



AMC 2023

Session 2

**Name, Image, Likeness:
Current Legal Issues for
College Athletes**

Christopher Pham, Fredrikson & Byron, P.A., Minneapolis, MN

About the Presenter...

Christopher D. Pham is a shareholder in the Minneapolis office of Fredrikson & Byron, P.A. He received his undergraduate degree from the University of Minnesota in Sociology – Law, Criminology, and Deviance; his master’s degree from Chapman University (CA); and his law degree from Mitchell Hamline School of Law cum laude. He is co-chair of Fredrikson & Byron’s Sports & Entertainment Group and runs the Sports & NIL Clinic at the University of Minnesota Law School. Mr. Pham is committed to pro bono work, community engagement, and leads the firm’s inclusion & diversity initiatives. He currently serves on the Board of Trustees of Mitchell Hamline School of Law and is a Board member of Twin Cities Diversity in Practice, and The Legal Revolution. Mr. Pham has been recognized as a “40 Under 40 Honoree” by Minneapolis/St. Paul Business Journal, “Attorney of the Year” by Minnesota Lawyer, and “Top 100 Under 50 Emerging Leader” by Diversity MBA Magazine. He is a member of the Hennepin County Bar Association, Minnesota State Bar Association, and Federal Bar Association, where he is Co-Vice President of the Diversity & Inclusion Committee of the Minnesota Chapter.

Name, Image, and Likeness: Current Legal Issues for College Athletes

Presented and materials prepared by:

Christopher Pham

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Minneapolis, MN

TABLE OF CONTENTS

I.	NCAA NIL TIMELINE	3
A.	2000’s: Landmark Cases/Events Pave the way for NIL Rights	3
1.	<i>O’Bannon</i> (2015)	3
2.	California’s Fair Pay to Play Act (2019).....	3
3.	DOJ Letter to NCAA (2021)	4
4.	<i>NCAA v. Alston</i> (2021).....	4
B.	2021: Athletes Allowed to Engage in NIL Activities for the First Time	4
1.	NCAA Interim Policy	4
II.	LAUNCH OF SPORTS & NAME, IMAGE, AND LIKENESS CLINIC AT UMN LAW	4
A.	Clinic Overview	4
B.	Clinic Goals	5
C.	Clinic Services	5
III.	CURRENT LANDSCAPE	6
A.	NIL Regulation	6
1.	State Legislation	6
2.	University Policies	6
B.	NIL Partnerships/Opportunities	7
1.	Partnership Deals.....	7
2.	Partnership Trends	7
C.	Biggest Issues Confronted To-Date	8
1.	Educational Gaps	8
2.	Level-setting Expectations.....	8
3.	Awareness of and Desire to Utilize Available Resources	8
IV.	PRACTICAL ADVICE FOR STUDENT ATHLETES	9
A.	Violating NCAA Rules	9
B.	Breaching Contract Terms	9
C.	Failing to Disclose Income	9
D.	Damaging Reputation	9
E.	Neglecting Academic & Athletic Obligations	10
F.	Conflict of Interest	10
G.	Oversaturation and Loss of Focus	10
H.	Seek Professional Guidance from Lawyers and Financial Advisors	10
V.	IMPORTANT CONTRACT TERMS	11
A.	Exclusivity Clauses	11
B.	Revenue Sharing/Percentage Splits	11
C.	Length/Term of Contract	11
D.	Termination Clauses	11
E.	Ambiguous Usage Rights	12
F.	Intellectual Property Rights	12
G.	Payment Terms	12

H.	Representations and Warranties	12
VI.	LOOKING AHEAD: THE FUTURE OF NIL AND WHAT MAY COME	13
A.	Emerging State Law	13
1.	Texas House Bill 2804.....	13
2.	Assembly Bill 252 in California	13
B.	Athletes as Employees?.....	13
C.	Future of the Clinic.....	13
VII.	QUESTIONS?	13

I. NCAA NIL TIMELINE

A. 2000's: Landmark Cases/Events Pave the way for NIL Rights

1. *O'Bannon* (2015)

- Former University of California men's basketball star Ed O'Bannon filed suit against EA Sports and the NCAA for violating antitrust laws by conspiring with its partners to block college athletes from being paid for the use of their names, images and likenesses in broadcasts and video games.
- Federal District Court Judge Claudia Wilken focused the case upon "revenue sports," and held in August 2014 that the NCAA violated antitrust law by prohibiting athletes from profiting from their names and images in TV broadcasts and video games.
- Wilken held that schools should be allowed to compensate student-athletes for use of their name, image, and likeness, with payments capped at \$5,000 per year, per student-athlete, to be collected upon the end of their playing career.
- On Appeal, two of the three judge panel—while maintaining that the NCAA's compensation rules were an unlawful restraint of trade—held that preserving amateurism was an important goal and that any compensation athletes might receive had to be related to education.

2. California's Fair Pay to Play Act (2019)

- In 2019, California became the first state in the country to create a legal right for college athletes to be compensated for the commercial use of their name, image, and likeness.
- The Fair Pay to Play Act made it illegal for California colleges to deny student-athletes the opportunity to gain compensation for their name, image, and likeness, and authorized college athletes to hire agents and other representatives to assist them in the process.
- By creating a new statutory right under California law, the fact that the NCAA rules prohibited what the Act compelled of California colleges became irrelevant; California colleges could not disregard the Act because the law trumps the internal rules of the NCAA.
- The popularity of the Act in the California legislative process, coupled with the enthusiastic advocacy it received from celebrities such as LeBron James, led other states to consider similar legislation.

3. DOJ Letter to NCAA (2021)

- Ahead of the NCAA annual meetings in January 2021, the Justice Department’s antitrust division leader sent a letter to NCAA President Mark Emmert expressing strong concerns about the association’s direction on rules regarding athletes’ ability to transfer universities and to be compensated for the use of their names, images, and likenesses.

4. NCAA v. Alston (2021)

- Former West Virginia football player Shawne Alston filed suit against the NCAA and college football’s five major conferences, claiming they violated antitrust laws by agreeing to cap the value of an athletic scholarship at less than the actual cost of attending school.
- Key holding: the NCAA’s compensation rules are subject to Sherman Act scrutiny.
- Justice Kavanaugh: “The NCAA is not above the law.”

B. 2021: Athletes Allowed to Engage in NIL Activities for the First Time

1. NCAA Interim Policy

- The Policy provides the following guidance to college athletes, recruits, their families, and member schools:
 - Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
 - College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.
 - Individuals can use a professional service provider for NIL activities.
 - Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

II. LAUNCH OF SPORTS & NAME, IMAGE, AND LIKENESS CLINIC AT UMN LAW

A. Clinic Overview

- Created in partnership with Fredrikson & Byron, P.A. in 2022, the Sports & Name, Image, and Likeness Clinic at UMN Law works with and assists student-

athletes and social media influencers across the U.S. in navigating the rapidly changing landscape of NIL.

- By providing legal services on a pro bono basis, the clinic helps ensure that representation and counseling are available to those in need when a paid alternative may not otherwise be feasible.
- Over the past year, the clinic’s inaugural group of student attorneys—guided by full-time Fredrikson attorneys with extensive experience in the sports and entertainment space—have assisted clients in leveraging their newly recognized NIL rights and helped facilitate a wide range of NIL-related deals.

B. Clinic Goals

- Position student-athletes and social media influencers to effectively navigate the NIL landscape and maximize their NIL potential.
- Help limit the uncertainty surrounding the ever-changing NIL space and ensure that the conduct of those choosing to engage in NIL activities remain compliant with the latest legal, regulatory, and policy-related developments.
- Serve as an accessible, all-inclusive legal resource to NIL participants in the Twin Cities area and beyond.

C. Clinic Services

- Services offered include (but are not limited to):
 - Reviewing NIL contract proposals.
 - Drafting of contracts and other legal documents.
 - Assisting in the due diligence process with potential brand partners.
 - Counseling related to adherence with applicable state laws, university policies, NCAA rules, and other pre-existing contractual agreements.
 - Connecting clients with other service providers and individuals in adjacent areas such as financial literacy, philanthropy, and marketing.
 - “Value Add”
 - Providing general legal advice.

III. CURRENT LANDSCAPE

A. NIL Regulation

1. State Legislation

- Based on the interim policy, those engaged in NIL activity must comply with the state law of their respective universities.
- To-date, more than half of the states in the U.S. have passed some form of NIL legislation.
 - Notably, neither Minnesota nor Wisconsin has state laws in place that govern NIL activity, meaning student-athletes/social media influencers need only be concerned with the rules and policies of their university and conference.

2. University Policies

- University policies inevitably vary from school to school, but generally speaking, student-athletes are typically prohibited from engaging in NIL activities that fall under specific business/product categories.
 - Prohibited categories include (but are not limited to):
 - Adult entertainment
 - Sports gambling
 - Tobacco and smoking
 - Weapons
 - Alcohol brands; and
 - Drugs.
- Similarly, NIL activities typically cannot:
 - Interfere with studies
 - Interfere with athletic practices
 - Conflict with existing university contracts
 - i.e., a student-athlete cannot partner with Adidas to wear its cleats during competition, when the university is exclusively contracted with Nike for the same purpose.

- Utilize university facilities without permission.
- Interfere with team activities.
- Use university-owned intellectual property.

B. NIL Partnerships/Opportunities

1. Partnership Deals

- To find and secure partnership deals, student-athletes and influencers typically work with a collective that is associated with their university, hire an agent, or communicate with prospective partners directly through phone, email, and direct-message communication.
 - *Collectives*: “Name Image Likeness (NIL) collectives are structurally independent of a school, yet fund NIL opportunities for the school’s student-athletes. They are typically founded by well-known alumni and supporters of the school. Collectives generate and pool revenue raised through contributions from a wide variety of sources, including boosters, businesses, fans, and more. They use these funds to create opportunities for student-athletes to leverage their NIL in exchange for compensation.”

2. Partnership Trends

- Social media partnerships are the most common type of NIL deal, making up 80% of the NIL deals secured to-date.
 - These partnerships typically involve a student-athlete or influencer agreeing to post specific content on their social media accounts in exchange for monetary compensation or agreed upon goods/services from the partner.
- Other kinds of deals seen in the marketplace include (but are not limited to):
 - Camps/instructional offerings
 - In-person appearances and direct-to-consumer content such as Cameos
 - Personalized merchandise; and
 - Autographs
- While the ‘big’ deals worth hundreds of thousands or even millions of dollars typically grab headlines and receive the most attention

nationally, it is important to understand that most NIL deals secured by student-athletes and influencers are much smaller in value.

- Average deal size: \$650 per student-athlete, per activity.

C. Biggest Issues Confronted To-Date

1. Educational Gaps

- Financial literacy
 - i.e., understanding the tax implications of a proposed partnership deal and planning appropriately.
- Requisite legal knowledge to effectively review and (at minimum) generally understand a proposed contract prior to engaging in negotiations and/or reaching an agreement without legal representation.
- Recognizing circumstances that may warrant using an attorney.
- Understanding of the various parties involved and their respective roles, value, etc.
 - Collectives, agents, lawyers, marketing agencies, state legislatures, universities.

2. Level-Setting Expectations

- Misunderstandings/misconceptions of the current NIL landscape and the nature of deals being offered.
- Disconnect between student-athletes/influencers and their realistic NIL earning potential.

3. Awareness of and Desire to Utilize Available Resources

- Uphill battle to gain traction in student-athlete and/or institutional circles.
 - Process of establishing the necessary trust to be a regularly sought out and utilized resource.
 - Very important to have the endorsement of and/or word-of-mouth recommendations from key university parties.
 - i.e., Compliance Office, Athletic Department, coaches, teammates.

IV. PRACTICAL ADVICE FOR STUDENT ATHLETES

A. Violating NCAA Rules

- While the NCAA now permits student-athletes to engage in NIL activities under its interim policy, it is still of upmost importance for student-athletes to comply with existing NCAA rules. Maintaining eligibility is a priority.

B. Breaching Contract Terms

- Student-athletes must remember that by agreeing to an NIL deal of any kind, they are entering into a *legally binding* contractual agreement.
- Breaching contract terms is not akin to missing a practice, failing a class, or any other common misstep that lacks legal ramifications. Failure to abide by the terms of an executed contract can result in serious consequences with lasting effects, and student-athletes should heavily consider whether they can reasonably fulfill the duties set forth in any proposed partnership deal before reaching an agreement.

C. Failing to Disclose Income

- Failing to disclose income associated with NIL activities could result in future negative tax implications and/or increase the risk of conduct that presents conflicts of interest with state law or university policies (discussed further below).

D. Damaging Reputation

- By entering into the NIL marketplace, student-athletes must be mindful of the fact that they are not only representing themselves, but their respective institutions, conferences, and the NCAA at large.
- When seeking out and considering potential NIL partnership deals, student-athletes must identify and recognize the right partnership “fit” for themselves and their personal brand.
- Before agreeing to partner with any brand or entity, student-athletes should ask themselves: what is my brand, and what kind of partnership makes sense for me?
 - Certain factors to consider may include:
 - Personal values
 - Existing or target audience
 - Credibility/public perception of the potential partner

E. Neglecting Academic & Athletic Obligations

- As noted above, NIL conduct cannot interfere with academic and athletic obligations.
- Student-athletes should closely review the contractual duties of a proposed NIL deal and consider whether the fulfillment of such duties would impede on their already existing academic and athletic commitments such as practice, mandatory study hall or tutoring sessions, etc.

F. Conflict of Interest

- Student-athletes must be aware of relevant state laws and university policies that may present conflicts of interest with potential partnership agreements.
- Entering into an agreement without vetting potential conflicts of interest could lead to unintended and potentially inevitable breaches of contract by the student-athlete.

G. Oversaturation and Loss of Focus

- While student-athletes are encouraged to take full advantage of their newfound NIL rights and maximize their earning potential, there is a fine line between effective/strategic engagement in the NIL marketplace and oversaturation.
- Student-athletes should be wary of taking on too many endorsement deals and/or spreading themselves too thin in pursuit of fulfilling their deal commitments.
 - Doing so may not only negatively affect their performance of contractual duties (i.e., loss of focus), but also dampen/weaken their perceived value in the marketplace for potential partners (i.e., diminished “exclusivity” factor or marketing impact due to oversaturation).

H. Seek Professional Guidance from Lawyers and Financial Advisors

- Student-athletes should always consider whether to seek legal representation or legal services of any kind whenever they are presented with a proposed NIL opportunity.
 - Such a determination will largely depend on the nature of the deal being considered, but it is never a bad idea to seek legal advice.
- Many legal services (such as the Sports & NIL Clinic at UMN Law) are offered pro bono to student-athletes who qualify.
- Not every deal will require legal representation/services, but when in doubt, it is always better to be safe than sorry.

V. IMPORTANT CONTRACT TERMS

A. Exclusivity Clauses

- Proposed NIL deals—specifically from marketing agencies—will often include an exclusivity clause, which (if unaddressed) would prohibit the student-athlete from working or engaging in business with another entity (including collectives) for the purpose of NIL activity.
- Because of the integral role that collectives typically play in the NIL marketplace—working closely with their associated universities and serving as a liaison between student-athletes and potential partners—it is often advisable to carve out an exception that allows for the student-athlete to engage with collectives.

B. Revenue Sharing/Percentage Splits

- Student-athletes will want to ensure that the provided revenue sharing terms and/or percentage splits in a proposed partnership deal align with industry standards.
 - i.e., the typical marketing agency percentage split is 20/80 in favor of the student-athlete. (Range is typically between 15-25%).

C. Length/Term of Contract

- A “Term” provision establishes the period of time that the contract will govern the parties’ relationship.
 - In other words, it clearly sets forth the times at which the contractual relationship will begin and end.
- A contract’s term could be days, months, or even years depending on the nature of the deal.
- Regardless of length, it is crucial that the term is included so that the student-athlete, as a contracting party, knows how long they will be bound by the terms of the agreement.

D. Termination Clauses

- A “Termination Clause” outlines the circumstances under which one or both parties may terminate the contract.
- Whether or not it is advantageous, advisable, and/or necessary for an NIL partnership contract to include a termination clause will largely depend on the nature of the deal.

- In the event a termination clause is included in a proposed contract, a student-athlete will want to make sure that they are properly protected/insulated from ill-conduct by the other party, and similarly not at risk of hasty/unwarranted termination due to overly broad terms in favor of the other party.

E. Ambiguous Usage Rights

- It is crucial that a proposed NIL deal clearly specifies the permitted usage of a student athlete's NIL. If left ambiguous or overly broad, a student athlete may unintentionally permit a partner to use their NIL in unwanted, undesirable, and/or unintended ways.

F. Intellectual Property Rights

- Depending on the nature of the deal, it is often advisable for a student-athlete to retain certain rights via the inclusion of an intellectual property and/or creative control provision.
 - For example, if a student-athlete signs a partnership deal with a local restaurant in which the restaurant pays the student-athlete in exchange for use of their NIL in social media posts from the restaurant's Instagram account, the student-athlete may want the right to approve all posts that utilize their NIL.

G. Payment Terms

- A proposed NIL deal simply setting forth the specified amount of compensation is not enough. The contract should additionally include clear and specific payment terms, such as the method of payment and the payment schedule.

H. Representations and Warranties

- A "Representations and Warranties" provision sets forth assertions and/or assurances given by the parties to the agreement.
- An added layer of protection that often tracks with the NIL policy. See example below:

"Agency represents and warrants to Athlete that: (i) Agency has not conditioned its representation of Athlete hereunder on representing Athlete in connection with the negotiation of a professional athletic playing contract; (ii) Agency has not induced athlete to continue to be enrolled at any specific educational institution; (iii) Agency will comply with all applicable laws relating to this Agreement and the operation of its business; and (iv) Agency will possess all material licenses, authorizations, approvals, or permits required by applicable laws to conduct its business generally and to perform its obligations under this Agreement."

VI. LOOKING AHEAD: THE FUTURE OF NIL AND WHAT MAY COME

A. Emerging State Law

1. Texas House Bill 2804

- Protects Texas institutions—including collectives and schools themselves—from NCAA enforcement of NIL related violations.
- The bill itself still bans pay-for-play inducements but would make enforcement a matter for the state rather than the NCAA.
- Could go into effect as soon as July 1, 2023.

2. Assembly Bill 252 in California

- The bill would require some Division I schools to share up to 50% of revenue produced by sports programs with the student-athletes in those programs, predominately men's football and basketball.
 - The goal would be to compensate athletes whose scholarship value does not match the fair market value of their services.
- The bill would also mandate preservation of all sports programs—not only those that generate revenue—which is a common concern regarding student-athletes as employees of their schools.

B. Athletes as Employees?

- Evidenced by the efforts of Kain Colter and the Northwestern football team to unionize in 2014, there may be increased efforts to reach some form of an employer-employee model in college athletics—akin to the professional sports model that allows for collective bargaining—on the horizon.

C. Future of the Sports & NIL Clinic

- Continued efforts to gain traction in the Twin Cities market and beyond.
- Growth in both the number of student-attorneys working for the Clinic and the number of clients served by the Clinic on an annual basis.
- Aim to bring NIL symposium to Minneapolis.

VII. QUESTIONS?

NAME, IMAGE, AND LIKENESS: CURRENT LEGAL ISSUES FOR COLLEGE ATHLETES



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1

Who Am I

Education:

- Mitchell Hamline School of Law, J.D., 2009, *cum laude*
- Chapman University, M.A., 2006
- University of Minnesota, B.A., 2004

Professional:

- Shareholder at Fredrikson & Byron
- Co-Chair, Sports & Entertainment Practice Group
- SuperLawyer
- Minneapolis/St. Paul Business Journal, 40 Under 40 Honoree
- UMN Law Sports & Name, Image, and Likeness Clinic Adjunct Professor



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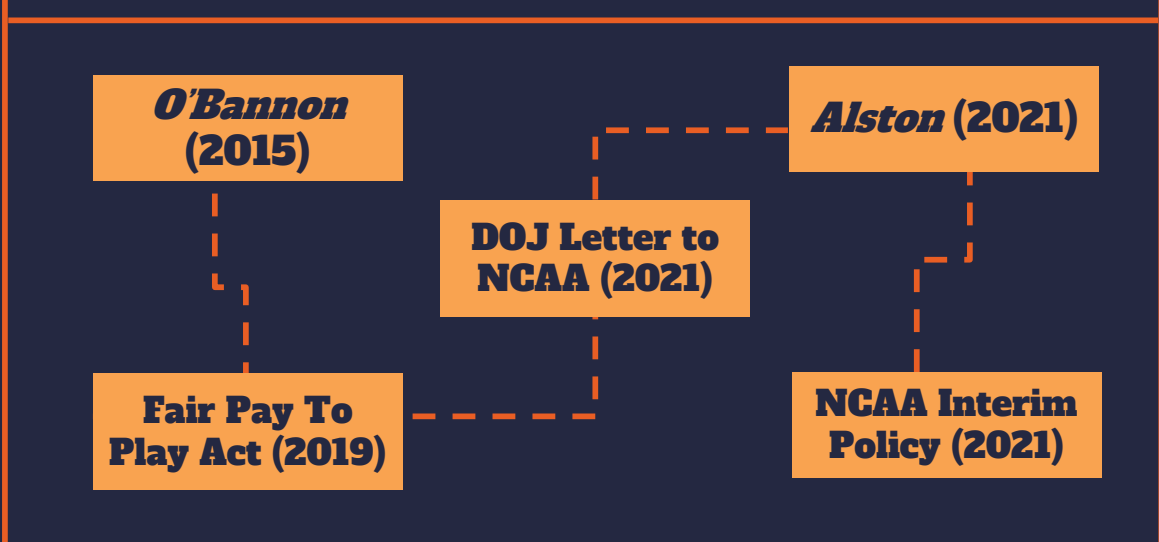
AGENDA



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NCAA NIL Timeline



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O'Bannon (2015)



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California's Fair Pay To Play Act (2019)



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DOJ Letter to NCAA (Jan 2021)

NIL Rules

The Division also has followed the NCAA's lengthy review of its policies with respect to collegiate athletes' use of NIL. Your comments on the NCAA's NIL policies, however, appear to suggest a possible misunderstanding of antitrust law. Speaking at the Aspen Institute, you indicated that the antitrust laws, and some court decisions interpreting those laws, require that any benefits college athletes receive must be tethered to education.⁵ The antitrust laws do no such thing. By contrast, courts have recognized that "loosening or abandoning the [NCAA's] compensation rules" might be procompetitive, *i.e.*, the type of conduct that the antitrust laws were designed to promote.⁶ While courts have acknowledged that "offering [college athletes] cash sums untethered to educational expenses" would be "a quantum leap" from the NCAA's current practice, they have never suggested that the NCAA cannot take this step because of the antitrust laws.⁷

Pursuing a goal of promoting amateurism does not insulate the NCAA's rules from scrutiny under the antitrust laws.⁸ Any restraints on competition must reflect a careful balancing of the proffered procompetitive justification against any resulting harm to competition.⁹ The antitrust laws limit the NCAA's ability to restrict competition among college athletes, coaches, and schools.¹⁰ For example, if the NCAA adopted a rule that fixes the price at which students can license their NIL, *e.g.*, based on what the NCAA determines to be a "fair" market value, such a rule may raise concerns under the antitrust laws.

Ultimately, the antitrust laws demand that college athletes, like everyone else in our free market economy, benefit appropriately from competition. As I noted in my August 2018 speech at Notre Dame Law School, I applaud the NCAA's willingness to reform potentially anticompetitive rules and practices, and appreciate your attention to the Division's concerns as you consider the NCAA's rules. The Division stands by to support any NCAA efforts to do so with respect to its transfer rules, NIL, or any other matters. Meanwhile, we remain committed to enforcing the nation's antitrust laws on behalf of college athletes and consumers.



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7

Alston (2021)

CONCLUSIONS

"Nowhere in America can business get away with agreeing not to pay their workers fair market rate on the theory that their product is defined by not paying their workers fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different.

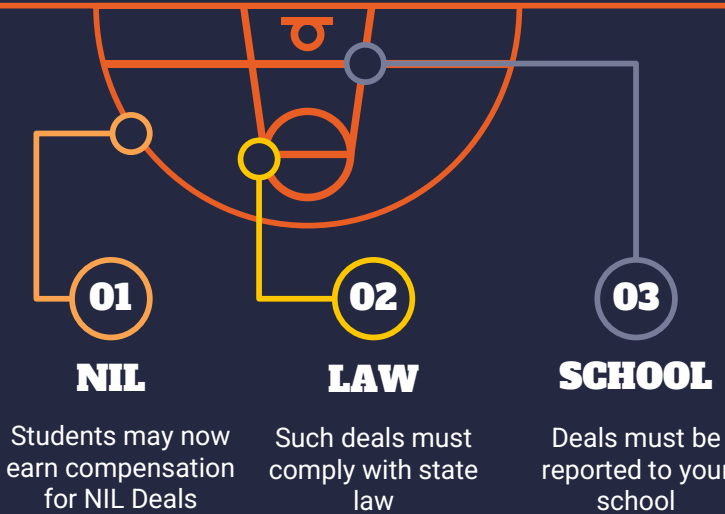
The NCAA is not above the law"



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8

NCAA Interim Policy

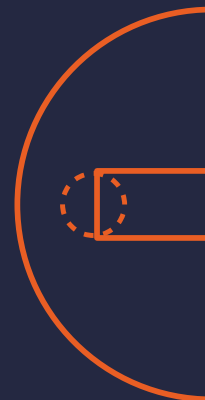


On July 1, 2021 the NCAA released a short interim policy permitting NIL deals and leaving regulation up to state law and individual schools.

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SPORTS & NAME IMAGE AND LIKENESS CLINIC AT UMN LAW



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10

CLINIC OVERVIEW



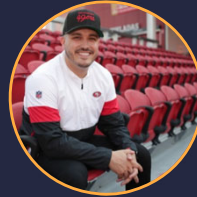
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11

CLINIC GOALS



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12

CLINIC SERVICES

- Review NIL contract proposals.
- Draft of contracts and other legal documents.
- Assist in the due diligence process with potential brand partners.
- Advice related to adherence with applicable state laws, university policies, NCAA rules, and other pre-existing contractual agreements.
- Connect clients with other service providers and individuals in adjacent areas such as financial literacy, philanthropy, and marketing.
- Provide general practical and legal advice.

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13

CURRENT LANDSCAPE



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14

NIL Regulation

LAWS IN EFFECT

26 states have passed laws governing NIL

26

WAITING

5 States have passed bills that have yet to go into effect



NO LAWS

As of right now, neither Minnesota nor Wisconsin has state laws governing NIL deals. While Minnesota has a bill introduced, there is no telling if or when it will be enacted.

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15

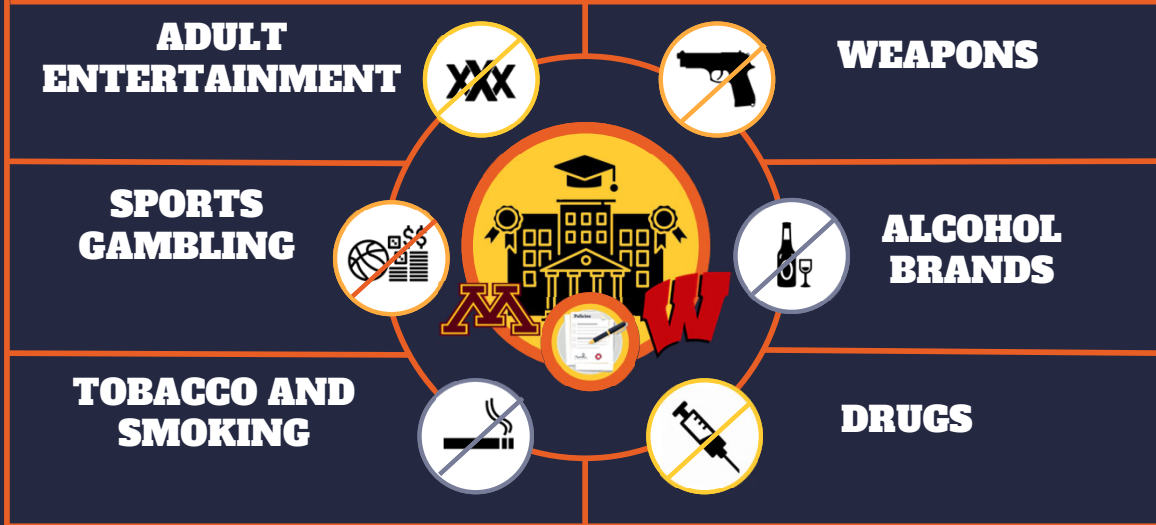
NIL Regulation



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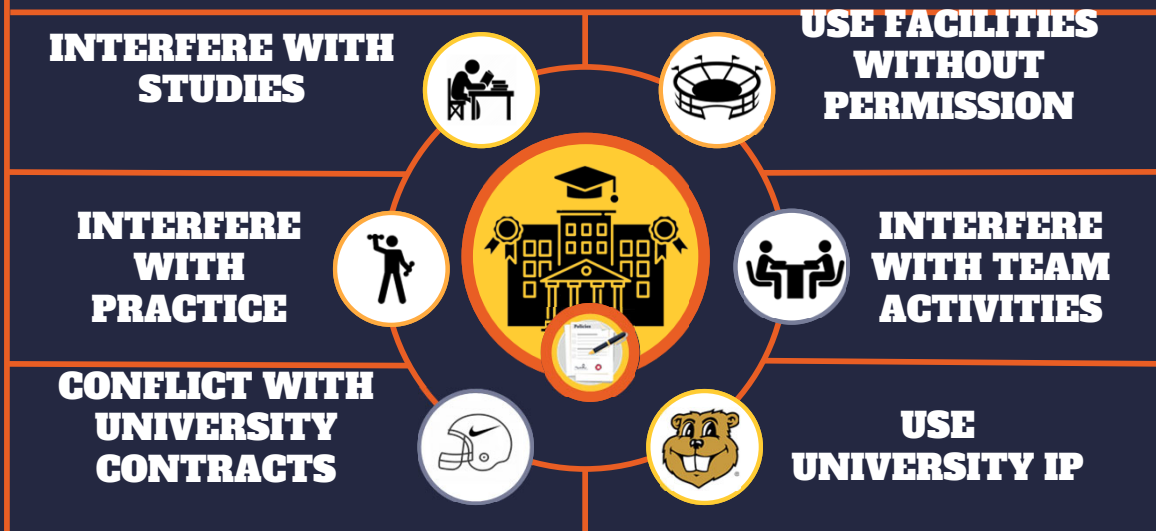
University Policies



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Deals CANNOT



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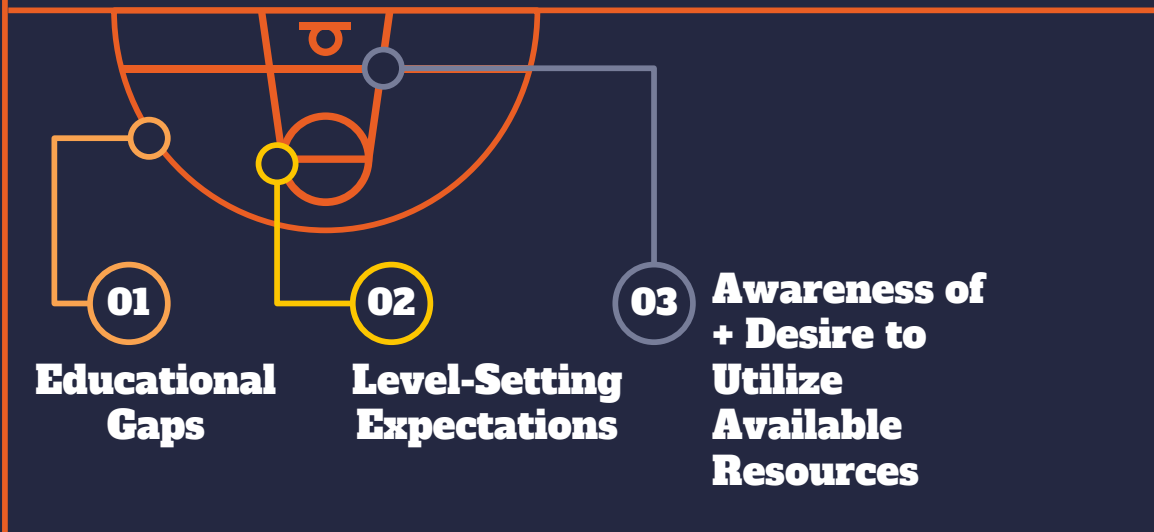
NIL Partnerships/Opportunities



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19

Biggest Issues



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20

Educational Gaps

- Financial literacy
 - (i.e., tax implications of NIL deals).
- Legal knowledge necessary to review and thoroughly understand a proposed contract.
- Understanding when to use an attorney.
- Understanding of the various parties involved and their respective roles, value, etc.
 - Collectives, Agents, Lawyers, Marketing Agencies, State Legislatures, Universities



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21

Level-Setting Expectations

- Misunderstanding of the current NIL landscape and the nature of deals being offered.
 - *Average deal size:*
\$650 per student-athlete, per activity
- Disconnect between student-athletes + influencers and their realistic earning potentials.



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22

Awareness + Desire to Utilize Available Resources

- Stigmas often tied to working with specific resources (i.e., lawyers)
- Uphill battle to gain traction with student-athletes and/or institutional circles.
 - Importance of endorsements and/or word-of-mouth recommendations from key university parties (i.e., Compliance Office, Athletic Department, coaches, teammates).
 - Building the necessary trust to be a regularly sought out and utilized resource.



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23

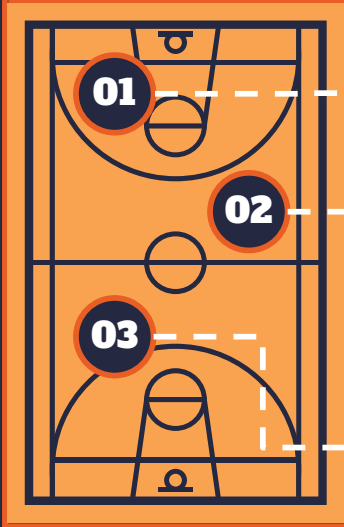
PRACTICAL ADVICE FOR STUDENT ATHLETES



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24

PROTECT YOUR FUTURE



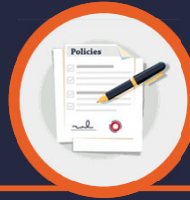
**NCAA OR
ACADEMIC
VIOLATIONS**



**DAMAGING
REPUTATION**



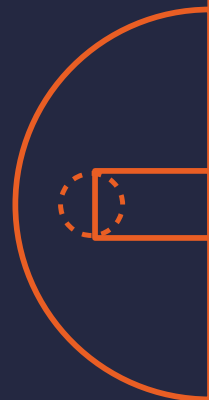
LEGAL ISSUES



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25

IMPORTANT CONTRACT TERMS



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26

KEY CLAUSES AND TERMS

EXCLUSIVITY

X

END

**TERM AND
TERMINATION**

**REVENUE
SHARING**

\$

**AND SO MUCH
MORE**



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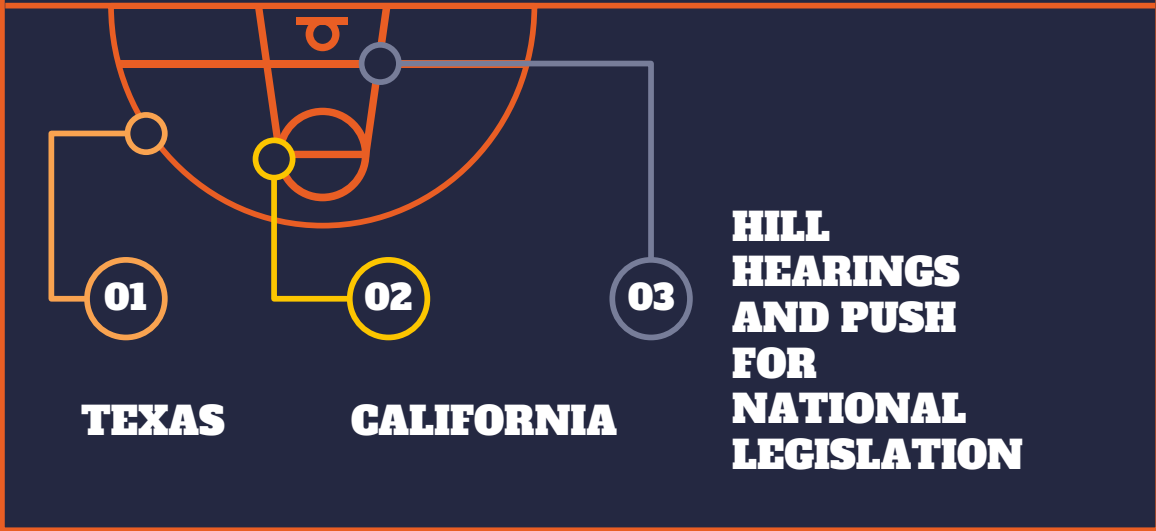
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**LOOKING AHEAD:
THE FUTURE OF
NIL
AND WHAT MAY
COME**

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28

EMERGING LEGISLATION



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29

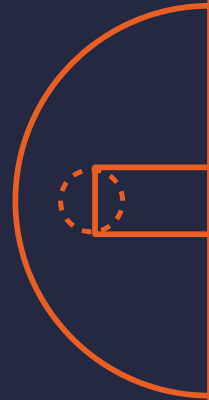
STUDENT-ATHLETES AS EMPLOYEES



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30

THE FUTURE FOR THE CLINIC



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31

QUESTIONS?



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32