

NIL in college athletics: a 2024 update

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Name, image and likeness rights remain a hot issue, with third parties pushing new opportunities for student athlete compensation as the National Collegiate Athletics Association struggles to keep pace, explain Saul Ewing partner Amy Piccola and associate Levi Schy

The college sports landscape has transformed rapidly since public support for student athletes pushed many US state legislatures to enact legislation in 2019 that – for the first time – allowed student athletes to be compensated for the use of their name, image and likeness (NIL).

Prompted by this sea change and the Supreme Court's June 2021 ruling in *NCAA v Alston* (20-512), the National Collegiate Athletics Association (NCAA) quickly followed suit by implementing its interim NIL policy which allowed student athletes to receive NIL compensation in accordance with relevant state law while continuing to prohibit:

- NIL agreements without quid pro quo (ie, compensation for work not performed);
- NIL compensation made contingent upon enrolment at a particular school;
- direct compensation for athletic participation or achievement (ie, pay-for-play); and
- institutions compensating student athletes for use of their NIL.

This was a significant departure from the NCAA's long-held position that student athletes should be prohibited from accepting any form of compensation to preserve amateurism in college sports.

In 2022, the NCAA and most state legislatures appeared to be aligned in holding the line to maintain amateurism and avoiding pay-for-play in college sports by prohibiting higher education institutions from directly compensating student athletes for use of their NIL. But as the NIL marketplace has grown, student athletes, schools, NIL collectives and states legislatures have been eager to test the boundaries of the NIL guardrails in an effort to gain a competitive edge – either in NIL compensation, revenue or recruiting top talent to college teams.

Since 2022, it has become clear that the NCAA is in the NIL game whether it likes it or not, and the line between educational institutions and student-athlete compensation continues to blur. Driven by lawsuits, state legislation and NCAA action, the landscape continues to change and a more permissive environment around compensation for student athletes (NIL and otherwise), involvement by colleges and universities in such compensation, and revenue sharing in the lucrative college sports industry appears inevitable.

Court decisions

NCAA v Alston did not directly concern NIL rights but gave schools and athletic conferences more latitude in setting standards regarding benefits provided to student athletes (and thereby less control to the NCAA to dictate such standards) under antitrust law. The case is largely regarded as a catalyst for much of the change in NIL compensation and NCAA rules over the past few years.

Litigation has continued to drive developments in this arena. The following are a sample of active litigation:

- *Tennessee v NCAA* – the attorneys general of Tennessee and Virginia (later joined by Florida, New York and the District of Columbia) filed a lawsuit in Tennessee federal court against the NCAA claiming that the restrictions on athletes' use of their NIL in the recruiting process violated antitrust laws and hampered student athletes' ability to negotiate the use of their NIL rights at the time when they should be poised to maximise potential NIL compensation. The court granted the states' motion for a preliminary injunction that effectively precluded the NCAA from enforcing its NIL recruiting ban or taking any other action to prevent prospective college athletes from engaging in NIL discussions with NIL collectives or other third parties prior to enrolment.
- *House v NCAA* – a California federal court awarded class status to student athletes in a lawsuit asserting that the NCAA wrongly denied student athletes opportunities to earn compensation for use of their NIL. The student athletes seek compensation for NIL payments they allege they would have earned but for NCAA rules prohibiting them from receiving such money. The class action lawsuit leaves the NCAA and its member conferences vulnerable to potential damages of up to \$4.5 billion. At the time of writing, the parties are apparently actively engaged in developing a settlement framework for House and two similar cases – *Hubbard et al v NCAA* and *Carter v NCAA* – which could include not only damages payments, but also a revenue sharing arrangement between athletic conferences and their student athletes and a resolution of the question of direct NIL compensation by institutions to students.
- *Johnson v NCAA* – in one of several cases challenging NCAA bylaws that prohibit direct payments to student-athletes as compensation for participation in college athletics, a federal court in Pennsylvania allowed this case – in which former Division I athletes argue that student athletes should be considered employees subject to the Fair Labor

Standards Act and should be paid for their time related to athletic activities – to proceed past the pleading stage. The case is currently pending before the US Court of Appeals for the Third Circuit.

As early outcomes in these cases suggest, gone are the days where the courts blindly accept NCAA restrictions on student-athlete compensation and revenue sharing in the name of amateurism. Unsurprisingly, court decisions favouring student athletes have continued to push developments in the NIL and college athletics world, including by way of new state legislation and NCAA action.

State legislation

Initially, state legislation concerning NIL compensation was largely consistent with the NCAA's interim NIL policy in that such legislation generally respected the NCAA's desire for separation between student-athlete compensation (NIL or otherwise) and the institutions where the student athletes are enrolled. However, in line with Virginia's involvement in *Tennessee v NCAA*, the Virginia legislature amended its NIL legislation, effective 1 July 2024, to explicitly allow institutions of higher education to directly compensate student athletes for use of their NIL.

If the waterfall of NIL legislation beginning in 2019 is any harbinger of what is to come, Virginia's move will likely entice other state legislatures to push the boundaries in a similar fashion, as states with more permissive NIL laws are likely to have an advantage in attracting top athletic talent to their colleges and universities. An increase in states with NIL laws that contradict NCAA rules is expected to pressure the NCAA to further action.

NCAA action

As court action and state legislatures have continued to march toward a no-holds-barred college sports industry where student athletes have increased ability to be compensated for their NIL and participation in college athletics, including directly from their college or university, the NCAA continues to react by loosening its fixation on traditional notions of amateurism in college sports.

On 22 April 2024, the NCAA approved significant rule changes to its NIL "student-athlete protections" (originally approved in January 2024) effective 1 August 2024. The original January 2024 rule allowed colleges and universities to engage directly in student athletes' pursuit of NIL opportunities by providing "assistance and services", including helping student athletes to identify NIL opportunities and facilitating deals, but stopped short of permitting institutions to directly compensate student athletes or induce prospective student athletes to enrol at a particular institution with the promise of NIL opportunities.

However, as discussed earlier, the court in *Tennessee v NCAA* has enjoined the NCAA from enforcing its rules prohibiting prospective college athletes from engaging in NIL discussions with NIL collectives or other third parties before enrolment. The April amendment accordingly scaled back NIL reporting requirements and eliminated risk to student athletes' eligibility for failure to disclose NIL activities.

In December 2023, NCAA president Charlie Baker proposed further seismic changes to NCAA rules, including:

- removing the cap on restrictions of educational benefits that Division I institutions could offer student athletes;
- allowing institutions to contract directly with student athletes on NIL deals providing student athletes an additional avenue for NIL deals beyond collectives; and
- allowing certain institutions to directly compensate student athletes for athletic participation.

During the January 2024 NCAA Convention, the Division I Board of Directors directed the NCAA's D-I Council to develop a recommended framework that addresses Baker's proposal. While such proposed action directly from NCAA leadership represents an unprecedented reversal of previously paramount NCAA amateurism values, some see the move as reactionary and too little too late, as NCAA action remains hamstrung by uncertainties posed by pending court cases and legal action.

A less restrictive future

As stakeholders join the arms race to capitalise on the opportunities presented by the newly formed NIL marketplace, the terrain of college sports and permissible student-athlete compensation continues to shift at a breakneck pace in response to action by courts, state legislatures, and the NCAA. While one can only guess how each effort will unfold, it is clear that the future of college sports involves a drastically less restrictive model where colleges and universities are inevitably more involved in student athlete compensation, through NIL or otherwise. Stakeholders looking to play and win in this field (and avoid risk by maintaining legal compliance) will be well served to pay close attention to the changes as they occur and closely consider how such developments impact other legal obligations.



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