



Student-Athlete Name, Image, and Likeness Rights

What to Expect in 2021 and Beyond

By Nicholas A. Plinio and Gregg E. Clifton

The world of college athletics is in a state of flux, largely revolving around student-athlete name, image, and likeness rights (NIL), which allow student-athletes to receive compensation for their marketing rights without violating NCAA bylaws or losing their amateur status. The issue of NIL rights is being considered by nearly 30 states, with six states having passed specific NIL laws. Several proposed federal bills also have been introduced in the Senate and House of Representatives. In addition, the NCAA is considering changes to its bylaws that would grant NIL rights to student-athletes.

In addition to state and federal legislative efforts, the U.S. Supreme Court has agreed to consider *NCAA v. Alston*, which could reshape college athletics by eliminating financial limits placed on student-athlete scholarships. This article details the current landscape of NIL rights and the developments and legal issues that will dominate 2021 and beyond.

State NIL Legislation

Presently, six states (California, Colorado, Florida, Michigan, Nebraska, and New Jersey) have passed NIL legislation. The state laws that have been enacted all have significantly delayed effective dates, except for Florida law, which will become effective in July 2021. The delays are intended to give the NCAA or the federal legislature time to enact uniform standards governing the compensable rights of student-athletes marketing their name, image, and likeness.

New Jersey Fair Play Act (S-971/A-2106). New Jersey enacted its NIL law in September 2020, allowing student-athletes to earn financial compensation from the use of their name, image, and likeness. The Fair Play Act also authorizes student-athletes to use attorneys and agents to negotiate NIL opportunities without it affecting the student-athletes' ability to continue their collegiate careers and scholarship eligibility.

The Fair Play Act becomes applicable in the fifth academic year following its enactment. Under the Fair Play Act, a four-year institution is prohibited from upholding any rule or other limitation that prevents college athletes from monetizing the use of their name, image, or likeness. In addition, a four-year institution is prohibited from joining any athletic association, conference, or other organization with control over intercollegiate athletics if student-athletes are prohibited from earning compensation from their name, image, or likeness; a student-athlete is prevented from obtaining professional representation in relation to contracts or legal matters; or the association interferes with compensation reaching a student-athlete.

While granting the student-athletes the right to profit from their name, image, and likeness, New Jersey's law places certain obligations upon the student-athlete. The student-athlete must disclose any deal to market their name, image, or likeness to a university-designated official. In addition, student-athlete endorsers will be prohibited from earning compensation in connection with certain industries: adult



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entertainment, alcohol, gambling of any kind, tobacco and electronic smoking, pharmaceuticals, controlled dangerous substances, and firearms. *If a student-athlete earns compensation from any of these prohibited areas, their scholarship eligibility will be revoked.*

California Fair Pay to Play Act (SB206). California was the first state to pass NIL legislation in September 2019. The bill, with a delayed effective date until 2023, has served as the model for other state NIL legislation. The general premise of California's law is to allow NCAA student-athletes to personally market and earn compensation for the use of their name, image, and likeness without affecting their scholarship eligibility. SB206 also restricts a student-athlete from entering into shoe and apparel contracts that conflict with current university agreements. New Jersey's Fair Play Act, as well as all of the other state NIL laws, contain a similar provision.

Colorado SB20-123, Compensation and Representation of Student-Athletes. Like New Jersey and California, Colorado permits student-athletes enrolled in state higher education institutions to profit from use of their name, image, or likeness, and to hire representation to protect their interests and prevent athletes from losing eligibility for exercising NIL rights. In addition, like New Jersey and California laws, the Colorado law has certain specific disclosure requirements for athletes who do sign NIL agreements.

Nebraska Fair Pay to Play Act (LB962). Many of the provisions of Nebraska's NIL track those of the other NIL laws described here. However, unlike the others, the Nebraska law states that "each postsecondary institution shall determine a date on *or before* July 1, 2023" to begin applying the law. To date, no school has exercised this legal right to apply the new state law and risk potentially violating NCAA bylaws prior to the formal enactment date of July 1, 2023.

Florida SB646, Intercollegiate Athlete Compensation and Rights.

Florida's NIL legislation, signed into law in June 2020, has gained significant attention because of its effective date: **July 1, 2021.** It is believed that the NCAA and affected conferences, like the SEC and ACC, which have schools in multiple states (including Florida), may seek injunctive relief to block the effective date of the law.

Michigan House Bill 5217. Michigan's bill is the most recently enacted state NIL legislation, effective July 31, 2022. Michigan's law places specific limitations and obligations upon student-athletes. For example, similar to New Jersey's law, prior to entering into any endorsement agreement, the student-athlete must disclose the opportunity to a university official at least seven days prior to committing to the opportunity. Additionally, student-athletes will be prohibited from using the University of Michigan name, trademarks, logos, or other intellectual property in connection with marketing their own name, image, or likeness.

Federal NIL Legislation

Federal NIL legislation has been introduced in both the Senate and House of Representatives. Expect these bills to gain traction quickly as the federal government works to avoid a situation in which there is no uniform standard for NIL usage, leaving enforcement up to competing and conflicting state laws. It is likely a federal law will be in place before the fall of 2021.

In the Senate, New Jersey's Cory Booker, a former NCAA Division I football player at Stanford University, is leading the charge with a landmark proposal that he and Sen. Richard Blumenthal (D-Conn.) introduced in December 2020. The College Athlete Bill of Rights is by far the most aggressive NIL proposal to be introduced on the state or federal level. In addition to Booker's propos-

al, Sen. Roger Wicker (R-Miss.) has introduced the Collegiate Athlete and Compensation Rights Act. In the House, Reps. Anthony Gonzalez (R-Ohio) and Emanuel Cleaver (D-Mo.), both former NCAA Division I football players as well, have introduced the bipartisan Student Athlete Level Playing Field Act.

College Athlete Bill of Rights.

Booker's proposal would provide substantial rights to NCAA student-athletes, including the right to benefit from their name, image, and likeness. A critical distinction in this proposal would also grant student-athletes the right to market themselves as a group to capture and potentially share revenue from the lucrative video game marketplace. The bill also would prohibit schools from preventing athletes from wearing shoes of their choice during mandatory team activities, which may open the door to endorsement deals in conflict with school equipment sponsorship contracts.

The broad language in the bill extends beyond NIL rights and includes provisions that could completely overhaul college athletics and the NCAA. The bill seeks to establish a nine-member "Commission on College Athletics," appointed by the President of the United States and include at least five former college athletes with legal expertise. The commission would take a majority of the responsibility of overseeing college athletics away from the NCAA. The commission also will regulate athlete endorsement contracts, certify athlete agents, monitor Title IX compliance, and establish health, wellness, and safety standards for college athletes. It also would be responsible for enforcing rules laid out in the law and given subpoena power to investigate violations, along with the authority to impose penalties against institutions, conferences, and the NCAA. These penalties may range from penalties in excess of \$10 million to suspension of officials from working at a school or in college sports at all.

Booker's proposal also will undoubtedly significantly affect universities and their athletic departments. Indeed, the College Athlete Bill of Rights addresses not only the economic rights of athletes, but also their health and safety and educational opportunities. For example, the bill's sweeping provisions provide the following:

- Schools would be required to share profits from revenue generating sports with athletes who play those sports, after deducting the cost of scholarships;
- Student-athletes would be guaranteed a scholarship for as many years as it takes the student-athlete to obtain an undergraduate degree;
- A medical trust fund that would provide broad health care coverage for student-athletes and be accessible to them up to five years following the end of their athletic eligibility;
- A wide range of health and safety guidelines set by the Centers for Disease Control and Prevention;
- A requirement that athletic trainers, team medical personnel, academic advisers and tutors operate and provide services to student athletes "independently from the athletic department";
- A ban against coaches and staff influencing academic decisions such as the selection of academic majors and courses;
- A prohibition against schools imposing restrictions on student-athletes' speech beyond those imposed on other students;
- The elimination of restrictions and penalties related to transferring from one institution to another or breaking a national letter of intent;
- The ability for student-athletes to enter a professional draft and return to college athletics, so long as they do not get paid by a professional team and inform the school of their return

within seven days after the completion of that draft;

- A requirement that athletic departments annually disclose revenues and expenditures, including department personnel salaries;
- A requirement that a school cannot cut a team "unless all other options for reducing the expenses of the athletic program, including reducing coach salaries and administrative and facility expenses, are not feasible";
- A requirement that schools have academic credit courses related to financial literacy and life skills consistent with the school's guidelines.

Collegiate Athlete and Compensation Rights Act. The Senate bill competing with Booker's College Athlete Bill of Rights is Wicker's College Athlete Compensation Rights Act. Like Booker's proposal, Wicker's bill would permit student-athletes to earn compensation for use of their name, image, or likeness, in effect creating a uniform, national framework for NIL compensation. Additionally, it would:

- Ensure student-athletes have access to educational resources regarding use and compensation for use of their name, image, and likeness;
- Protect student-athletes and their families from deceptive business practices or exploitation from unscrupulous actors;
- Prohibit third parties from entering into NIL agreements or offering NIL agreements to a student-athlete prior to enrollment at an institution; and
- Authorize and direct the Federal Trade Commission to select and oversee a private, independent, nonprofit entity to develop and administer NIL rules within collegiate athletics.
- Wicker's proposal focuses on preserving amateurism by prohibiting colleges and universities from classifying student-athletes as "employees." To

that end, the bill also would expressly prohibit boosters from directly or indirectly compensating student-athletes and their families for use of the student-athlete's name, image, and likeness.

Unlike Booker's proposal, Wicker's bill proposes broad anti-trust protections sought by the NCAA and its member institutions, which protect them from liability under competition laws for making changes to NIL rules, among other things.

Student-Athlete Level Playing Field Act. Rep. Anthony Gonzalez (R-Ohio), former Ohio State University star and NFL player, introduced a bill in the House of Representatives that appears to present a "middle ground" between Booker's and Wicker's bills. Framed as a civil rights bill, the legislation is aimed at ensuring that student-athletes can capitalize on their earning potential in a similar way to their peers in music, art, or other studies who have always been able to earn compensation from their work product.

Like Wicker's proposal, the Level Playing Field Act places high importance on protecting amateurism by prohibiting athletes from being considered employees and preventing academic institutions from directly compensating athletes. It does not, however, include the same anti-trust provisions as Wicker's bill, which leaves the door open to potential lawsuits against institutions should they stand in the way of a student-athlete's ability to profit from their name, image, and likeness. The bill also does not contain group licensing provisions, which makes it a less attractive option for student-athletes.

NCAA Response to NIL Legislation

In addition to the state laws described above, in late-January 2021, the NCAA delayed its anticipated approval of the most significant amend-

ments to its bylaws in recent history following receipt of a letter from the U.S. Department of Justice Antitrust Division. The letter cautioned the NCAA of potential anti-trust issues arising from granting name, image, and likeness rights to student-athletes. The delayed NCAA bylaw amendments, designed to provide a unified standard to govern all NCAA institutions, seeks to reduce the likelihood that various state laws will cause confusion and conflict. Originally, the NCAA sought to have their bylaw changes become effective prior to the 2021–2022 academic year. It is likely that the NCAA will still seek to implement some version of its proposed amendments following additional discussion with the Department of Justice.

The Supreme Court Weighs In: NCAA v. Alston

While the legal focus in college athletics has been on the expansion of NIL rights for NCAA student-athletes prompted by state and federal legisla-

tion, the U.S. Supreme Court has shifted the focus to the courts. On Dec. 16, 2020, the Supreme Court agreed to hear an appeal from the NCAA and several high-level conferences in *NCAA v. Alston*, a case challenging the NCAA's restrictions on compensation student-athletes can earn while participating in collegiate athletics.¹ The appeal comes from a U.S. Court of Appeals for the Ninth Circuit ruling that the NCAA's limits on providing education-related benefits to student athletes violate federal antitrust laws. Relying on the 1984 case, *NCAA v. Board of Regents*,² the NCAA maintains that "athletes must not be paid" and seeks continued latitude toward its unique amateurism model.³ Student-athletes argue that the NCAA is simply attempting to secure an antitrust exemption and that Congress and the states are already in the process of scaling back limits on student-athlete compensation. The case will likely be set for oral argument in the spring of 2021.

Conclusion

With groundbreaking state and federal NIL legislation on the horizon, the potential that the NCAA will adopt the most significant amendment to its bylaws in decades, and the Supreme Court ready to rule on student-athlete compensation, 2021 should see the most significant changes to collegiate athletics in history. With these changes will undoubtedly come unique legal issues that will shape the landscape of sports law for years to come. ⚡

Endnotes

1. See *American Athletic Conference, et al. v. Alston, et al.*, No. 20-520 (U.S. 2020).
2. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 102 (1984).
3. See *Alston, et al. v. National Collegiate Athletic Association*, Case No. 19-15566, Dkt. Entry 149 (N.D. Cal. 2020).



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