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Name, Image & Likeness (NIL): Three Key Legal Issues Facing Businesses in College Athlete Endorsement Deals to Date

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The commercial landscape of college athletics has experienced significant change in recent months. The release of the new NCAA “interim policy,” prompted in part by the U.S. Supreme Court decision in *NCAA v. Alston*, has allowed college athletes and businesses to benefit from new endorsement and income opportunities involving the licensing of an athlete’s name, image, and likeness (“NIL”). Following the NCAA interim policy released in June 2021, a multitude of states enacted NIL statutes outlining the procedures and limitations for endorsement deals by athletes to license their NIL.

Despite the world of opportunities that has opened up, the NIL landscape faces ongoing uncertainty and potential pitfalls due to the patchwork of NCAA, state, and university rules and regulations requiring compliance by college athletes and businesses. In order to benefit from all that NIL has to offer and avoid problems, businesses should be aware of three main legal issues that have been prevalent in NIL deals to date.

(1) NIL agreements should comply with NCAA policies, state laws, and university rules

In pursuing opportunities to contract with college athletes, businesses should perform their legal due diligence before finalizing any deal. Companies should strive to ensure that an NIL agreement complies with the NCAA interim policy, state law, and any applicable rules adopted by the school itself. If the state has yet to pass an NIL statute, the agreement should be flexible enough to accommodate future laws that may be enacted. Businesses should also consider that Congress may adopt a uniform federal law affecting NIL agreements.

Even if a possible NIL deal satisfies the relevant state laws, businesses should also seek compliance with NCAA policies such as the prohibitions against both pay-to-play and using NIL as a recruiting inducement. This means the agreement and related compensation cannot be, among other things, contingent on the athlete attending a specific school, participating in a certain number of games, or performing at a certain level.

Businesses seeking endorsement deals with college athletes should also be aware of the categorical prohibitions on athlete association with certain brands or products under state law or university rules. These categorical exclusions vary by state and by institution and may even be enforced through team-specific codes of conduct.

(2) NIL agreements should avoid conflicts with the university’s intellectual property and existing sponsorships

A frequent hot topic in NIL deals has been the potential for conflicts with existing school or team sponsorships and with the use of school-specific intellectual property (“IP”), which may involve the school’s logos, nicknames, slogans, mascots, venues, and in some cases, team colors. Businesses should be aware of the possible limitations on NIL deals.

NIL deals usually grant the sponsor the right to use the athlete’s IP. However, these agreements may not cover use of the school’s IP, and the schools are not obligated to agree that their IP can be used. If the business wants the athlete to wear their team jersey, use the team locker room, or showcase a school landmark, the com-

pany will need to seek permission from the school itself. Universities have sometimes invoked their right to refuse such requests.

Additionally, agreements between businesses and college athletes cannot conflict with existing school or team sponsorships with other companies. Athletes may face serious consequences if an NIL deal conflicts with existing sponsorships. Thus, it is in the business's best interest to ensure that such conflicts do not occur.

(3) NIL agreements should consider social media legal and branding issues

The marketing opportunities presented by NIL deals have attracted both national brands and small, regional, and non-traditional businesses that may have previously struggled to secure high-profile endorsements. Nearly all businesses can now partner with college athletes, especially for relatively low-cost social media campaigns promoting their brands to an athlete's followers. Using an athlete's NIL in a social media campaign presents an enticing option for businesses that wish to engage with a younger audience, but there are certain risks associated with social media that should be evaluated and monitored closely.

First, businesses should carefully vet the athlete and ensure that his/her personal brand and character align with the business's approach to marketing. Social media campaigns can allow athletes to promote a company in a way that feels more personal and authentic to consumers. However, social media platforms also allow for real time posting of user-generated content which might not be subject to prior review. This could potentially hurt the business's image if the athlete or others make comments that are not a good fit for the company.

In addition, the ease through which photos and videos are shared on social media presents the risk of an athlete inadvertently violating IP limitations imposed by the school. To avoid these issues, businesses should consider designating a representative who will be responsible for managing the social media relationship between the athlete and the company's brand.

Conclusion

In short, the groundbreaking changes in the NCAA interim policy on NIL have opened up a world of opportunities for businesses and college athletes. However, the legal risks associated with NIL deals require the respective parties to stay well informed on the relevant and quickly changing rules and regulations. In order to ensure your business is well protected, it is important to consult with counsel before entering into any NIL agreement. ♦

RESOURCES

See Schnader's client alert, "A Checklist for University Policies Addressing Student-Athlete Name, Image and Likeness (NIL) Issues" –

<http://www.schnader.com/wp-content/uploads/2021/09/Checklist-for-University-Policies-Addressing-Student-Athlete-NIL-Issues-9-13-21-2.pdf>

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