

How to Help Student-Athletes Benefit From Their Name, Image, and Likeness -a compliance auditor's perspective to the rules on name, image, and likeness-

Thursday, August 6, 2020

As college football is approaching during the pandemic, the growing argument for student-athletes to profit from their name, image, and likeness (NIL) has hit a fever pitch. With college football in flux and the urgency for normalcy, there are student-athletes taking a stand about having control and voice. This is occurring as the debate continues how to compensate student-athletes for their NIL. In addition, there is the question of whether colleges and universities should pay student-athletes for their sports talent. With more questions than answer, what rules should be implemented to help student-athletes without hampering their entrepreneurial spirit and maintain eligibility?

Independent Third-Party

The best thing for NCAA, its conferences, and colleges and universities would be to have an independent third-party entity operate the compliance aspect of NIL activities. This would minimize conflict of interest between the entities' interest and the student-athletes' NIL activities. Further, the resources and staffing issues faced by colleges and universities are minimized to focus on other compliance matters such as academics and Title IX.

This third-party handles record-keeping, review and approval of NIL activities. Colleges and universities could contact this entity for verification of information related to student-athlete NIL activities. Think of these services like a background or due diligence check, but for NIL activities. For the student-athlete, they could deal with a system created by the third-party that promotes consistency and transparency throughout the review and approval of NIL activities.

Give the student-athlete a fish, that individual eats for a day. Teach the student-athlete how to fish and that individual eats for a week. Give the student-athlete the right tools to fish and that individual eats for a month. But, if you give the student-athlete the right tools, teach that student-athlete how to use the right tools, the right way, now that individual eats for a lifetime.

Establish national standards, not guardrails

The NCAA wants to establish rules for profiting from NIL, but there is a catch. The catch is their form of guardrails that could potentially limit the amount of compensation and allowable activities. As someone with federal compliance auditing experience, the best thing is to establish a national standard of what student-athletes can and cannot do to profit from their NIL. This national standards should apply across all divisions, sports, and conferences. Doing so, eliminates the current caste system and prepare all athletes an equal opportunity to profit from their NIL in an open market. And for the love of God (or to whom you pray to), do not burden

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student-athletes with wordy and complex rules (READ: get rid of the lawyer talk) along with guardrails to marketing their NIL in an open market.

Who can profit from student-athletes' NIL

Student-athletes are the first individuals allowed to profit from their NIL. As a result, they can dictate the individuals or entities that profit from their NIL for the right price. They can add individuals and entities to an established system for record-keeping and compliance purposes. If they are not on the list, no profiting from the student-athlete. Those permitted individuals and entities must obtain written permission from the student-athlete to use their NIL. An example of what the content of the written permission would include at minimum:

- name of the requested individual or entity,
- Industry of the requestor,
- the purpose of the use, and
- duration of use.

At the student-athlete's discretion, they can request additional information from the requestor. This is no different than how the NFL and other large organization handle the use of its NIL by requesting formal written request. Notice that I did not include that the agreed upon amount of the activity. In the same manner as federal government employees' own outside employment requests and disclosures, the amount of money exchanged or the value of the deal between the student-athlete and party of the deal. It will be at the discretion of the student-athlete to openly discuss the amount of the activity.

Who cannot profit from student-athletes' NIL

The list of who cannot profit from a student-athlete's NIL is more specific to minimize confusion or questions. In fact, it should be straightforward for all interest parties. If you are not on the approved list, you cannot profit from the student-athlete's NIL. Think of this as the VIP list to an exclusive nightclub. If you want entry to the exclusive nightclub, you are on the VIP list. If you are not on the list, access denied and no profits for you in the student-athlete's NIL world.

Prohibited activities related to student-athletes' NIL

The activities that are a non-starter for student-athletes looking to market their NIL must be clear and specific. You cannot leave questions or confusion about what activities are a no-go related to profiting from their NIL. For example, student-athletes cannot participate in the following activities while enrolled in a collegiate sports program.

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- Adult entertainment,
- Alcohol,
- Tobacco or smoking products,
- Weed (unless for medical purposes and applicable to local, county, and state regulations),
- Illegal sports performance supplements and drugs,
- Gambling,
- Nightclubs,
- Tax evasive activities,
- Abuse, mistreatment, discrimination, or exploitation of human beings,
- Abuse, mistreatment, or exploitation of animals,
- Illegal sale and operation of weapons,
- Illegal trafficking,
- Acts of domestic or international terrorism,
- Activities related to fraudulent behavior,
- Businesses or individuals who may have similar activities with the college or university that would create a conflict of interest (unless there is a written agreement for collaboration activities that result in (non)monetary compensation), and
- Any Criminal activity as applicable to city, county, state, and federal laws.

Allowed activities related to student-athletes' NIL

The allowed activities are broad enough to allow student-athletes that freedom to explore options to profit from their NIL. However, student-athletes need to make sure that they pay attention to the list of prohibited activities to avoid any issues. Like Federal regulations, student-athletes would consider an activity allowed unless explicitly stated as a prohibited activity. Since they would know the prohibited activities, it would be easier for them to stay in compliance.

Reminders

Student-athletes can change the list of who can profit from their NIL at any time with formal advanced notification in writing. Likewise, student-athletes should be informed in writing about any changes to the list of prohibited activities.

All individuals including family members, friends, and other associates operating outside of the student-athletes' direct control must obtain written permission to profit from their NIL. No ifs, ands, or buts.

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Student-athletes receive monetary or non-monetary compensation from activities related to their NIL. However, they need to make sure they do not receive any compensation from prohibited activities. In addition, student-athletes need to make sure that their compensation does not result in the exploitation, abuse, or other ways demeaning or would create reputational, physical, emotional, or other forms of risk to them.

Student-athletes and college or university should be allowed to partner on activities that result in monetary or non-monetary benefits to both parties. Both would need to explicitly agree to the partnership in writing.

Takeaway

There needs to be an independent third-party that can ensure consistency and transparency of the review and approval process on a national level. The rules need to be clear and concise so that student-athletes regardless of conference, sports, or division level, can ensure compliance and minimize risks to their NIL. These rules should not include guardrails that benefit the programs, conferences, and NCAA, but hamper the student-athletes' ability to profit from the NIL in an open market. Student-athletes should be allowed to profit from their NIL through activities that are not considered prohibited. Student-athletes need to have a voice and control of their NIL activities that include dictating who can profit from them. And they should get the necessary resources and support to help succeed on and off the field.