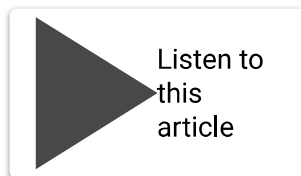


Game changer: NIL law merges college athletics, legal practice

Jason Boleman // December 10, 2023 //

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Following a 2021 U.S. Supreme Court decision, college athletes have an unprecedented opportunity to profit from their name, image and likeness – creating an intersection between the commonwealth’s college athletes and legal practitioners.

The unanimous decision in *NCAA v. Alston* found that college athletes can be compensated for their name, image and likeness – or NIL – and noted the “complicated relationship” America’s colleges and universities have with sports and money.

Prior to the ruling, college athletes were prohibited from accepting any compensation from NIL, whether it be from appearances, autograph signings or endorsements.

The ruling further created an intersection between student athletes, athletic departments and lawyers who are navigating a new and rapidly changing practice area, while accounting for state-level statutes and NCAA policy.

Richmond attorney Tricia Dunlap, whose firm Dunlap Law has a budding NIL practice, told Virginia Lawyers Weekly that the biggest challenge for attorneys is “keeping up with a highly dynamic legal landscape.”

“Some states moved quickly to permit student athletes to sign NIL deals because state legislators saw opportunities for state universities to get a leg up on recruiting,” Dunlap said.

Noting that the NCAA remains the “sole and ultimate arbiter of student-athlete and institutional eligibility,” Dunlap said attorneys must be mindful of navigating laws and NCAA policy while making sure their clients maintain their eligibility.

“The NCAA recently announced that athletes who engage in NIL deal terms that are permitted by state law but that violate NCAA guidelines will lose eligibility,” she said. “That’s why attorneys need to understand both the laws and NCAA rules.”

Virginia law runs point

In Virginia, NIL is governed by Va. Code § 23.1-408.1, which states that no institution, athletic association, athletic conference or other organization can bar a student athlete from earning compensation for his or her name, image or likeness.

The statute further bars those organizations from preventing a student athlete from obtaining legal representation for an NIL issue.

Some exceptions exist as to what NIL deals student athletes are permitted to sign, including if the deal “conflicts with an existing institutional agreement” or if the arrangement is in connection to an area specifically named in the statute, including gambling, alcoholic beverages and controlled substances.

The measure was signed into law by Gov. Glenn Youngkin in 2022 after two identical bills passed the General Assembly with broad bipartisan support. The bills, SB 223 and HB 507, were patroned by Sen. Jeremy McPike and Del. Terry Austin, respectively.

Norfolk attorney William Palmer, who is part of Kaufman & Canoles’ sports and entertainment practice, said the legislation is “fairly tame” compared to some of the more ambitious legislation in other states.

“The Virginia statute essentially mirrors the basic structure and restrictions outlined in the NCAA regulations that were passed following *NCAA v. Alston*,” Palmer said.

Virginia is also one of a growing number of states permitting high school athletes to enter into NIL deals. The Virginia High School League passed an NIL policy earlier this year on a 32-2 vote, providing guidance to the commonwealth’s public schools on the matter.

Dunlap said the guidelines make NIL deals “highly unlikely” for student athletes.

“A high school athlete’s NIL would have to be so famous that it would have marked value even if disassociated from their school, team and the school’s mascot,” Dunlap said. “That’s a high bar – but maybe will happen.”

Palmer noted that the new policy represents “a trickle down to high school sports” and that the market for such deals remains unclear.

“The new guidelines, as well as laws surrounding contracting with minors, could present interesting legal challenges and potential traps for the unwary,” Palmer said.

Lawyers as role players

Ashley Chiera-Davis, associate athletic director of compliance at Virginia Commonwealth University, told Lawyers Weekly that her experience with NIL has been “overwhelmingly positive.”

But she noted that there is a concern that student athletes could be taken advantage of when it comes to contracts.

“It is generally understood that many student athletes are not seeking legal advice or counsel for contracts they are agreeing to sign, many times because they don’t believe they need to because the deals are often gift-in-kind,” Chiera-Davis said.

Though it has not happened yet, as far as she knows, Chiera-Davis said lack of counsel could lead to breach of contract issues and “further difficulties” for student athletes.

Dunlap said attorneys representing student athletes in NIL matters function as “advocates and representatives” for the athletes and must have a solid understanding of intellectual property principles and licensing deal structures and have strong contract-drafting skills.

“It is essential that we provide students with a contract drafted in plain English so they can understand it easily and comply with its terms,” Dunlap said. “Student athletes have a lot on the line in these deals – they can lose their eligibility. Getting it wrong can destroy promising careers.”

Beyond simple legal representation, Dunlap said it is important for attorneys also to understand the student-athlete experience. She noted that an attorney joining her firm’s NIL practice next summer played baseball at the Division I level, “giving him a perspective that few attorneys share.”

She added that student athletes should reach out for counsel as early as possible in the NIL process – sometimes even as soon as they commit to their university. That way, athletes and their counsel can begin to build a relationship and develop a strategic plan.

Key to “any comprehensive NIL programming” is education, according to Chiera-Davis.

“This education generally begins with a general understanding of an individual’s right to publicity and what rights are given up when engaging in NIL, and then grows to understanding contract terms and what phrases such as ‘in perpetuity’ and ‘intellectual

property' mean," she said.

Drafting new rules

Dunlap noted that Congress this year held several hearings on NIL and have multiple bills pending. No national NIL legislation currently exists, leaving a patchwork of state laws for attorneys to navigate.

"Every single day, something changes in this landscape. Right now, it's the Wild West," Dunlap said, adding that the NCAA is expected to adopt new proposals in January aimed at enhancing student-athlete protection regarding NIL rights.

Palmer said federal legislation would likely be similar to Virginia's.

"If/when federal legislation is passed, I suspect it will look similar rather than the more expansive and ripe-for-abuse legislation in other states," Palmer said.

Among the possible areas addressed in federal legislation is international student athletes, who are barred from most NIL activity due to visa restrictions. Chiera-Davis said it "remains a large issue" and that federal legislation on the process has been introduced.

The present NCAA interim policy explicitly states prohibitions on NIL policy. However, much gray area exists outside of those guidelines, exacerbated by the patchwork of legislation. Chiera-Davis said that patchwork "creates confusion at times when states permit or prohibit different things."

"Clarity in the space on both fronts, law and NCAA regulations, would assist institutional staff and lawyers alike in assisting student athletes and understanding where the lines are," Chiera-Davis said.

Despite the challenges faced by those in the NIL space, Chiera-Davis said she believes it has been "a generally positive addition" to the collegiate athletics landscape.

"It provides an opportunity for student athletes to gain real-world education, knowledge and experience on a scale much greater than they have been permitted to do so in the past," Chiera-Davis said. "The importance of these experiences cannot be overstated."

North Carolina Lawyers Weekly reporter Heath Hamacher contributed to this story.