

Name, Image, and Likeness Reform Is Here: The Business Basics

By Jake Nicholson

On June 30, 2021, less than 24 hours before it was set to go into effect, the NCAA unveiled one of the most significant changes in its 115-year history. The governing body announced that it would indefinitely suspend its rules restricting student-athletes' use of their names, images, and likenesses ("NIL"), effectively creating a new economy of brand marketing and a new class of entrepreneurs overnight.

The New Landscape:

The NCAA's now-suspended NIL rules varied by division. Generally, Division I athletes were not permitted to use their NIL to promote or endorse any commercial product or service regardless of whether it related to athletics, while Division II and III athletes could use their NIL for promotional purposes but could not be compensated if the NIL use was related to their status as an athlete.

That's all gone.

As of July 1, 2021, all student-athletes are free to capitalize on their athletic affiliations to ink endorsement deals, donate their time and autographed memorabilia to charitable causes, start podcasts and YouTube channels, and otherwise monetize their NIL without being deemed ineligible by the NCAA.

As expected, social media has proven to be the new industry's first frontier. High-profile athletes from Power 5 schools have begun sharing posts promoting moving companies, chicken fingers, cell phone carriers and everything in between. Some even launched online stores selling personally branded merchandise shortly after midnight on July 1. At the same time, many Division I schools have started contracting for software programs to help their student-athletes create social media content and monitor their endorsement activity.

While lesser-known Division I athletes and those who participate in Divisions II and III are not lining up agents and waiting by the phone for sponsors to call, the rule change does provide them with unique opportunities to flex their entrepreneurial muscles. They are now free to create youth sports camps, offering private coaching sessions, or start their own businesses unrelated to sports that leverage their status as student-athletes as a marketing tool. Camps and coaching may prove especially lucrative for those athletes in sports where NCAA play is considered the peak of competition or no mainstream professional league exists (e.g. volleyball, wrestling, or women's lacrosse).

How We Got Here:

Though the debate over compensation for college athletes may feel cyclical, this past year was the first time amateurism and the role of the NCAA were being discussed in all corners of government:

- At the state level, more than 20 legislatures passed laws permitting student-athletes to monetize their NIL in conflict with the now-suspended NCAA rules. The first wave of laws took effect on July 1.
- On June 21, the Supreme Court unanimously rejected the NCAA's arguments in *NCAA v. Alston* and *American Athletic Conference v. Alston* that it should be permitted to place caps on the amount of education-related benefits schools are permitted to provide their athletes. The Court also refused to accept the NCAA's position that should be exempt from the antitrust laws that normally prevent businesses from restricting employee compensation.
- In Congress, multiple bills with bipartisan support have been introduced since last September that would do away with or modify the NCAA's NIL rules, but no timetable for debate or vote has emerged.

The NCAA has publicly supported modifications to its NIL rules since last fall, but wanted to do so on its own terms. NCAA President Mark Emmert told the New York Times that he hoped to have a new NIL rule in place before July 1 to avoid conflict with the state laws, and he also urged Congress to act before then to preempt the state laws with a national, uniform standard.

With no alternative NIL policy in place on June 30, NCAA leadership opted to suspend its restrictions instead of trying to navigate a competitive system in which the rules vary by state and some schools have inherent recruiting advantages over others.

What's Next:

The NCAA has been firm that it does not see the blanket suspension of its NIL rules as a permanent solution, but rather a placeholder until a federal law or a new NCAA policy can be approved. Such a return to more restrictive rules may be complicated by other lawsuits currently making their way through the judicial system that seek to limit NCAA control over athlete compensation on antitrust grounds.

For now, individual schools will be tasked with shaping their own NIL rules and it remains to be seen what compliance measures they will put in place. At a minimum, schools can be expected to implement processes for athletes' business dealings that (1) minimize legal liability for the athlete and the school; (2) protect the school's intellectual property; (3) establish a vetting or certification process for athletes' agents and marketing service providers; and (4) safeguard athletes with reporting requirements, educational programs, and fair market value calculations.

Businesses will need to be cognizant of these measures when deciding what kinds of partnerships to pursue. Another area of exploration will be how businesses can build mutually beneficial relationships with schools in light of the Supreme Court's *Alston* decision, which opens the door for collaboration in providing athletes with internships, scholarships and other "non-cash education-related benefits."

Ultimately, the legal framework that will be used in NIL-related deals for the foreseeable future (maybe even the next 115 years!) is expected to be laid out and refined over the upcoming school year. We will continue to monitor this issue and provide updates as needed. Roetzel is here to assist with questions regarding how to plan for and comply with NIL changes.

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