



DECEMBER 1, 2021 • NO. 1

## Name, Image, and Likeness: Five Months into the NCAA'S New Frontier

*Five months into the NCAA interim policy allowing amateur athletes to profit from their name, image, and likeness (“NIL”), here is what institutions, athletes, parents, personal representatives, and brands need to know.*

### **NIL IS (CURRENTLY) A CREATURE OF STATE LAW**

While the NCAA's interim NIL policy opened the door for college athletes, recruits, and their families to begin to profit, it provided very little in the way of actual rules.<sup>1</sup> The NCAA's policy provides only that (1) an athlete cannot enter a “pay-for-play” agreement, and (2) athletes can use a professional services provider (i.e., agent, lawyer, financial advisor, or business/marketing manager) for NIL activities. Currently, the NCAA has left the rest to state legislations, which have begun passing NIL laws in droves. Approximately 17 states have NIL laws that have already gone into effect, with another 11 states having passed legislation that will take effect over the next four years. The NCAA interim policy will remain in place until federal legislation or new NCAA rules are adopted.

In the current landscape, institutions, athletes, parents, personal representatives, and brands must understand the state's laws in which the athlete is attending a university. For example, ten states prohibit athletes from NIL deals with certain categories of goods, such as the Pennsylvania NIL law, which prohibits athletes from entering into contracts relating to (1) adult entertainment products and services, (2) alcohol products, (3) casinos and gambling

(sports betting), (4) the lottery, (5) betting in connection with video games, online games, and mobile devices, (6) tobacco and electronic smoking products and devices, (7) prescription pharmaceuticals, and (8) a controlled dangerous substance.<sup>2</sup> Contrast that with California, Florida, and other states that do not have any restrictions on the content of the NIL deals.<sup>3</sup> In Florida, athletes have signed NIL deals with local breweries and in Colorado, athletes over 21 years old have been offered NIL agreements with a sports betting operator.<sup>4</sup>

Despite the substantive differences, nearly all state NIL laws include requirements as to (1) student-athlete disclosure of deals to the institution, (2) licensing requirements for agents and attorneys providing professional services, and (3) preventing a reduction in scholarship or grant-in-aid based on earning NIL compensation. The disclosure requirements have come into the spotlight recently with media outlets suing both Louisiana State University and the University of Georgia for NIL deal details available in the required athlete disclosure forms.<sup>5</sup> The institutions have successfully argued that that information is protected under state and federal student privacy laws, such as the Family Educational Rights and Privacy Act (“FERPA”).

State law may not always rule the landscape. There have been half a dozen bills introduced at the federal level to govern NIL. As recently as September 30, 2021, NCAA president Mark Emmert appeared before Congress requesting legislative assistance in providing a “federal framework” around NIL. The NCAA hopes to provide uniform protections for athletes rather than the “patchwork” state laws currently in place. The progress of federal NIL legislation will be essential to track into 2022, as the NCAA’s interim policy expires upon the passing of federal legislation. Additionally, on November 8, 2021, the NCAA released a draft constitution that included a permanent edict giving athletes the right to benefit commercially from NIL.

In addition to state laws, institutions can and should continually implement and monitor their own NIL policies to protect their intellectual property and existing sponsor relationships. As discussed below, all institutions should have licensing agreements for athletes and brands that wish to utilize the institution’s intellectual property in NIL deals.

The NIL laws of Arkansas, Nevada, and Tennessee are the next to take effect on January 1, 2022.

## THE ATHLETE BRAND IS VALUABLE, BUT BEWARE OF PITFALLS

In the short time since NIL began, athletes have undoubtedly benefited. While details are currently protected from disclosure to the public, several athletes have signed NIL deals estimated in value of at least six figures, some much higher. Recently, HBO Real Sports featured a story on twins Haley and Hanna Cavinder, athletes on the Fresno State University basketball team that have parlayed their more than three million Tik Tok followers into hundreds of thousands of dollars in endorsement deals since NIL took effect.<sup>6</sup>

While the athlete may benefit from their own brand, they must be mindful of their school’s brand. While litigation has not yet sparked on this issue, unless an athlete licenses the rights to their institution’s logos or other trademarks, they often will not be able to use them for commercial purposes. Many institutions are adopting policies or licensing programs related to this issue. Those policies must be navigated; even things like wearing a university-logoed shirt in a paid Instagram post could be a violation.

Moreover, some states and institutions are implementing policies banning NIL deals that conflict with existing contractual agreements for the institution or its athletic departments, such as a Nike-sponsored school prohibiting an athlete from entering NIL deals with a competitive

apparel company. Institutions that are not banning competitive brands or categories must continually monitor usage of their intellectual property by athletes, including in social media posts, to not run afoul of their own exclusive contractual commitments.

Just recently, a new issue was brought to light: the morality clause. While NIL deals cannot be contingent on performance—protecting athletes such as University of Oklahoma quarterback Spencer Rattler, who was benched, and University of Miami quarterback D’Eriq King, who was injured for the season—the NIL deals likely all have morality clauses making them terminable by the sponsor based on certain actions. For example, on November 3, 2021, the *Los Angeles Times* reported that a UCLA athlete had his NIL partnership terminated following a video of him surfacing on the Internet where he was using profanity directed at a female student.<sup>7</sup>

Other contractual pitfalls for both institutions and athletes to be aware of include a duration that exceeds the athlete’s time as a college student, and the quantity and scheduling of obligations against the practice and competition schedule of an athlete. In addition, institutions should provide counseling to their athletes on certain contractual clauses such as forum selection and choice of law provisions, mandatory arbitration provisions, or attorneys’ fees shifting provisions, which can make it difficult for an athlete to seek redress under the contract.

## ATHLETES CAN BE REPRESENTED IN NIL ACTIVITIES

For decades, student-athletes have faced the consequences, including losing their eligibility to play, based on engaging professional agents during their amateur playing careers. At least for NIL purposes, those restrictions are no more. The NCAA interim policy, and the state laws that have been enacted to date, provide that athletes, recruits, and their families may receive professional services from an agent, lawyer, financial advisor, or business/marketing manager in connection with entering into NIL contracts. This, however, is not without limitation. The state laws require that the agents are registered in the university’s state and that attorneys are members of the state’s bar. Therefore, if you are a Pennsylvania athlete, your representation must be a Pennsylvania-licensed attorney, a Pennsylvania-registered agent, or a financial advisor in accordance with the laws of the Commonwealth.<sup>8</sup>

In addition to athlete representation, many states require institutions to provide athletes with education on financial literacy as part of their NIL laws. Institutions should cover

topics such as banking, budgeting, impacts of income on financial aid, and taxes. Beyond the required financial literacy education, institutions should consider providing athletes with education and resources regarding reviewing contract terms and compliance with state law and institutional or conference policies.

## TAXES, TAXES, AND TAXES

As the end of the calendar year nears, those benefitting from NIL deals must remember that NIL compensation is, for the most part, considered for tax purposes as ordinary business income. NIL athletes are classified as independent contractors, meaning the business will not be withholding taxes from the compensation received. Therefore, as self-employed workers, NIL athletes will be responsible for paying their income taxes (both federal and, for most, state), Social Security tax, and Medicare tax. There is also a Medicare surcharge tax for self-employment income exceeding \$200,000.

And, the taxes are not limited to just the money earned. Any “free” stuff that a company provides as part of a NIL deal, like gear, a car, or even trips, is subject to taxes. The companies write off those items on their taxes and the value must be applied as income on the NIL athlete’s taxes.

Come April 15, 2022, the athletes that benefitted the most from the NIL policy will owe a significant portion to Uncle Sam.

\*\*\*

NIL appears, through its first five months, to be a significant positive for amateur athletes. NIL deals have been struck by scholarship players and walk-ons from nearly every sport. But it is an ever-evolving landscape and institutions, athletes, parents, personal representatives, and brands need to continue to track the policy changes at the federal, state, conference, and institutional levels.

**Cody Wilcoxson is a member of the Sports Law practice at Blank Rome LLP. Blank Rome provides counseling to institutions, governing bodies, personal representatives, and brand executives on implications of state laws, NCAA policies, and conference and institutional policies regarding athlete name, image, and likeness (“NIL”).**

For additional information, please contact:

**Christopher Cody Wilcoxson, Philadelphia Office  
Associate, Litigation  
215.569.5573 | [cody.wilcoxson@blankrome.com](mailto:cody.wilcoxson@blankrome.com)**

1. Michelle Brutlag Hosick, NCAA.org- The Official Site Of The NCAA (2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.
2. S.B. 381, 2021 Pa. Gen. Assemb. (Pa. 2021).
3. Fair Pay to Play Act, S.B. 26, Ch. 159 (Cal. Stat. 2021); Fla. Stat. § 1006.74 (Intercollegiate athlete compensation and rights).
4. Amanda Christovich, Alcohol, Betting Nil Deals Fair Game For Some Athletes Front Office Sports (2021), [frontofficesports.com/alcohol-betting-nil-deals-fair-game-for-some-athletes/](http://frontofficesports.com/alcohol-betting-nil-deals-fair-game-for-some-athletes/).
5. Daniel Libit, Georgia, Lsu Nil Deals Spark Fights Over Media And Privacy Rights (2021), [www.sportico.com/leagues/college-sports/2021/nil-georgia-lsu-face-1234647071/](http://www.sportico.com/leagues/college-sports/2021/nil-georgia-lsu-face-1234647071/)
6. Robert Kuwada, Fresno State Twins Haley, Hanna Cavinder On Hbo For Nil ... [fresnobee.com](http://fresnobee.com) (2021), [www.fresnobee.com/sports/college/mountain-west/fresno-state/bulldogs-basketball/article255105947.html](http://www.fresnobee.com/sports/college/mountain-west/fresno-state/bulldogs-basketball/article255105947.html).
7. Ben Bolch, UCLA Defensive Lineman Jay Toia Continues Practicing After Combative Video Surfaces Los Angeles Times (2021), [www.latimes.com/sports/story/2021-11-03/ucla-defensive-lineman-jay-toia-continues-practicing-combative-video](http://www.latimes.com/sports/story/2021-11-03/ucla-defensive-lineman-jay-toia-continues-practicing-combative-video).
8. See supra note 2, Section 8, Intercollegiate Athletics, Section 2004-K(B).