

A Checklist for University Policies Addressing Student-Athlete Name, Image and Likeness (NIL) Issues

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In the wake of the Supreme Court's decision in *Alston v. NCAA*, the National Collegiate Athletic Association ("NCAA") issued an interim policy announcing that it will no longer enforce its rules prohibiting compensation for the use of a student-athlete's name, image and likeness ("NIL"). Other athletic associations have like-wise amended their bylaws to allow student-athletes to profit from the use of their NIL. Additionally, new laws recently enacted by many states, such as Pennsylvania, now require institutions of higher education to publish policies on these issues.

To comply with NCAA rules and state law, universities face a range of somewhat complex considerations in forming and implementing NIL policies and procedures. Here are some of the key issues in the form of a practical checklist:

1. Know the NCAA policy or the policy of the athletic association that governs your institution's teams.

The NCAA has a Division Manual for each of its three divisions. The Manuals are several hundred pages long and include at least several dozen policies that address issues that may be impacted by NIL activity. These manuals and policies have not yet been revised. Instead, the NCAA's interim policy states simply:

"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 a 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."

<https://www.ncaa.org/about/taking-action>

2. Know what hasn't changed in the NCAA manuals.

- Subject to state law, the NCAA still prohibits a "NIL agreement without quid pro quo (e.g., compensation for work not performed)."
- Subject to state law, the NCAA prohibits "NIL compensation contingent upon enrollment at a particular school."
- Subject to state law, the NCAA still prohibits "compensation for athletic participation or achievement. Athletic performance

may enhance a student-athlete's NIL value, but athletic performance may not be the 'consideration' for NIL compensation."

- Subject to state law, the NCAA still prohibits "institutions providing compensation in exchange for the use of a student-athlete's name, image or likeness."

https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf (See Q. 11)

3. Know your **state's NIL law**.

A majority of states have enacted brand-new NIL laws, and the requirements vary considerably. Some states even require that institutions create funds from ticket sales or other promotional activities to benefit athletes. Pennsylvania's new law contains many provisions similar to those in other states. For example:

- Pennsylvania's law applies to institutions within Pennsylvania and to students participating in intercollegiate athletics at those institutions. The laws of other states may also apply to their residents regardless of where they attend school. 24 P.S. §20-2001k, et seq.
- Pennsylvania's law permits college athletes to earn compensation for the use of the athlete's NIL and provides that the compensation must be commensurate with the market value of the athlete's NIL.
- Pennsylvania's law prohibits college athletes from accepting compensation in exchange for their attendance, participation, or performance at the institution ("pay-for-play").
- Pennsylvania's law prohibits college athletes from earning compensation for NIL use "in connection with a person, company or organization related to or associated with the development, production, distribution, wholesaling or retailing" of the following:
 - Adult entertainment products and services.
 - Alcohol products.
 - Casinos and gambling, including sports betting, the lottery, and betting in connection with video games, online games, and mobile devices.
 - Tobacco and electronic smoking products and devices.
 - Prescription pharmaceuticals.
 - A controlled, dangerous substance.
 - Other products or activities prohibited by the institution.
- Pennsylvania's law also permits institutions to prohibit student NIL use more broadly: (i) in activities that conflict with existing institutional sponsorship arrangements and (ii) based on other considerations that conflict with institutional values, as defined by the institution. The Pennsylvania law requires institutions to have policies that "specify the name, image or likeness activities [in] which the college student may not engage."
- Pennsylvania's law requires students to disclose proposed NIL contracts to a designated official of the institution at least seven days before the execution of the contract.
- Pennsylvania's law prohibits institutions (i) from preventing student-athletes from earning compensation through the use of the student's NIL or (ii) from obtaining professional representation in relation to NIL use.
- Pennsylvania's law prohibits institutions from arranging third-party compensation for a student-athlete relating to NIL use as an inducement to recruit prospective students.
- Pennsylvania's law requires any person producing a college team jersey, video game, or trading card for profit to make a royalty payment to each athlete whose NIL or "other individually identifiable feature" is used.
- Pennsylvania's law does not require institutions to facilitate or enable NIL opportunities for athletes. The law specifically states that it does not require an institution to permit athletes to use the institution's marks, logos, mascots, or other

intellectual property.

4. Know your state's student-athlete agency law. Many states, including Pennsylvania, require registration, which may include payment of fees and posting of bonds. See, e.g., 5 Pa.C.S. §3301 et seq.
5. Tell the students where to find a list of "banned products." Pennsylvania's law requires that institutions disclose to students the types of deals that the institution prohibits. Therefore, institutional policies should let students know which products and activities are prohibited by state law and by institutional decree. For example, should student-athletes be permitted to engage in NIL activity for CBD and hemp products? Nutritional supplements? Guns? Professional sports teams? Gambling? Broadcasters? Can they contract with university entities, such as a meal service? Institutional policies should also specify products that conflict with school contracts, such as institutional sponsorship deals that include exclusivity promises. Policies should let students know whether all teams have a conflict or just certain teams.
6. Is certain activity prohibited on social media?
7. Tell students whether and how they can use the school's copyright materials (including game footage, logos, nicknames, mascots, etc.), and if appropriate, how to get permission to do so. Consider requiring all vendors, whether involved through the student NIL process or otherwise, to seek approval in the same way for the use of school marks.
8. Tell students whether they can use the school's facilities and fields for NIL purposes, and if so, how to get permission to do so.
9. Tell students whether NIL activity can interfere with class time or team activities.
10. Warn students of other potential hazards, including:
 - The need to consult with the designated school official for international students (because many students are in the United States on visas that prohibit employment), and
 - The need to consult with the financial aid office (because a successful NIL venture may result in income, which may need to be included in determining income-based financial aid eligibility and awards).
 - Indeed, before rolling out an NIL policy, it might be a good idea to coordinate with the university's financial aid office and international student office.
11. Require disclosure of student-athlete NIL contracts. Pennsylvania law requires disclosure to the institution of all NIL contracts at least seven days prior to the execution of the contract. In other states, some institutions are establishing dollar amount thresholds. Your policy should clarify what happens in the event the institution is unable to respond in a timely manner. Does a failure to respond mean that the student has the institution's approval to proceed?

Create a formal process for disclosure of NIL deals by student-athletes and review by the school. Many schools may find it helpful to designate an NIL coordinator.

12. Consider requiring all agents representing student-athletes for NIL activities to register with your school and to provide basic information. Consider advising students of the need to comply with NCAA rules regarding agents, including that students "shall be ineligible... if the individual enters into an oral or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed eligibility in that sport." NCAA Manual, Div. 1, 2021-22, bylaw 12.3.1.3.
13. Consider providing education to students about (a) the NIL and agent registration laws, (b) protecting intellectual property, (c) financial acumen, and (d) university policies and procedures.
14. Consider an internal appeal process or grievance process for NIL issues.
15. Consider other policies and documents that may require review and revision:
16. School contracts containing licensing provisions. Will the school be responsible for student NIL disputes with a university vendor?

17. Insurance policies. Will the university's insurance respond if there are disputes?
18. Social media policies.
19. Student forms granting the university permission to use the student's NIL in connection with university promotional activity.
20. Student discipline policies which may need to specifically identify the types of discipline that may be assessed on students who violate NIL rules.
21. Student grievance policies. Do existing policies allow students to file complaints if the institution prohibits a proposed NIL contract or fails to respond to a proposed contract?

Takeaways. Institutions of higher education must create policies to inform student-athletes of their rights and responsibilities and consider updating related rules across the full range of inter-connected issues within the institution. Institutions must be prepared to make further updates as additional guidance becomes available and as rules change.