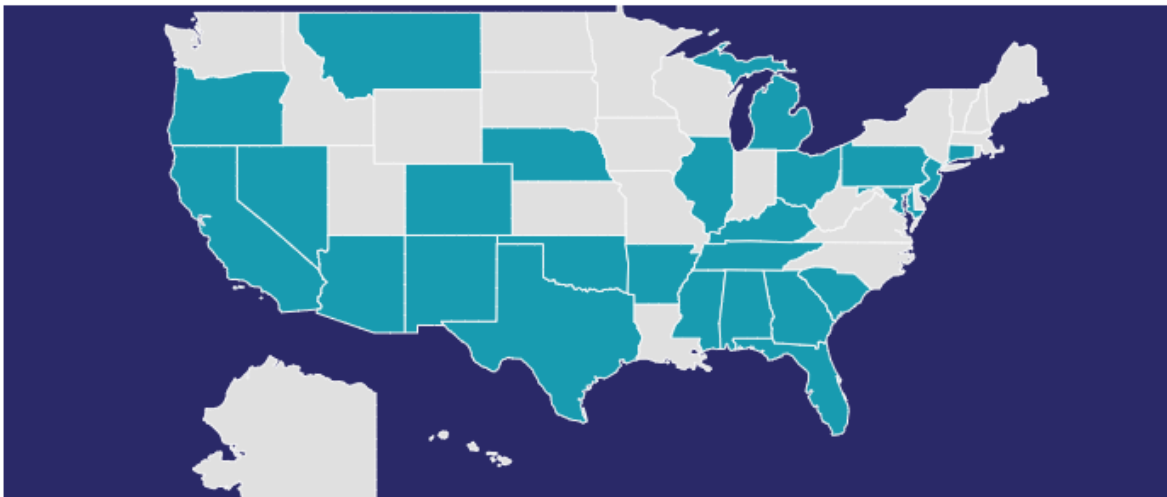
Section 1 issues can arise in a number of ways for associations:

- Meetings
- Self-regulation and codes of ethics/conduct
- Statistical reporting
- Standard-setting and certification
- Membership requirements, access to association services and activities, expulsion

Association Meeting/Discussion: Good Practices

- Because association meetings generally involve communications between rivals, care must be taken to avoid illicit communications – agendas and presentations should be prepared and distributed in advance of meetings
- Care should be taken to keep to these materials at the meeting unless there is a good reason to depart
- Minutes of the meetings should be prepared that concisely reflect the discussions – Especially where they diverge from the preprepared materials
- There are several red flag topics where discussions could lead to illegal agreements with traditional associations:
 - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price for company's products or services
 - Whether to do business with suppliers, customers or competitors
 - Complaints about business practices of other firms
 - Confidential company plans regarding output decisions or decisions regarding future offerings

NIL Laws by State (as of 8/12/21)



Name, Image, Likeness State Legislation Basics

- Compensation for name, image, and likeness from third party.
- Athletes may use professional representation.
- No “pay for play” or recruiting inducements.

Inconsistencies in State Laws

Conflicts with institution

Use of institutional marks and logos

Fair market value limits on compensation

Broadcast rights

Joint licensing

Education requirements

Reporting requirements

Institutional involvement

Official team activities

Another Uniform Solution?

- **Uniform Law Commission College Athlete Name, Image, or Likeness Act**
- **Finalized July 2021**
- *The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.*
- *ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.*

NCAA NIL Interim Policy

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- Individuals can use a professional services provider for NIL activities.
- College athletes who attend a school in a state without an NIL law can engage in NIL activity without violating NCAA rules related to name, image and likeness.
- State law and schools/conferences may impose reporting requirements.
- No pay for play/recruiting inducements;
- Must be quid pro quo
- Cannot provide compensation based on athletic achievements

Federal Activity

- March 2019, U.S. Senator Chris Murphy (D-Conn.) released the first of a series of reports that examined the economics and structure of college athletics.
- March 2019, Representatives Walker (R-NC) and Richmond (D-LA) introduced the **Student-Athlete Equity Act**.
- December 2019, Representatives Shalala (D-FL) and Spano (R-FL) introduced the **Congressional Advisory Commission on Intercollegiate Athletics Act**.
- December 2019, Senators Murphy (D-CT) and Romney (R-UT) formed a bipartisan working group included Senators Booker (D-NJ), Perdue (R-GA), and Rubio (R-FL).
- May 2020, Senators Booker (D-NJ) and Murphy (D-CT) sent a joint letter to NCAA President Mark .
- April 2020, Senator Wicker (R-MS), chairman of the Senate Committee on Commerce, Science and Transportation, sent letters to 50 college associations.

Federal Activity

- June 18, 2020 Senator Rubio (R-FL) introduces the *Fairness in Collegiate Athletics Act*.
- December 17, 2020 Senators Booker (D-NJ), Blumenthal (D-CT), Gillibrand (D-NY), Schatz (D-HI) introduce the *College Athlete Bill of Rights*.
- December 10, 2020 Senator Wicker (R-MS) introduces the *Collegiate Athlete Compensation Rights Act*.
- September 24, 2020: Representatives Gonzalez (R-OH), Cleaver (D-MO), Fudge (D-OH), Stivers (R-OH), Davis (R-IL), Duncan (R-SC), Gottheimer (D-NJ), Allred (D-TX) introduce *The Student Athlete Level Playing Field Act*.
- February 4, 2021: Senator Murphy (D-CT) and Rep Trahan (D-MA) introduce the *College Athlete Economic Freedom Act*.
- February 24, 2021: Senator Moran (R-KS) introduces the *Amateur Athletes Protection and Compensation Act of 2021*.
- April 26, 2021: Representatives Gonzalez (R-OH) and Cleaver (D-MO) reintroduce the *Student Athlete Level Playing Field Act*.

***Alston v.
NCAA***
9-0
decision
(plus Justice
Kavanaugh
concurrence)

- Benefits related to education
 - In-kind (non-cash)
 - Cash
- Benefits unrelated to education

**Key
Takeaways
from *Alston***

- “Relaxing these [education-related benefit] restrictions would not blur the distinction between college and professional sports and thus impair demand.”
- “NCAA can develop its own definition of benefits that relate to education.”
- “The NCAA and its members can continue fixing education-related cash awards, too—so long as those limits are never lower than the limit” on awards for athletic performance.”
- “Injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still.”
- “The NCAA is free to forbid in-kind benefits unrelated to a student’s actual education.”



Who Is the Client?
 President/Chancellor, Athletics Director, and Board of Trustees- Differing philosophical views on NIL policy or how broadly the institution funds education related benefits?

Who Are Other Key Constituents?
 How do you manage the expectations of the faculty governing body, coaches, students, student-athletes, alumni, donors, lawmakers, local community leaders/businesses, and conferences?

Counsel Penetrating the Athletics “Silo”



Liability Issues

Some states require institutions to provide NIL education to student athletes, or your institution may wish to do so voluntarily.

What is the potential liability for administrators or faculty members providing specific NIL advice to a student-athlete?

If you opt to use outside consultants, what is your vetting process?



Intellectual Property/Use of Institutional Marks

Does your institution have a process to grant permission to students to use marks and other institution-owned IP?



How will you enforce violations of permission requirements when not followed?

Will the institution want to participate in group licensing arrangements with student athletes or teams and share royalty payments?

Equity Concerns and Title IX Issues

NIL Support- Title IX will look at level of educational or school assistance provided to women's sports in comparison to men's sports. Are you equitably educating/assisting/promoting?

Education related payments- For payments such as graduation and academic achievement awards, higher payments to revenue-generating teams like football could run afoul of Title IX proportionate benefits requirements.

Budget implications- What are the institutional budget implications for funding other sports?



Labor Organizing Implications

The National Labor Relations Board is positioned to find that student-athletes are employees.

Does institutional participation in NIL group licensing deals with a team or individual bolster that position?

Would education-related awards that are too easily achievable look like pay-for-play?

Gearing up for NLRB decision and labor unions to organize.

The NCAA and Athletic Conferences

What will/can they regulate, if anything, regarding NIL and education benefits?



Will we see a massive reform of college athletics after the NCAA Constitutional Convention?

A collection of sports equipment including a soccer ball, a basketball, a baseball glove with a baseball inside, a football, a tennis ball, and a baseball bat, arranged on a wooden surface.

Questions?



Practical Issues & Takeaways

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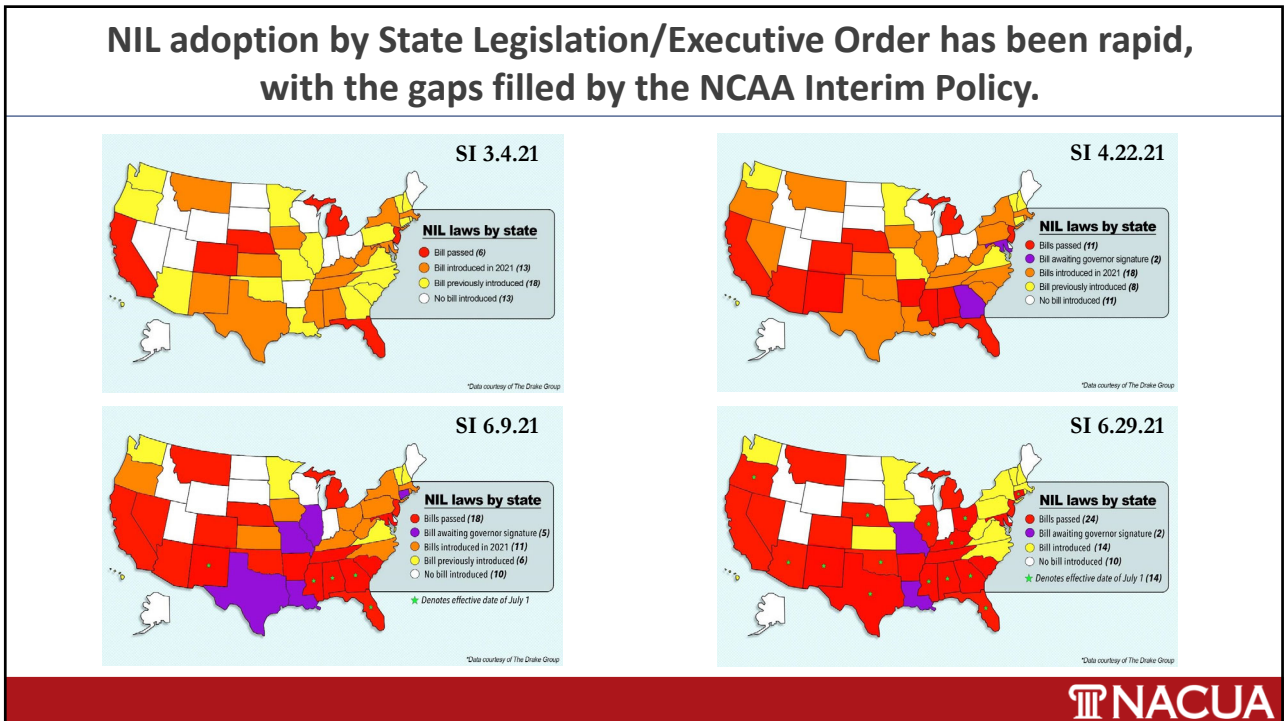
Alston + NIL // Practical Implications

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Despite State law differences, there are many shared principles across State Legislation + Executive Orders.

- ✔ Student-Athletes have affirmative right to earn NIL compensation.
- ✔ Student-Athletes may obtain professional representation only for NIL rights (usually from agent or attorney licensed + in good standing in the applicable State).
- ✔ NIL opportunities may not conflict with institution contracts or team rules (and potential NIL contracts must be disclosed to the institution).

Despite State law differences, there are many shared principles across State Legislation + Executive Orders.

- ✔ Institutions have right to control their Marks + identify “off limit” endorsement categories (e.g., alcohol, tobacco, drugs, adult entertainment, etc.).
- ✔ NIL compensation cannot be used for “pay for play” or recruiting of prospective Student-Athletes by an institution.
- ✔ Institutions may provide financial + life skills training to Student-Athletes.

NOTE: NCAA Interim Policy authorized NIL activities + use of professional representation until either (a) new NCAA rules or (b) federal legislation is adopted.

Despite headlines, NIL market is still emerging; however, it will grow once seasons begin and marketable Student-Athletes emerge.

\$400 Average NIL Compensation Per Student-Athlete

Division I: \$471 Average (\$210,000 Max, \$35 Median)

Division II: \$81 Average (\$750 Max, \$30 Median)

Division III: \$47 Average (\$50 Max, \$30 Median)

Where did the money come from?

46% Social Media Promotions

29% Licensing NIL Rights

10% Signing Autographs

6% Making Appearances

6% Creating Content

1% Hosting Camps

1% Selling Products

What were the most common types of activities?

88.5% Social Media Promotions

3.9% Licensing NIL Rights

2.7% Creating Content

2.0% Making Appearances

1.7% Hosting Camps

0.7% Selling Products

0.4% Signing Autographs



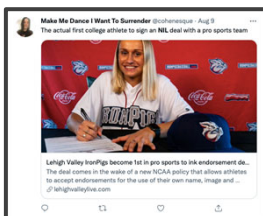
Data Provided by @RossDellenger/@opendorse.

- July 2021: **1,361** NIL transactions on the INFLCR platform.
- Average Transaction Amount: **\$963**.
- 802** Student-Athletes; 64 Division I Schools.
- 47%** - Football; Men's Basketball; Women's Basketball Student-Athletes.
- 53%** - All Other Sports.
- 20%** Female Student-Athletes.
- 12%** of Transactions from non-Power 5 institutions.



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Early NIL deals feature Student-Athletes with large social media followings + businesses seeking to be early adopters of NIL relationships.



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Counsel should have active discussions with Executive Cabinet + Athletic Department Staff about University/Department/Team policies.

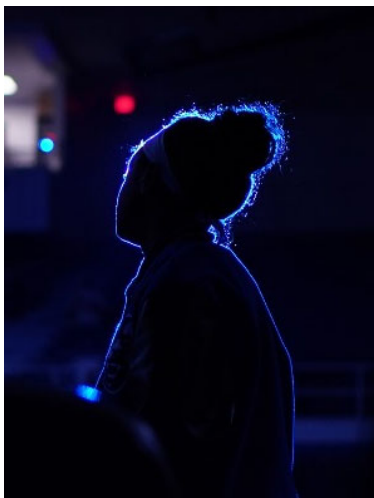
- **NIL Policy.** Review NIL Policy to ensure compliance with State law, NCAA Bylaws, + Institution/Department/Team priorities.
- **Student-Athlete Handbooks/Team Rules.** Review policies around NIL rights, expectations, official team activities.
- **Social Media Policies/Guidelines.** Review to ensure such policies are not too restrictive and if they contain restrictions on when/where/what information can be shared.
- **Enforcement.** Have discussions with Athletics Staff + Coaches about who gets to enforce violations of NIL-related rules.



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NIL legislation now authorizes professional representation to aid Student-Athletes in securing NIL contracts.



- **Agent Policy.** Counsel should review and update Department Agent policies relating to the securing of Student-Athlete NIL rights, including Agent Counseling Panels.
- **Marketing Advances.** Counsel + Compliance staff should educate Student-Athletes about Agent Marketing Advances, which could be improper inducements (esp. if tied to future professional representation).
- **Other Representatives.** Student-Athletes may use Attorneys, Tax Advisors, Brand Management Companies, etc. Rules should take all authorized parties into account.

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Many Student-Athletes, though, are not using Agents, but instead using third-party apps/software connecting them to NIL opportunities.

Counsel should carefully review all contracts to ensure that they meet Compliance Department needs around disclosure, notice, conflicts, NCAA compliance, etc.



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Generally, Student-Athletes are barred from entering into NIL contracts that conflict with Institution/Department/Team contracts.



- **Off-Hours.** Counsel should provide Athletic Staff/Coaches with guidance around times/places where Student-Athletes may endorse competing brands.
- **Apparel/Pouring Rights/MMR Contracts.** Counsel should review Institution/Department obligations of major contracts (e.g., Student-Athlete apparel during travel, beverages on podiums, etc.).
- **Ambush Marketing.** Counsel should discuss with Athletic Staff about how to handle ambush marketing tactics by competing brands tied to Student-Athletes.



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If State law is silent, Institutions need to decide on their tolerance for authorizing the use of Institution Marks for Student-Athlete NIL deals.



Dr. Pepper/Deutsch LA

- **Official Media.** Student-Athletes have started requesting official photos, video, recordings of themselves for NIL use.
- **Mark Prohibition.** Even if Institution prohibits use of its Marks, distinctive colors or other institutional identities could still be present.
- **Licensing.** Student-Athletes have begun working through third-party licensing companies to officially license Institutional Marks.



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Institutions also need to determine if there are any categories that they will prohibit Student-Athletes from endorsing.



- **Prohibited Categories.** Counsel should work with the President and Athletic Director to create the institution's prohibited NIL categories – examples:
 - Firearms
 - NCAA/Conference/School banned substances and performance enhancing drugs
 - Alcohol-related enterprises (e.g., beer/wine/liquor, bars, breweries, etc.)
 - Tobacco and/or tobacco alternatives
 - Cannabis-related enterprises (e.g., dispensaries, grow suppliers, seed companies, etc.)
 - Casinos, sports wagering, or other gambling services
 - Illegal Drug and paraphernalia
 - Adult entertainment and products
 - Professional sports teams and/or organizations



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However, unless explicitly prohibited by State law, Institutions need to carefully craft prohibitions to not be overly broad or hypocritical.

University Alcohol Sponsorships



RAGIN' CAJUNS GENUINE LOUISIANA ALE.

University CBD Licenses



WINSTON PEKI (7.4.2019)

Additionally, Counsel + Athletic Staff – esp. Compliance – need to decide on where to draw the line on certain NIL contracts.



sent you a message:

Dear U of L Student-Athletes,

We are advising all student-athletes to cease involvement with "Barstool Sports" in terms of NIL activity. Barstool Sports does not comply with University of Louisville policies and it does not comply with the criteria outlined in the Kentucky Governor's Executive Order. If

Institutions should remind Athletics staff, boosters, + fans about continued prohibitions around recruiting/inducements.



NCAA. NCAA prohibitions regarding “pay for pay” and recruiting still apply.

Promotion. Institution (and affiliated) persons may not arrange, facilitate, or promote Student-Athlete NIL activities.

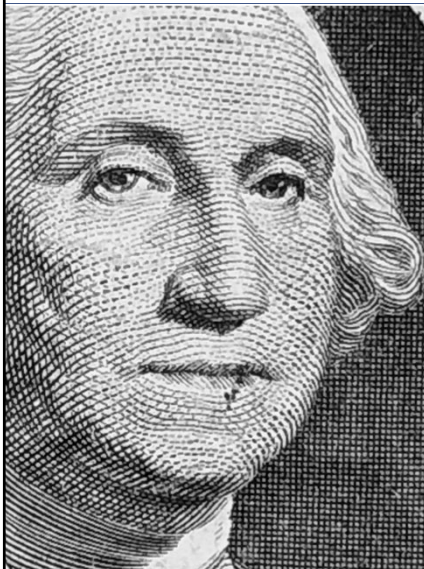


Boosters. Boosters can enter into agreements with Student-Athletes, but solely for legitimate NIL purposes.



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Many States’ NIL laws require institutions to provide “financial literacy and life skills” training to Student-Athletes.



- **Life Skills Workshops.** Most Athletic Departments are already providing some form of life skills training (including financial literacy) to Student-Athletes.
- **Content.** In some instances, there are specific topics that need to be covered (or avoided) for NIL compliance – counsel should ensure authorized content is being delivered.
- **Individual Counseling.** Counsel should ensure that the Institution is not provided direct financial reviews, analysis, or legal reviews of proposed NIL deals (consider legal and entrepreneurial clinics on campus as well).



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NIL deals will break the “command and control” information relationship with Student-Athletes.



- **Sports Information.** The Media’s access to Student-Athletes is highly controlled by SIDs + Coaches.
- **Content.** However, as seen through early NIL deals, there is a high desire for “content” + “insider access.”
- **Sensitive Information.** Counsel should work with SIDs/Communications around Media Training for Student-Athletes to avoid Institutional data being released (injury information, playbooks, data analytics, etc.).

State NIL laws + NCAA Interim Policy fail to address NIL rights for International Student-Athletes, creating a two-tiered system.

- **F-1 Visa.** Most International Student-Athletes are on F-1 Visas in the United States.
- **Compensation.** F-1 Visa Holders are authorized to perform limited work; however, may not earn “substantial income” while studying in the United States.
- **International Offices/Financial Aid.** Counsel should work with counterparts on campus to address impact on NIL deals on International Student-Athletes + risk tolerance for incidental benefits or team benefits.



Counsel should also update Institution counterparts on other myriad of other issues that relate to NIL Student-Athlete NIL transactions.



Financial Aid. While NIL compensation should not impact a Student-Athlete's grant-in-aid Agreement, it may impact Pell or other scholarship recipients' financial thresholds.



FERPA. Counsel should not only review all FERPA waivers provided to Student-Athletes, but also train Athletics staff on handling requests for such FERPA-protected data from third-parties (e.g., current and prospective sponsors, professional representatives, etc.).



Title IX. To the extent Institution is involved with NIL opportunities, efforts should be equitable for male and female Student-Athletes (e.g., showcases, deal approval criteria, etc.).

Counsel should also update Institution counterparts on other myriad of other issues that relate to NIL Student-Athlete NIL transactions.



Facilities. Facilities staff should be trained to determine when a Student-Athlete's promotion of a commercial product, service, camp, clinic, etc. warrants a Facilities Use Agreement.



Development. There are disagreements over the impact of NIL deals on philanthropic or corporate giving to Institutions and Department of Athletics.




MMR/Apparel/Pouring Rights. If NIL deals remove exclusivity for brands and sponsors, Institutions need to look for reductions in sponsorship fees + increased enforcement requirements in these types of agreements.




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Counsel should be involved in discussions around “educational benefits” if Institution elects to increase offerings.




Educational Benefits. While there is no obligation or requirements to provide education-related benefits, traditionally, Institutions have provided items like computers, musical instruments, study abroad expenses, tutoring, etc.




Reasonable Standard. Pre- and post-*Alston*, Institutions must utilize a reasonable standard for what constitutes an “education-related benefit.”



Competition. However, for competitive purposes, Institutions are given latitude to decide what benefits they provide to Student-Athletes that fall into this category.



Conferences. Athletic Conferences may still discuss any impositions of limits on education-related benefits post-*Alston*.



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