

7 NIL Considerations For Brand Deals With Student-Athletes

By **Thomas Magnani, Sean Corrado and Benjamin Danieli** (November 6, 2023)

With colleges and universities back in session and college football now officially underway, brands may now be revisiting the arena of name, image and likeness in collegiate athletics.

In what is projected to be more than a billion-dollar marketplace by the end of this year and beyond, endorsement deals for student-athletes have skyrocketed, with no evidence of slowing down.[1]

As a result, any brand with an advertising budget, whether a Fortune 500 company or local business, should seriously consider turning to student-athletes to boost promotional efforts.

NIL deal making, however, remains the wild west of endorsement and promotion as the NCAA, individual universities and more traditional institutions, like state governments and the Federal Trade Commission, have all passed laws, rules and regulations governing NIL agreements.

To complicate matters further, those laws, rules and regulations are constantly changing, resulting in a landscape that is difficult to navigate.

Regardless, the benefits of a successful NIL marketing campaign can outweigh the challenge of traversing this complex framework.

The following key issues should be considered when entering into NIL deals with student-athletes in order to help guide legal compliance efforts, maintain positive brand perception and support successful marketing campaigns.

1. Service Descriptions

Common NIL services include social media posts, appearances, merchandising and signing memorabilia. Each raise their own considerations that affect other deal terms.

For example, if a brand takes photos or videos of a student-athlete, such as in connection with an appearance event, the intellectual property terms will need to reflect a broad license in order to permit the brand to use those photos and videos as needed.

Similarly, if a student-athlete endorses a brand's products or services on social media, the FTC's endorsement and disclosure guidelines will apply — more on that below.

Lastly, if the student-athlete provides merchandise or signature services, the license to the student-athlete's NIL may need to address payments for any merchandise or memorabilia sold.

Creating a clear scope of services is therefore an essential piece of the NIL contracting process.



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2. Intellectual Property

With respect to IP considerations, a brand should evaluate what licenses it is prepared to grant to a student-athlete, what licenses it can receive from a student-athlete, and the ownership rights it may need over IP developed through NIL engagements.

If a brand needs to grant a student-athlete a license to use its IP — e.g., trademarks, trade dress, logos, copyrights, etc. — then standard license restrictions should almost always be included in the agreement.

Such restrictions may include brand guidelines for how trademarks must appear in marketing materials — e.g., color, font, style, etc. — limitations governing when the student-athlete may use the brand's IP, quality control procedures, and potentially even territorial restraints dictating where the student-athlete may use the brand's IP.

A brand must also evaluate the purposes for which it will use a student-athlete's NIL in connection with its marketing campaign.

In the social media example, consider whether the brand will want to repost sponsored content on its own social media channels and whether it should be permitted to keep posts on its social media pages active following the term of the agreement.

In addition, a brand should consider whether the student-athlete has their own trademark, slogan or other IP that the brand will use in connection with the NIL engagement. Each of these considerations will affect the IP license terms in the NIL agreement.

If merchandise or the development of other deliverables is contemplated in the engagement, brands should ensure that the license language relating to the student-athlete's NIL, as used in connection with the merchandise and other deliverables is also adjusted accordingly.

Generally, licenses to such merchandise or other deliverables should be perpetual and irrevocable in order to grant the brand rights to use the student-athlete's NIL on such merchandise or deliverables beyond the term of the agreement.

3. Term and Termination

The term of an NIL engagement should generally be for a specified period of time, as evergreen contracts that tie compensation to services may lead to a student-athlete continuing the relationship or performing services beyond a brand's initial expectations.

Accordingly, many NIL agreements expire when a student-athlete exhausts or relinquishes their eligibility to participate in collegiate athletics. This default term stems from various state laws that were passed shortly after NIL regulation first came into effect, but this is no longer a requirement in many states.^[2] Depending on the applicable state, brands may therefore consider a longer term or option to renew NIL deals with student-athletes after their collegiate eligibility has expired.

Shorter terms may also be beneficial for brands. If a student-athlete does not perform well during a particular season or their popularity significantly declines, the value of an NIL deal may change. As such, the brand may consider limiting a term to the student-athlete's season or one particular school year.

The risk is that if a student-athlete has gained increased notoriety, whether through an expanded following, on-field performance or otherwise, they could demand more favorable compensation in exchange for any contract renewal. A right of first refusal, which would permit a brand to match any competing offer before the student-athlete engages with another brand in a separate marketing campaign, could help reduce risk for a brand in that scenario.

With respect to termination, morality clauses permit brands to terminate NIL deals if a student-athlete takes some action that decreases their popularity or tarnishes their reputation. Morality clauses are therefore essential to permit a brand to terminate an NIL engagement if a student-athlete is arrested, becomes subject to a public scandal, or performs some other act that could bring themselves, their university or the brand itself into disrepute.

If a student-athlete transfers from one university to another while an NIL agreement is in place, it could dramatically change the value of the engagement. Local and regional brands that lack a national presence should therefore consider termination provisions around transfers in NIL engagements, especially as student-athletes' use of the NCAA's transfer portal to change schools has become commonplace. To note, however, transfer provisions should be carefully crafted to avoid any violation of applicable state statutes and the NCAA's rules.

4. Compensation

Under the NCAA's Division I rules, "NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions."

NIL engagements that provide unjustifiably high payment can appear to provide compensation in exchange for a student-athlete's enrollment at a certain university. Such compensation would violate NCAA regulations and several state statutes, as discussed further below.

Brands should be able to justify compensation terms in NIL engagements through the use of objective factors, such as the type and frequency of the services that a student-athlete will provide and the range of consumers the promotion might reach in order to avoid applicable violations.

5. NCAA and University Compliance

In addition to the NCAA, many individual universities have also promulgated rules applicable to student-athletes. Thankfully, there is a fair amount of overlap between the NCAA's and most universities' rules. Two of the most prominent rules for brands to consider include "no pay-for-play" restrictions and reporting requirements.

The "no pay-for-play" restrictions in the NCAA's and most universities' rules prohibit brands from paying student-athletes for, or otherwise using NIL engagements to, compensate student-athletes for athletic participation or achievement at a particular university.[3] Separately, the reporting requirements common to both NCAA and university rules mandate that student-athletes disclose NIL-related contracts to officials or departments at the student-athlete's university, in some cases, prior to execution.[4]

6. Legal Compliance

More than half of all U.S. states have active NIL-related legislation and many more are currently wrestling with proposed bills. The federal government is also considering a number of NIL-related bills and the NCAA's new commissioner has voiced support for an overarching federal law. Currently, there is no federal legislation in place and as such, each state's laws are controlling.

In evaluating state laws governing NIL agreements, there are a few common threads important for brands to consider.

Reporting

Most state laws, like NCAA and university rules, require student-athletes to disclose NIL-related contracts to universities, though they differ on the timing of such disclosure.[5]

Review Authority

State laws typically grant universities broad rights to reject or void NIL deals that violate university guidelines or team contracts, and in some cases, that could be reasonably judged to cause financial loss or reputational damage to the school.[6]

Representation

Requirements for the representation of a student-athlete, including registrations, fees, educational requirements and certifications, are also common to most state laws.[7]

Substance Restrictions

A fair number of states also prohibit student-athletes from promoting gambling, alcohol, tobacco, marijuana and other substances in NIL agreements.[8]

Minors

Although most student-athletes will be over 18 years old, some states prohibit NIL agreements with minors or have additional requirements for such agreements.[9]

While the above constitute some commonalities in the relevant legislation, certain states also have niche requirements. Brands should therefore closely review applicable state laws before executing NIL agreements with student-athletes to confirm whether any additional provisions are required in their NIL contracts to ensure legal compliance.

The FTC also has jurisdiction over endorsements and has recently updated its disclosure guidelines for social media influencers. These guidelines are applicable to student-athletes posting sponsored content on social media platforms and prescribe the disclosure practices that student-athletes should use in connection with social media endorsement campaigns to avoid deceptive or misleading advertisements and therefore, FTC enforcement actions.

The FTC guidelines require brands to inform student-athletes of their obligations. Brands should therefore familiarize both themselves and their student-athlete partners with these guidelines — and any other tools available from specific social media platforms[10] — in order to help ensure legal compliance.

7. Due Diligence

Brands should take care in reviewing the relevant regulatory and statutory frameworks, including looking into the applicable state laws, NCAA and university rules, and FTC regulations. In particular, many universities have sponsorship deals with existing brands that may prevent student-athletes from signing agreements with certain companies.[11] Reviewing university rules before approaching a student-athlete with an NIL-related offer is therefore an essential piece of due diligence for all brands entering the NIL space.

Those inquiries, however, are not the only diligence that brands should consider. Vetting a student-athlete's personality and marketability can be just as an important of an indicator of the potential value of an NIL engagement as on-field performance.

Brands should therefore perform appropriate due diligence on student-athletes by reviewing their use of social media and discussing the student-athlete with references and/or the student-athlete's university, if permitted.

For larger deals, additional diligence, such as background checks, could be considered. Although most employment-related laws will not apply to NIL engagements, brands should remain conscious of potential claims of discrimination if they intended to conduct background checks and should be sure to base any NIL-related decisions on objective factors, such as a student-athlete's following and past academic history, rather than on any protected characteristics.

Findings in the diligence process may also inform whether additional legal terms are necessary. Below are just a few other considerations that may be revealed in the diligence process that may affect NIL agreements.

Exclusivity

Preexisting terms may prohibit a student-athlete from endorsing certain services or products similar to a brand's, especially where student-athletes are likely to engage with a brand's competitors.

Loan-Out Entities

If a student-athlete conducts their NIL business through a corporate entity — sometimes referred to as a loan-out entity — then the legal language and parties to the agreement may need to be adjusted to help ensure that the student-athlete is properly bound by the relevant terms.

Foreign Student-Athletes

Student-athletes studying under an F-1 visa may not be permitted to enter into NIL agreements as payment for the student-athlete's NIL may jeopardize that student-athlete's visa status.

Conclusion

Brands are just one of the many players in the NIL marketplace. The other essential players are the student-athletes themselves, the universities for which they compete, and the collectives or organizations that assist student-athletes and universities in connecting with brands.[12]

While the above are some of the primary considerations for brands in NIL deal making, different considerations are present for each of the other players.

The various players, layers of laws, rules and regulations, ever-changing policies, and novel marketing concepts all create a daunting NIL framework. By understanding the key considerations, however, businesses can take advantage of these new opportunities to further market their brands through NIL campaigns and prevail in the wild west of endorsement and promotion.

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[1] After once being barred from earning any compensation from their NIL, numerous student-athletes have now received millions in endorsement deals.

[2] Compare Fla. S. Comm. on Ed., CS for CS for SB 646 (2020) (signed into law June 12, 2020) (Section 1006.74(2)(j) of Florida's initial NIL law provided that the duration of any NIL contract may not extend beyond the student-athlete's "participation in an athletic program at a postsecondary educational institution.") with FLA. STAT. ANN. § 10076 (West 2022) (as amended in 2023) (now silent with respect to contract duration). See also, Tex. Educ. Code Ann. § 51.9246(g)(2)(C) (West 2021); Tenn. Code Ann. § 49-7-2802(k) (West 2022); Miss. Code. Ann. § 93-19-17(1) (West 2021).

[3] These restrictions served as the grounds for the NCAA's first NIL-related enforcement action earlier this year against the University of Miami.

[4] Several universities use platforms like INFLCR, a content and compliance software platform for athletics programs to approve deals, through which student-athletes complete an application that solicits questions about NIL engagements.

[5] Cal. Educ. Code § 67456(e)(2) (West 2021); Va. Code Ann. § 23.1-408.1(G) (West 2022).

[6] N.Y. Educ. Law § 6438-a(6)(c)(iv) (McKinney 2023); Ga. Code Ann. § 20-3-681(d)(1) (West 2021).

[7] Ariz. Rev. Stat. Ann. § 15-1892(c) (2021); 110 Ill. Comp. Stat. Ann. 190/20(a) (West 2022).

[8] La. Stat. Ann. § 17:3703(c)(2) (2022); Tenn. Code Ann. § 49-7-2802(g)(3) (West 2022).

[9] Miss. Code. Ann. § 93-19-17(1) (West 2021); Tenn. Code Ann. § 49-7-2802(j) (West 2022). Some states have also passed "Coogan laws" or their equivalents that may require a brand to establish a trust for some portion of the total compensation to the minor in connection with their NIL engagement See N.M. Stat. Ann. § 50-6-19(E) (West 2007); Cal. Fam. Code § 6752(b)(4) (West 2020).

[10] Specific social media platforms now provide specialized tools for assisting in required disclosures. For example, Instagram offers guidelines and other features for influencers and Snapchat includes disclosure guidelines in its Commercial Content Policy.

[11] For example, the Ohio State University's "Student-Athlete Name, Image, Likeness Guidelines 2022" bars companies competitive to Nike and Coca-Cola from entering into certain NIL deals with the university's student-athletes.

[12] These organizations have been subject to recent federal scrutiny as the Internal Revenue Service issued a memorandum on June 9, 2023, indicating that in many cases, NIL collectives will not be eligible for section 501(c)(3) tax exempt status. The formation, structuring, and operation of NIL collectives is beyond the scope of this article.