

It's a New Game: Pennsylvania Statute Adopted on College Athlete Compensation for Name, Image and Likeness

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On June 30, 2021, Governor Tom Wolf signed legislation to allow college athletes in Pennsylvania to earn compensation for the use of their name, image, and likeness ("NIL"). The new law, adopted as part of Senate Bill 381 ("SB 381"), was signed on the same day the NCAA approved a related policy reversing its long-held prohibition against such NIL activity.

The new Pennsylvania statute, along with similar laws in other states and the NCAA policy reversal, follows years of mounting pressure from athletes. These reform initiatives reached a clear turning point with the unanimous antitrust decision by the U.S. Supreme Court in *National Collegiate Athletic Association v. Alston* on June 21, 2021, affirming an injunction against NCAA rules that had limited the education-related benefits schools may offer student-athletes.

The NCAA's June 30 policy allows students who participate in intercollegiate athletics to engage in NIL activities consistent with the laws of the state in which their school is located. Those attending school in a state without NIL laws can still participate without violating the NCAA's NIL rules. Other non-NCAA athletic conferences may issue their own rules as well. However, Pennsylvania's new statute does not include those who take part in club or intramural sports or professional sports outside of intercollegiate athletics.

SB 381 returns the individual Right of Publicity to college athletes, which was originally denied by prior NCAA regulations. With these regulations set aside, athletes can now take advantage of the same rights enjoyed by other public figures.

SB 381 provides much-needed guidance in Pennsylvania for institutions of higher education and for athletes and their potential representatives in this brand-new and unprecedented era of student-athlete endorsements and compensation. Essential analysis and practical takeaways for athletes and schools are presented below.

COLLEGIATE ATHLETES

SB 381 states that "a college student-athlete may earn compensation for the use of the college student athlete's name, image or likeness." However, athletes should be cautious when pursuing opportunities, as there are specific rules and limitations under this new law. The statute includes detailed provisions about disclosure required by athletes before signing potential NIL deals; avoiding NIL compensation in exchange for participation or commitment to a school; avoiding product and service categories banned for use of NIL; avoiding conflicts with current school sponsorships; hiring professionals for assistance; and bringing a lawsuit if necessary.

Under SB 381, athletes must disclose any potential NIL deals "at least seven days prior to execution of the contract to an official of the institution of higher education, who is designated by the institution of higher education."

NIL compensation cannot be "provided in exchange ... for a current or prospective student-athlete to attend, participate or perform at a particular institution." This provision is intended to avoid transforming collegiate athletics into some form of a "pay-to-play" scheme.

By way of restriction, the law provides that athletes "may not earn compensation . . . in connection with a person, company or organization" associated with these product and service categories:

- Adult entertainment,
- Alcohol,
- Casinos and gambling, including sports betting,
- Tobacco and electronic smoking products,
- Prescription pharmaceuticals or
- Controlled substances

Furthermore, athletes may not engage in NIL activities and contracts that "conflict with existing institutional sponsorship arrangements at the time." For example, a school may be able to prohibit an athlete from engaging in an NIL agreement with one athletic shoe company when the school has a prior sponsorship arrangement with a different athletic shoe company. Schools may also prohibit a student's NIL activities based on other considerations, such as conflicts with "institutional values." In addition, schools "shall have policies that specify" the NIL activities in which athletes "may or may not engage."

In addition to NIL compensation paid on a fixed-fee basis, athletes may also earn royalty payments. SB 381 requires a party that produces a college team jersey, video game or trading cards "for the purpose of making a profit" to make a royalty payment to each athlete whose NIL or "other individually identifiable feature" is used. It is important to note that payment for royalties or endorsements shall not affect the athlete's eligibility, scholarship, or grant-in-aid.

College athletes can hire professional representation for their NIL dealings. These professionals can be:

- (1) An athlete agent meeting state registration requirements under 5 Pa.C.S. Ch. 33;
- (2) A financial advisor acting under Pennsylvania law; or
- (3) An attorney admitted to practice law by a court of record of the Commonwealth.

However, "a person that represents an institution of higher education may not represent a college student-athlete in a business agreement." This language in the Commonwealth's new law needs clarification, but some may interpret this to mean that an individual representing the school in some capacity cannot also represent an athlete of that same university in their NIL dealings. These issues regarding potential conflicts for law firms in particular and whether such conflicts can be waived are yet to be determined.

Athletes also maintain their right to pursue a private civil action for any violation of SB 381's NIL provisions, and they may receive costs and reasonable attorney fees, in addition to damages, if they prevail.

COLLEGES AND UNIVERSITIES

Pennsylvania colleges and universities ("institutions") and athletic associations and conferences, including the NCAA, are now prohibited from preventing an athlete from earning NIL compensation. An institution itself cannot be prevented by an association or conference from participating in intercollegiate athletics due to an athlete's NIL dealings.

Institutions are not required "to identify, create, facilitate, negotiate or enable opportunities" on behalf of athletes to earn NIL compensation, but they can choose to do so. In addition, institutions are not required by SB 381 to allow athletes to use the school's "name, trademarks, service marks, logos, symbols or any other intellectual property," but again, they can choose to do so. This will open the door to opportunities for institutions to share in a revenue stream should they elect to license the use of their intellectual property as part of an athlete's endorsement campaign.

Institutions may prohibit an athlete's involvement in NIL dealings that conflict with existing institutional sponsorship arrangements at the time of the athlete's disclosure. Similarly, institutions can prohibit NIL dealings that conflict with "institutional values."

Institutions of higher education "shall have policies" that specify the NIL activities in which athletes "may or may not engage." As discussed above, prohibited NIL activities could include, at the very least, adult entertainment, alcohol, casinos and gambling (including sports betting), tobacco and electronic smoking products, prescription pharmaceuticals, or controlled substances. Schools also have the right to expand this list in accordance with their values and codes of conduct.

In addition, schools maintain the right to establish and enforce academic standards and requirements, team rules of conduct or other rules of conduct, disciplinary rules applicable to all students, and policies regarding participation in intercollegiate athletics, such as NCAA rules.

Schools must designate "an official of the institution of higher education" to receive notice from students disclosing a possible NIL contract.

Also, "any person" who sells merchandise using an athlete's NIL must pay royalties to the athlete. This includes sales of jerseys, cards, or other merchandise that uses an athlete's name, image, or some other feature of identity. While the use of the term "any person" is slightly ambiguous, we believe that this is intended to include institutions of higher education.

PRACTICAL TAKEAWAYS

Athletes thinking about profiting from their NIL should consider contacting a licensed attorney and/or other professionals to assist them with the process. Endorsement agreements are often long, complicated documents that may contain language that works against the athlete's interests if not carefully reviewed. In addition, students will need assistance to ensure they are abiding by state law, school rules, and NCAA policies.

Athletes may also benefit from professional representation if they want to negotiate for the right to use the logos and other intellectual property of their school or conference. Colleges and universities will need to closely address and monitor this issue.

In considering opportunities for NIL compensation, an athlete who deems it to be cost-effective may further benefit from seeking federal trademark protection for his/her name, signature, nicknames, logos, and the like. Similarly, athletes should consider registering internet domain names based on such categories. Legal counsel well-versed in the costs and processes associated with intellectual property laws and practices can help to make these economic determinations and strategic filings.

Institutions should consider drafting specific NIL rules, including those required by SB 381, and updating other relevant policies. Effective written policies will provide necessary guidance for athletes and protect the interests of the school. Ongoing training for staff and monitoring of NIL activities will also protect the school's interests in the event of a dispute. Policies should identify the official at the school who will be responsible for reviewing and approving contracts disclosed by athletes and address the circumstances under which contracts will not be approved.

In order to protect its intellectual property, an institution should also consider expanding its portfolio of registered trademarks and logos to include protection for product categories that are likely to be the subjects of athlete NIL endorsements.

Although institutions are not required to facilitate NIL opportunities for students, it will likely benefit the institution to find appropriate ways to assist athletes in such activities. Schools may want to consider relaying such opportunities to their

athletes and suggest prospects for mutual participation in these deals.

SB 381 constitutes a significant development for collegiate athletes in their longstanding efforts to protect and benefit from their Right of Publicity. However, there are some outstanding questions that remain, including:

- Will institutions be subject to the statutory provisions requiring royalty payments for the sale of merchandise using athletes' NIL?
- Can institutions charge athletes a royalty or a flat fee for the use of the institutions' trademark, logo, and other intellectual property in conjunction with the athletes' endorsement deals?
- What are the parameters of the conflicts provision stating, "a person that represents an institution of higher education may not represent a college student-athlete in a business agreement"? What effect will this have on lawyers and law firms, and can these conflicts be waived?
- Is there a transparency requirement for these NIL contracts, and must they be disclosed to the public?
- When a student discloses a potential NIL contract at least seven days prior to its execution, as required by SB 381, what will happen if the school fails to review the contract within this time?

Athletes and institutions, as well as companies contemplating endorsement deals with students, should consider working with attorneys and other professionals who have broad experience with the various interrelated aspects of these issues, including the state and federal laws for higher education, intellectual property, sports law, and other relevant subjects.

In short, the game has changed in a big way for both college athletes and their educational institutions. We are monitoring these emerging issues and will continue to report on material developments. As these matters evolve over time, individuals and organizations should consult with counsel.

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