

On My Mind Blog

The Revolution of Name, Image, and Likeness in Amateur Athletics

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Prior to 2021, amateurism in college sports prohibited college athletes from capitalizing on their names, images, and likenesses, commonly known as “NIL.” However, recent developments have led to a plethora of states enacting NIL laws permitting collegiate athletes, and in some instances high school athletes, to profit from their names, images, and likenesses. As a result, the National Collegiate Athletic Association (“NCAA”) has paused enforcement of its prohibitory rules, revolutionizing the concept of amateurism.

In June 2021, the U.S. Supreme Court unanimously held in [NCAA v. Alston, 141 S. Ct. 2141 \(2021\)](#) that the NCAA was not legally allowed to limit any education-related payments to students as this violated Section 1 of the Sherman Act. Following the decision, various states enacted laws permitting college athletes, and in some instance high school athletes, to capitalize on their names, images, and likenesses.

NCAA Interim Policy

In light of the actions taken by various states, the NCAA, through its board of directors, suspended its rules prohibiting collegiate athletes from selling the rights to their names, images, and likenesses. The NCAA's interim policy provides the following guidance to college athletes, recruits, their families, and member schools:

- A college athlete may engage in NIL activities that are consistent with the law of the state where the athlete's school is located.
- A college athlete who attends a school in a state without an NIL law may engage in NIL activity without violating NCAA rules.
- A college athlete may use a professional service provider for NIL activities.
- A college athlete should report NIL activities consistent with the reporting requirements in the school's state or as set forth by the school and/or conference.

The NCAA's interim policy also states that college athletes may not be compensated by their schools, coaches or third parties for performance in their respective sports ("pay for play") or engage in any kind of quid pro quo.

State Legislation

The lack of federal law governing NIL activities in collegiate athletics has resulted in a cornucopia of state laws that are often difficult to navigate. States such as Alaska, Idaho, Indiana, Utah and Wyoming have not yet passed legislation addressing NIL, which leaves it up to the individual schools in those states to set their own NIL policies. Some states are waiting for the NCAA to install its new permanent rules. But as of July 2022, 29 states have passed legislation addressing the ability of amateur athletes to profit from their NIL, some of which are listed below:

- **California** – The Fair Pay to Play Act was enacted in 2019 permitting athletes to be paid for promotional activities.
- **New York** – Although both houses of the state legislature have passed the New York Collegiate Athletic Participation Compensation Act ("NYCAPCA"), this bill has not yet been sent to Governor Kathy Hochul for signature. The NYCAPCA would govern all colleges in New York and not just schools who are members of the NCAA. The NYCAPCA provides some basic rights such as the ability to earn compensation from NIL activities and utilize professional representation. Under the NYCAPCA, schools cannot revoke a scholarship because a student-athlete asserts NIL rights. The legislation requires student-athletes to provide advance notice to their school of an impending NIL contract and prohibits NIL compensation when the NIL agreement conflicts with the interests of the school. The legislation is silent on high school athletes, which leaves it up to local athletic associations in the state to set NIL rules for high school athletes. Notably, in October 2021, the New York State Public High School Athletic Association revised its rules and high school athletes can now benefit from their names, images, and likenesses.
- **Florida** – The Florida NIL law was enacted in July 2021 and provides basic rights to collegiate athletes in connection with monetizing their names, images, and likenesses, but also contains other provisions typically encountered with state NIL laws such as the term of a contract for representation or compensation for the use of an intercollegiate athlete's name, image, or likeness may not extend beyond the athlete's participation in the school's athletic program. Florida's NIL law does not provide NIL rights to high school athletes.

- **Texas** – In 2021, Governor Greg Abbott signed into law Senate Bill 1385 permitting intercollegiate student athletes to earn compensation for the use of their NIL in the State of Texas. Similar to other states, Texas NIL law prohibits businesses from trying to persuade athletes to attend a particular university by promising NIL opportunities. Additionally, an NIL agreement may not contain language that terminates the agreement should the athlete transfer from a school. An athlete must inform the school of any proposed NIL agreement.

Newly Permitted Activities

These recent developments have changed the landscape of college athletics and altered the definition of amateurism. Notably, an amateur athlete may now hire a professional service provider, such as an agent, to negotiate NIL activities. College athletes are permitted to capitalize on their NIL rights by:

- serving as brand ambassadors
- appearing in ad campaigns
- selling ads on social media
- selling merchandise
- creating their own businesses
- selling autographed memorabilia
- being paid for appearances
- delivering paid speeches
- teaching at camps or providing lessons

NIL Collectives

As a result of these new NIL rules, groups of boosters, donors, business owners, and/or fans have partnered to create business entities called “NIL Collectives.” NIL Collectives are separate entities from the schools themselves, although they are often formed by or received funds from prominent alumni and boosters. One-time payments can be directly donated to NIL Collectives or donations may be provided through a subscription where individuals make periodic payments. NIL Collectives have varying structures and objectives. Some NIL Collectives are formed to help connect athletes with businesses offering marketing opportunities. These NIL Collectives serve an agent role for athletes, and the donations to the collective are used for logistics and expenses.

Alternatively, some NIL Collectives pool money from boosters and donors to create NIL opportunities for athletes who are paid accordingly. This is the most common collective structure. However, it has led to some questioning whether this format essentially allows collectives to indirectly induce athletes to attend certain schools in defiance of NIL rules because athletes are often promised substantial amounts of money to sign with a certain NIL Collective tied to a particular school. As a result, NIL Collectives have been able to steer athletes to certain schools, despite the prohibition against pay to play. This has raised concerns for the NCAA and college administrators. Notably, New York has even considered banning NIL Collectives. Nonetheless, the proliferation of NIL Collectives has been noteworthy, with some projecting the market spend at over a billion dollars.

Recent College Athlete NIL Deals

Certain high-profile athletes have recently signed NIL deals, some of which are listed below.

- Bryce Young, the star Alabama quarterback and Heisman trophy winner, has signed NIL deals collectively valued at well over seven figures, including an NIL deal with Nissan.
- Paige Bueckers, the star women's basketball player at the University of Connecticut, has signed NIL deals with Bose, Gatorade, Crocs, StockX, and Cash App. Bueckers recently suffered an ACL injury and will not play during the 2022-2023 season, but has indicated she will return for her senior year.
- Rayquan Smith, a two-sport athlete at Norfolk State (football and track) has been dubbed the "King of NIL" because Smith has signed approximately 70 endorsement deals over the past year, including NIL deals with BODYARMOR, Arby's, and Champs Sports.
- Bronny James, son of NBA star LeBron James, although not yet a college athlete, signed an NIL deal with the popular headphones company Beats By Dre. Bronny is the brand's first high school NIL athlete, and even has appeared in a Beats By Dre commercial with LeBron.

The Future

Over the course of a year, NIL deals have substantially impacted the business of college athletics. As more states pass NIL laws, it remains to be seen whether this patchwork of individual state legislation will lead to an unlevelled playing field. Notably, there have been calls for federal legislation to provide a nationwide framework. NIL bills have been introduced on the federal level but none have generated the level of support needed for passage. Thus, the future of NIL and collegiate athletics will continue to evolve.

Takeaways

- An athlete should be aware that NIL deals do not provide the right to use the intellectual property of the athlete's respective school, and a licensing agreement would be needed to do so.
- Businesses who choose to sign a collegiate athlete to an NIL deal should ensure the agreement does not conflict with the interests of the athlete's school.
- As discussed above, the laws vary from state to state, and an athlete should ensure compliance with the NIL laws governing the deal.

- An athlete should seek legal assistance from a practitioner that understands NIL and intellectual property laws, has experience negotiating related agreements, and has a working knowledge of the business of collegiate sports.

For more information, please contact [Jeffrey Chery](#) or your CLL Attorney.

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Jeffrey's practice focuses on trademark prosecution, clearance, and maintenance matters. In addition, Jeffrey handles domestic enforcement issues and represents clients in contested proceedings before the Trademark Trial and Appeal Board.