

Navigating the NIL landscape may have student-athletes in compliance overload



Carla Erskine | Friday, July 16, 2021

Part 2 in the series "The Wild West of name, image, and likeness: Be prepared when the dust settles."

The long anticipated National Collegiate Athletic Association policy, which allows college athletes to earn money from their name, image and likeness (NIL) **went into effect on July 1**. As a result of this game-changing policy, college athletes can be paid for the commercial use of their identity in the form of endorsement deals from companies, monetization of their social media presence, earning money through autographed or licensed products like apparel, sports drinks or video games, making personal appearances, and more.

However, it's not all a money-making game. The obligation of compliance with institution-specific policy, NCAA policy and NIL state laws still remain. With no existing federal legislation to provide uniform guidance and the ability of each state to pass different NIL laws, The task of navigating the NIL landscape may become complex and students may find themselves in compliance overload. The wave of change as it relates to college athletes being able to profit from the commercial use of their identities, began in 2019 when California enacted the *Fair Pay to Play Act* – the first state legislation allowing student-athletes to be paid for promotional opportunities. Since then, a wave of states began to follow suit and propose or pass similar legislation. Increased pressure led the NCAA to **pass the newly implemented NIL policy**. The NCAA has since asked Congress to implement a federal legislation in order to preempt state laws and help provide a uniform standard for its over 1,100 member schools. Until then, parameters set by the NCAA are

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the only framework upon which student-athletes can rely, and right now [we know they have to comply with the following](#):

- Student-athletes can engage in NIL activities consistent with the law of the state their school is located.
- Student-athletes who attend a school in a state without an NIL law can engage in NIL activities without violating NCAA rules on name, image and likeness.
- Student-athletes should report NIL activities consistent with their existing state law, school and conference requirements to their school.
- Student-athletes NIL compensation is not be contingent on enrollment at a particular institution or any improper recruiting inducements.
- Student-athletes cannot receive pay-for-play.
- Student-athletes cannot be compensated for work not performed.
- Student-athletes can utilize the services of professional sport representation firms, agents or attorney for negotiation of NIL deals.

To best protect themselves, it is imperative for student-athletes to go beyond the mere understanding of the above stated NCAA policies. They need to be aware of and maintain compliance with the respective state law and college/university policies. This way they can avoid compromising their academic or scholarship eligibility, while also maximizing their marketability and earning potential at a time that could be the highest point of their athletic career, since going pro is not an option for everyone.

With that in mind and no federal law in place, athletes in states without NIL laws may end up with more flexibility and freedom for their NIL activities (unless schools impose additional NIL requirements). Meanwhile, athletes in states with NIL laws are more likely to seek legal counsel or the services of professional firms to help them navigate the complex NIL landscape.

In response to this wave of NIL legislation across the country, [Florida](#), [Illinois](#), and [Michigan](#) each [passed state laws](#), and [Ohio](#) issued an executive order, all prescribing general rules around NIL, as follows:

- (FL, IL, OH, MI) Athletes are authorized to earn compensation for the use of their name, image, or likeness.
- (FL, IL, OH, MI) A postsecondary educational institution may not adopt or maintain a contract, rule, or requirement that prevents an intercollegiate athlete from earning compensation for the use of her or his name, image, or likeness.
- (FL, IL, OH, MI) An athlete's scholarship or athletic eligibility, shall not be affected due to their earning of compensation from their name, image, or likeness.
- (FL, IL, OH, MI) Postsecondary institutions are prohibited from compensating a current or prospective athlete for their NIL.
- (FL, IL, OH, MI) Athletes are prohibited from entering into a contract for NIL compensation if a term of the contract conflicts with a term of the athlete's school team contract.
- (FL, IL, OH, MI) Requires athletes disclose contracts regarding NIL compensation with the postsecondary institution they are enrolled. **Michigan law requires athletes disclose the opportunity prior to signing the contract.*
- (FL, IL, OH, MI) Institutions may not prevent or restrict an athlete from obtaining professional representation by agent or attorney for the purpose of securing NIL compensation.
- (FL, IL, OH, MI) Scholarship or aid awarded to an athlete by a postsecondary institution may not be

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reduced or revoked as a result of an athlete earning for the purposes of NIL.

- (FL) Requires that institution’s conduct a financial literacy and life skills workshop at the beginning of the athlete’s first and third academic years. *However, there is no requirement that the athlete participate in these workshops.*
- (IL, OH) Restrictive measures regarding student-athlete engagement in contracts for compensation for use of their NIL if associated with the endorsement of gambling, sports betting, controlled substances, cannabis, a tobacco or alcohol company or brand, alternative or electronic nicotine product or delivery system, performance-enhancing supplements, adult entertainment.

Student-athletes may feel as if they are wading through murky waters as they attempt to navigate the NIL state laws, NCAA policies, and institution specific policies. However, intercollegiate stakeholders and state-level players seem to be aware of these pressures. The NCAA’s encouragement of athletes to report activities to their college/university institution and the NCAA requirement that “colleges (and) universities are responsible for determining whether (an athlete’s) activities are consistent with state law,” takes some pressure off athletes and places some of the onus on the institutions to ensure their athletes have some support in navigating all of the nebulous rules.

Similarly, state laws such as those in Florida (requirements on literacy and life skills workshop), Ohio and Illinois (restrictions on athletes from engaging in contracts with businesses engaged in controlled substances, adult entertainment and gambling) respectively, also show legislators trying to implement protective measures for fresh-faced student athletes. Additionally, states seem to be staying consistent with NCAA policy and may also be taking cues from each other when establishing their name image and likeness laws, as comparable principles on contract restrictions, contract disclosures requirements, scholarship eligibility, professional representation requirements and rules surrounding compensation are being seen across the board – a welcome trend if no federal legislation is seen in the near future.

As a former Division I tennis player and as an associate in the McDonald Hopkins business department, Carla understands how athletes will need attorneys to negotiate business and endorsement deals with the various companies. Carla completed a Sports Industry Essentials Graduate Certificate from Columbia University, and sports law continues to be an area of interest within her practice



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